The Employment Law Institute of New Zealand Inc.
Te Whakanōhanga o ngā Ture a Mahi o Aotearoa

14 February 2020

Attention: Employment Standards Policy, Labour and Immigration Policy, Ministry of Business, Innovation & Employment.

Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140

By email to: ContractorsConsultation@mbie.govt.nz

SUBMISSION OF EMPLOYMENT LAW INSTITUTE OF NEW ZEALAND INC (ELINZ) RE BETTER PROTECTIONS FOR CONTRACTORS FEEDBACK

1. Introduction

This submission is made on behalf of the ELINZ:

1.1 About ELINZ:

a. ELINZ was founded in 1995 by a group of like-minded individuals including retired judges, barristers, solicitors, employment law- and industrial relations-consultants, a law lecturer and employment law advocates.

b. ELINZ's guiding principle is to promote and enhance professional standards of employment law advocacy.

c. ELINZ members consist of Barristers Sole, practising Barristers & Solicitors, enrolled Barristers & Solicitors, Consultants, Advocates, Arbitrators, Mediators and others involved in employment law advice and advocacy. Our members are experienced employment law practitioners who regularly represent clients (employers and employees) before the Employment Court, the Employment Relations Authority or the Ministry of Business, Innovation & Employment's Mediation Service.

1.2 Contact details for this submission:

a. President Kelly Coley, Vice-President Anthony Drake, Executive Member Darien Fenton.

b. info@elinz.org.nz **OR** president@elinz.org.nz

1.3 ELINZ welcomes the opportunity to make a submission on the Ministry of Business, Innovation & Employment public consultation document Better Protections for Contractors.

1.4 This submission provides ELINZ's views on each of the eleven options outlined in the discussion document, with a general response provided to the questions.

2. What do we want to achieve?

2.1 ELINZ agrees that contracting arrangements can be beneficial to both business and workers, but the imbalance of bargaining power between business and vulnerable contractors needs to be addressed. We agree that all employees should receive their statutory minimum rights and entitlements, and misclassification of the employment relationship has led to some genuine workers missing out on these in circumstances where other workers classified as employees would have been entitled to these basic rights and entitlements. This has also lead to unfair competition between firms.

2.2 Contractors are governed by commercial law and required individually to take legal action to enforce their rights. This can put redress out of range for most vulnerable dependent contractors who lack the financial resources to either enforce their commercial law rights, or even to challenge their employment status in the current systems and institutions.

2.3 The factors that make dependent contractors vulnerable to exploitation are the power imbalance between the contractor and the business; lack of knowledge by the contractor about employment law and legal protections; the requirement for contractors to enforce rights individually; the fear of losing paid work; "take-it-or-leave-it" offers of contracts; issues relating to immigration status; dependence on one business for most or all of the worker's income; and lack of effective enforcement of employment law.

2.4 ELINZ is also mindful about the precarity of many small and medium sized businesses employers who take contractors on in good faith who could then find themselves subject to disputes over the status of their workers.

3. Specific responses

3.1 Option 1: Increase proactive targeting by Labour Inspectors to detect non-compliance. This will allow Labour Inspectors to actively respond to and proactively look for exploitation of workers, including investigating and challenging organisations' conduct.

a. ELINZ supports Labour Inspectors detecting and investigating non-compliance with employment laws generally. The Labour Inspectorate must be adequately resourced so that they can properly investigate breaches of the minimum code and employment status questions.

b. This proposal begs the question what role Inspectors will otherwise have under any legislative regime. Assuming there will be a change to the definition of employee status, the first question logically should be who is to bring and who is to decide disputed cases. If it is to be Inspectors who bring, but do not decide cases, then greater investigative powers will be appropriate. If, as ELINZ opposes, these issues are to be both investigated and decided by Inspectors, then it would be unprincipled for Inspectors to unilaterally investigate and then decide cases.

c. ELINZ believes that the status of employees, workers or contractors should properly be determined by the Authority or the Court.

3.2 Option 2: Give Labour Inspectors the ability to decide workers' employment status. In addition to their investigative powers, Labour Inspectors would be able to decide whether a worker is an employee or a contractor, either at the request of the worker or, possibly, at the Labour Inspector's own initiative.

a. It is unprincipled that public servants should decide on the contractual or status rights and freedoms of citizens, especially if there are not full rights of appeal from such decisions, in which case the exercise would simply become more complex, time-consuming and expensive. An unforeseen consequence would be the generation of judicial review litigation as the only means to challenge such decisions, if the current s6 of the Act were to be abolished. ELINZ would not oppose Inspectors having the power in conjunction with individual persons

to investigate and bring cases for decision by the Authority or the Employment Court. This will continue ensure there are clear rights of challenge and appeal.

3.3 Option 3: Introduce penalties for misrepresenting an employment relationship as a contracting arrangement. Currently, organisations are only liable for unpaid statutory minimum entitlements in cases of any misclassification. This option would create an additional penalty for organisations who misclassify employees as contractors. In its present version, this option would impose penalties on firms even where the misclassification was due to a genuine mistake or confusion by the parties.

a. ELINZ agrees that any wrongful or deliberate misclassification of the employment relationship employment rights could be subject to penalties. However, ELINZ is concerned about a proposal to introduce punitive measures for innocent misclassification of status, or misclassification following responsible and professional legal advice.

b. This option also presupposes that penalties would only be awarded against "employers" of workers. In reality, some independent contractor arrangements are either entered into at the request of the worker or with the worker's informed consent and it would, in these circumstances, be inequitable to penalise only the "employer" in such a sham arrangement if it were found to be such.

c. In addition, ELINZ is concerned at the potential expansion of penal regimes to essentially contractual arrangements in which remedies should be primarily compensatory. Penalties are payable to the state, whereas compensation is payable to persons who have suffered loss by unlawful action. Instead of penalties payable to the state, Parliament might consider compensatory payments to wronged persons where the breach is deliberate and calculated to defeat the obligations of employment law.

Options to Make It Easier for Workers to Access a Determination of Their Employment Status

3.4 Option 4: Introduce disclosure requirements for firms when hiring contractors. Under this option, organisations would be required to advise contractors, upon hiring them, as to what their legal obligations are (such as making their own PAYE, ACC, and KiwiSaver payments), and that they have a right to seek legal

advice prior to accepting the contract for services. The Government could create a standard disclosure form for use by the organisations.

a. ELINZ is in favour of all efforts to make contractors rights and obligations clear and transparent. This should include proactive publicity (that is publicity otherwise than upon entering into agreements) in different migrant groups' languages.

b. ELINZ is concerned that compliance with such requirements could be used subsequently as evidence that a contractor relationship exists in any dispute. For example, 16 year old contractors, who often are employed as independent contractors, but are in fact dependent. A great example is leaflet deliverers.

3.5 Option 5: Reduce costs for workers seeking employment status determination. This option would waive or reduce the application fees related to employment status determination in the Employment Relations Authority and/or the Employment Court to make these classifications more accessible.

a. ELINZ agrees with the proposal to reduce or eliminate filing and hearing fees on such applications although retaining the ability to make costs' awards in appropriate cases. These fees, certainly in the Employment Court, are a significant burden for many low-paid and vulnerable workers and some are unable to bring cases because of the unaffordability of doing so.

3.6 Option 6: Put the burden of proving a worker is a contractor on firms. Ordinarily, in an employment status determination matter, the worker would need to prove that they are an employee. This option would, instead, require the organisation to prove that the worker is a contractor and not an employee.

a. ELINZ is neutral on allocating an onus of proof, in the sense that the proposal pre-supposes that there is currently an onus.

b. It is important to note that there is, in reality, no onus of proof in applications to determine employment status. The Authority especially, but also the Court, investigate and consider all relevant factors and make decisions based on a weighing of these, without imposing an onus or proof on either party. The absence of an onus of proof is consistent with the wording of s6 of the Act. Given the investigative nature of the Authority, there would seem little reason to change the status quo on this issue.

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

a. At present, any decision about employment status determination only applies to workers who are parties in the particular case. This option would extend the application of such a decision to contractors who are engaged on substantially similar terms (as the worker who has been found to be misclassified) by the same business.

b. This involves a line-drawing exercise, i.e. how closely related others must be to a decided case's participants, to be bound by the decision affecting those participants alone. In reality and practice, closely affected participants often change their practices upon being advised how a case involving them might be decided, without the need for further litigation. Consideration should be given to class actions and how the "class" is defined so that, for example, workers of the same "employer" on materially identical agreements might be bound as would be the "employer". Defining the class, as in other civil litigation could be left to the Authority or the Court as a pre-hearing issue. There is much activity in the area of "class actions" in general and commercial litigation at present and the Ministry may wish to consider this, including such important questions as "opt-in/opt-out" arrangements if Parliament wishes to consider such questions.

c. ELINZ is aware there are large groups of workers in large corporations who are in this situation; Courier Drivers has been mentioned; Vision Stream is another, and vulnerable groups like contract cleaners also fit into this category.

Options to Change Who Is an Employee under New Zealand Law.

3.8 **Option 8: Define some occupations of workers as employees.**

a. This option would require that workers in certain occupations are deemed employees, which would preclude classifying such workers as contractors. However, this option leaves open the possibility of an opt-out for some workers.

b. ELINZ is concerned that if there is an opt-out, then why this is an option? The example of "vulnerable employees" under the Employment Relations Act provisions (Part 6A) points to line-drawing difficulties, principally in the arbitrary exclusion of groups of employees who are arguably as "vulnerable" as those so classed. If an opt-in or opt-out option is to be considered, careful consideration should be given to the psychology of such choices in situations

such as class actions. If there is a wish to give people freedom to decide for themselves, studies show that fewer people elect to opt-in than elect to opt-out.

3.9 **Option 9: Change the tests used by courts to determine employment status to include vulnerable contractors.**

a. In addition to the four tests that courts use to determine a worker's employment status, this option seeks to adopt a new test that would examine factors such as the degree of economic dependence between a worker and an organisation, bargaining power imbalance, or how much risk is passed onto the worker. This option also considers the modification of the existing intention test.

b. ELINZ does not consider this proposal provides any insight into what a "vulnerable contractor" might be before it is open to examine the factors giving rise to such a claim. The Authority and Employment Court already have the ability to take into account a range of factors and submissions on those factors which could include issues such as dependence, imbalance of power or risk passed onto the worker in determining the status of that worker.

c. ELINZ supports providing greater certainty by including such tests in much the same way as the so-called "overall reality test" under s6, encompasses the 4 or so traditional common law tests for employment.

Options to Enhance Protections for Contractors Without Making Them Employees

3.10 **Option 10: Extend the right to bargain collectively to some contractors.**

a. Presently, contractors cannot bargain collectively, unless they are granted an authorisation to do so on a case-by-case basis. This option would extend the collective bargaining right to contractors without the need for such authorisation.

b. Given the apparent inability since 1990 to increase the proportion of the employed workforce covered by collective bargaining, it might be problematic to persuade a more individualised and independent workforce to join a union or other collective groups and bargain collectively.

c. ELINZ recognises there are large scale workforces who are employed as both independent and dependant contractors. ELINZ does not consider this as being a reason to exclude contractors from collective bargaining.

3.11 **Option 11: Create a new category of workers with some employment rights and protections.**

a. In addition to employees and contractors, this option would create a third category of workers (such as "dependent contractors"), which would grant these workers some rights and protections under employment law, including minimum wage, paid leave, collective bargaining, and protection against unfair dismissal. Classification into this category could be at the workers' request.

b. Most of these minimum code rights and obligations have been granted by Parliament rather than being bargained for collectively (as ELINZ understands it), although this is not to deny much of the impetus for them coming from unavailing bargaining. Simply providing those statutory minima to such a class without a real right to bargain, including collectively, for better terms and conditions might just cause contracts to be offered on those minimal terms without any prospect of improvement on them.

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