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RCSA Submission to the Ministry of Business Innovation and Employment

Response to the Better Protections for Contractors discussion paper February 2020

Overview:

RCSA welcomes the opportunity to make a submission to the Better Protections for Contractors discussion paper.

RCSA is the peak industry body for the recruitment, staffing and workforce solutions industry in Australia and New Zealand, representing some 3000 corporate and individual members across the staffing sector.

RCSA members predominantly employ workers directly and use of contract labour is not the predominant form of engagement in the on-hire sector in New Zealand. That said, our members who operate in the on-hire sector have vast and deep experience in the flexible labour market and are experienced and familiar with trends, activity and operation of contract labour within it.

On-hire labour in New Zealand is predominantly employed casually, with some limited examples of permanent on hire employees who work between different host sites. The exception to this is in sectors such as IT and General Medical Practice (GPs) or in executive-level white collar placements, where a significant number of flexible employees negotiate with on-hire firms to employ them as independent contractors.

The experience in the labour and on-hire sectors in New Zealand when it comes to employing independent contractors, is that in the vast majority of cases it is workers themselves who direct employment as an independent contractor rather than an employee. In simple terms, in the labour hire sector, contract employment tends to represent high end, high income individuals with significant levels of demand and bargaining power that allow them to set the terms of employment in a way that works best for them.

Outside of that direct experience however, RCSA does agree there are pockets of vulnerability within the independent contracting sector which have resulted in unacceptable exploitation of workers who are not in a position of power in their relationship with their employer.

RCSA does not condone exploitation of any kind and we recognise the need to ensure that systems exist to protect our most vulnerable workers.

RCSA and its members have long campaigned for mechanisms to identify and stamp out illegal behaviour and worker exploitation in both the labour hire and broader employment sectors. We are committed to working with governments to strike the right balance between flexibility and responsibility in the labour market.

Indeed, within its own industry RCSA has established StaffSure, a third party audited certification program that makes it easy for businesses and governments to find and partner with reputable workforce services providers in New Zealand.

It is vital however, that measures adopted to protect vulnerable workers don't unnecessarily stifle innovation and flexibility by applying restrictive protective measures where they deliver little value or are not required.

The proposals in this consultation paper have significant implications for the independent contracting sector, the vast majority of which involve arrangements that support the preference of workers.

Policy frameworks we adopt must strike the right balance between flexibility and responsibility.

New Zealand's employment environment must support the capacity of NZ business to remain productive, competitive and responsive in an increasingly global marketplace.

Workers who choose to engage productively and happily as independent contractors should not have their own rights and opportunities impinged as a result of isolated poor behaviour from rogue businesses.

RCSA position

RCSA acknowledges that, in the area of independent contracting, the greatest challenge to successfully addressing vulnerability and exploitation is in navigating the grey area identified in the discussion paper.

The reason it presents such a challenge is because of the ease with which many genuine independent contractors can be impacted by incorrectly placing a safety net within that grey area. The implications for casting the net too wide are significant, both for business and workers themselves. Business, because they rely on responsible and genuine flexible independent contract working arrangements to support innovation, growth and global competitiveness. Workers, because the majority of independent contracting arrangements are driven by workers' preference because of the flexibility, choice and freedom they provide.

Adding to the challenge is the fact that within a large sea of independent contracting arrangements, the very real areas of concern for vulnerable workers who are suffering exploitative practices by rogue employers are isolated and by no means broad ranging. The discussion paper was unable to provide any evidence to suggest that the issue it was grappling with – while of very significant concern – was in any way wide-ranging or prevalent. Therefore, it is extremely important that the solution to the problem is not broad-reaching in its impact, as that is likely to result in vast negative consequences for both business and workers, while not assisting in any way to help identification and enforcement action.

It is vital to ensure the solution fits the problem, and that it doesn't cause a raft of new ones.

The tests explored in the discussion paper around dependence and integration are insufficient and ineffective in navigating grey area without an income overlay. We don't believe they demonstrate a sophisticated understanding of the independent contractor workforce in their own right.

For example, a significant proportion of the IT and digital workforce is engaged through independent contracting arrangements. This scenario has largely been driven by IT and digital sector workers' preference to engage in this way due to the flexibility and income potential it affords them. It is not a form of independent contracting arrangement that has come under any form of scrutiny from an exploitation perspective.

Nonetheless, on the basis of the nature of their work (often integrated in a business) and their reliance on a single source of income (ie: they have only one client), this scenario could readily find itself captured by the more simplistic tests.

We need to remember the focus of this activity is exploitation, not concern around people's choice to work in a non-permanent way.

To that end, RCSA believes the most important primary test to apply when navigating grey areas of independent contracting relates to income. We know the greatest areas of vulnerability and poor treatment of workers exist where a business applies pressure to employees to engage as independent contractors as a means of evading minimum wage and entitlement obligations.

Minimum wage and entitlement obligations exist to provide a 'floor' for workers in relation to the value of their engagement. In scenarios where independent contractors are engaging within income scales which would equate to them being well within minimum wage and entitlement arrangements, we don't see a role for any further regulation or activity for government. Indeed, RCSA believes interrogating such arrangements misdirects and wastes valuable investigation and enforcement resources that are much more effectively deployed in areas of genuine risk.

To that end, we believe a traffic light triage tool, based on income, should be the primary test in assessing risk of exploitation and vulnerability within independent contracting arrangements.

We believe that would provide a far more effective starting point for gross triage of risk and targeting of investigation and enforcement resources. Enforcement officers could then explore the value of other test mechanisms as overlays on the higher risk category that could provide a more sophisticated view of that risk segment, should it be beneficial.

RCSA recommends the government ensure that the minimum income threshold be set at a level that would equate to a PAYE income of just over (within 10-15%) a minimum wage rate of $20 per hour.

Attached below is a very high level summary table of how this traffic light system could be applied as a primary triage tool. RCSA would be happy to discuss this concept in greater detail with the government should that be of value.

Suggestion for Primary Triage Approach

Independent contractor income threshold	'Traffic light' category	Categorisation
$30 per hour or less	Red	Primary target for investigation and enforcement activity
$30 - $40 per hour	Amber	May be worth further consideration or investigation after application of additional test overlay
$40 per hour or above	Green	No further examination, regulation or direction required.

The beauty of an income-based primary triage tool is that it also has the potential to flush out questionable sub-contracting or other arrangements that are sometimes undertaken by independent contractors themselves. Essentially creates a scenario that will subject anyone who contracts labour within lower income bands to ensure they are able to justify that the arrangement is one of choice and preference.

It would enable a simplistic but effective mechanism to interrogate supply chains beyond the immediate level.

For example, it could provide a means for government to interrogate employment arrangements on the basis of price, all the way through to the ground level on major projects and other activity it commissions on behalf of taxpayers.

With that kind of information, the Government is in unique position to demonstrate real leadership in relation to independent contracting in its own supply chain. For example, it could require that as a condition of tendering for being awarded work on a government contract, a business must undertake that any workers engaged on arrangements where income is at or less than $30 per hour must be engaged as employees, not as independent contractors. It would also provide an opportunity for government itself to explore the same commitment with its own workforce.

A leadership response such as this would be an effective and influential way of addressing concerns in the areas of greatest vulnerability. More importantly, it avoids the erosion of equity and rights that would come from a mechanism that simply directs how a worker may engage in work through a political instrument.

COMMENTS ON SPECIFIC OPTIONS FOR CHANGE

1) Deter misclassification of employees as contractors

a: General comments

RCSA believes there are a range of factors at play in relation to misclassification of employees. While we do not deny there are cases that where employees are deliberately classified inappropriately, these scenarios make up a very small number of overall classification considerations. The bulk of employers classify a role based on operational need and best advice at the time of employ. Challenges around misclassification tend to emerge as interpretations of law, or indeed, changes to law, that result in a challenge to the original assumptions made in the intended correct classification of an employee.

Workplace relations regulation is a complex and shifting fabric, and in our experience the bulk of classification issues sit on the fringe of application and interpretation of law, with most involving well-intentioned employers who believed they were doing the right thing based on evidence, practice and often professional advice.

RCSA does not believe there is any evidence in the discussion paper that would suggest that deliberate misclassification of employees is a substantial or systemic issue in New Zealand. Therefore, the challenge in this scenario is to ensure any response effectively assists in identifying, targeting and stopping a very small cohort without having unintended consequences for flexibility, choice, efficiency and growth in the broader economy.

b: Specific comments:

Option 1: Increase proactive targeting by Labour Hire Inspectors to detect non-compliance

Better detection and enforcement are the most effective way of identifying and targeting scenarios where workers are deliberately inappropriately classified, against their own preference, for an employer's benefit.

RCSA supports Business NZ's view that a targeted approach will:

- Support in-depth appreciate of the nature of work, its operations and economic benefits
- The extent to which work is correctly classified in particular areas
- Allow more sophisticated 'triaging' of resources for future monitoring and investigation
- Identifying lower risk areas within the economy, that might on paper trigger

An effective targeted approach to monitoring and enforcement is the key to better understanding and navigating the grey zone referred to in the paper. It will enable the government to better understand areas that might on paper trigger a concern around intent with classification, and understand that the majority of those cases will in fact involve choice, agreement and harmony between employers and workers in relation to that classification.

A blanket regulatory approach has no capacity to achieve that outcome, and will only serve to unfairly reduce flexibility and choice for a large number of independent contractors, in attempting to

address issues and concerns that arise for what is by volume a much smaller cohort of workers and employers.

In no way does RCSA trivialise the significance of the issues faced by those who sit within that small cohort, we merely observe that the impact, both economic and social, from a blunt regulatory approach is enormous and cannot not be overlooked.

We support Business NZ's view that together with requirements around information disclosure and an appropriately resourced labour inspectorate, Option 1 offers significant improved opportunity for detection of inappropriately classified workers and enhanced effectively in enforcing law, with minimal unintended consequence for the broader economy.

Option 2: Give Labour Inspectors the ability to decide workers' employment status

RCSA does not support proposals to allow labour inspectors to determine workers' employment status.

Workplace relations law is extremely sophisticated and complex, the factors that weigh into a determination on classification and many and varied and the likelihood that labour inspectors, who are not judges and who are not being presented with evidence in a similar way as would occur through a legal process, will be able to make determinations in consistent and predictable manner is extremely slim.

Consistency and transparency of determinations is vital to providing a clear signal about intention of activity and operation for businesses who are trying to do the right thing by the very complex regulations that govern their actions. Opening the door to inconsistencies around determinations will add enormous stress, confusion and frustration for business and have significant implications for the broader labour market.

At the same time that it removes clarity and direction for employers, the addition of labour inspectors to the determination process will also increase the number of avenues for litigation on questions of status. The end outcome will be less clarity and direction for business and more money and time spent in formal processes to confirm classification determinations.

Option 3: Introduce penalties for misrepresenting an employment relationship as a contracting one

Member experience with the Australian 'sham contracting' laws have been that the increased penalties may result in employers interrogating administrative and employment arrangements slightly more thoroughly than they otherwise would, but that the concern is predominantly focussed on ensuring their diligence and compliance processes are detailed and thorough, as opposed to impacting intent. In short, employers who do the right thing by the law and have appropriate intent in the way they classify employees are more likely to respond to changes in law than are those who may already be turning a blind eye to much of the intent and direction that already exists in the way they operate their business.

To be effective in its ambitions, the focus of any action in relation to protections for vulnerable contractors needs to remain on scenarios where workers are deliberately misclassified by an employer and their preference or choice is not a factor in determining the status of their employment. There is no evidence in the discussion paper to suggest this is widespread, nor is there evidence to suggest that an increase in penalties would have a deterring effect on this cohort.

Our experience is that operators who regularly and deliberately breach legal requirements are less likely to be impacted behaviourally by additional regulation and penalties. Good faith provisions in The Employment Relations Act can already penalise this type of behaviour, but don't in themselves deter it. What tends to be more impactful is the application and enforcement of that law.

Put simply, the risk appetite for those breaking the law is not just the law itself, but the chance of getting caught. Effective resourcing and targeting of enforcement activity is the key to identifying and stamping out this type of behaviour and we believe is more relevant as a deterrent.

While RCSA is not fundamentally opposed a proposal for a signal in law, we strongly believe that the better detection and enforcement provides a significantly more important deterrent for law breakers than additional law on top of what already exists, and has far few ramifications for the broader labour market and economy.

2) Make it easier for workers to access a determination of their employment status

Option 4: Introduce disclosure requirements for firms when hiring contractors

RCSA supports the option of introducing disclosure requirements for firms when hiring contractors. We believe the proposal would support work to better identify and enforce non-compliance and could be a valuable source of information and input to increased proactive targeting by labour hire inspectors as outlined in Option 1.

We agree that disclosure requirements could be a valuable source of education and clarity for contractors in outlining their obligations and responsibilities in relation to tax and Kiwisaver. They have the potential to be effective in addressing scenarios in the grey zone where workers are unaware they are being employed as a contractor. Disclosure requirements would clarify the terms of arrangement for both workers and employers and facilitate conversations about those arrangements in advance of the worker commencing.

Option 5: Reduce costs for workers seeking employment status determinations

RCSA holds some concern around the impact of reduction of costs upon the merit and volume of cases challenged. We support Business NZ's view in relation to this option that:

1) We support the concept of reducing costs to access a determination of status, but acknowledge that any consideration of costs must ultimately factor litigation expenses which is an extremely complex and finely tuned space and has significant broader ramifications.

2) We oppose the adoption of Option 2 (giving Labour Inspectors the ability to decide workers' employment status) as a means of achieving Option 5.

Option 6: Put the burden of proving a worker is a contractor on firms

RCSA does not support Option 6. The impact of such a change on the broader economy and labour market is extremely significant and likely to deter use of flexible contract labour, which provides a vital support to business in enhancing efficiency, productivity and agility. A reverse onus of proof would be onerous and costly for employers and the economy. It will create a barrier for business in creating jobs and expanding opportunities for workers.

Option 7: Extend the application of employment status determination to workers in fundamentally similar circumstances

RCSA opposes Option 7. We support Business NZ's view that this option would have broad reaching consequences that will create uncertainty and prove costly. We believe common law rules are adequate and should not be interfered with.

3) Options to change who is an employee under New Zealand law

Option 8: Define some occupations of workers as employees

RCSA does not support Option 8. We agree with Business NZ that it is unsound legally, politically and practically and offers little value to the process of targeting and enforcing deliberate misclassification behaviour.

It politicises the notion of work, creating a hierarchy of treatment for workers and employers which is determined for them by political means without a legal or process basis in fundamental principles of equality or opportunity.

Outside of being outrageous from a rights and fairness perspective, even as a simple triage tool the proposal is not the most effective mechanism to add any value in identifying, targeting and enforcing poor behaviour.

The problem this paper is trying to address is not limited to a specific industry or industries. While deliberate misclassification activity may be more prevalent in some industries than others, that is not exclusive nor is it permanent, so applying different rules to occupation types will be completely ineffective in outcome and have enormously far reaching implications. Industry risk profile information may have some merit in informing increased enforcement activity by Labour Inspectors as outlined in Option 1, but certainly not as a basis for ruling some industries in or out in relation to choice and flexibility of employment.

RCSA believes there are more effective ways to identify and triage risk in this area than by industry sector, and that there are more effective ways to address and respond to that risk than by eroding rights and opportunity.

We encourage the government to consider the wage-based triage mechanism outlined in our general comments above as an effective and useful input to additional targeted enforcement activity. We also encourage the government to look at opportunities to demonstrate supply chain leadership in the projects it commissions by ensuring low wage earning workers throughout its own supply chains are appropriately classified. Behavioural change around worker status needs to be led by example, and the government has a significant opportunity to do exactly that. Simply defining a worker's status through a political instrument is unfair, unjust and has enormous economic and social consequences.

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

RCSA acknowledges that legal tests for determining the status of a worker are complex and interrelated and that attempts to separate and simplify them have been unsuccessful in the past.

We are also wary of options that risk politicising the notion of work and oppose any moves in that direction.

Measures outlined in the paper on 'how this option could work' still fail fundamentally to reflect an understanding of the nature and diversity of contract work. It is not as simple as a 'dependence' test. There are a significant number of independent contractors who may predominantly rely on a single source of income and may also be quite well integrated into and directed in their activity by the businesses they work for. This arrangement is particularly prevalent within the IT and digital workforce.

This proposal slips away from the stated objective of addressing exploitation issues and moves into the realm of reclassifying employment irrespective of the intent and ambition of the parties involved.

The priority of any outcome from this discussion paper needs to be stopping exploitation, not on inserting the government and courts into agreements readily and happily entered into by business and individuals on the basis of choice and preference.

We believe effective triage tools to target investigation and enforcement action are the key to creating a deterrent and stamping out bad behaviour.

Changing test would result in capture of legitimate and effective contracting arrangements and has broad reaching implications for business, workers and the economy.

RCSA does not support Option 9.

4) Options to enhance protections for contractors without making them employees

Option 10: Extend the right to bargain collectively to some contractors

RCSA support Business NZ's concerns about this option in relation to reduced competition and broader economic implications. We do not support Option 10.

Option 11: Create a new category of worker with some employment rights and protections.

RCSA has some reservations around additional complexity that may be caused by the introduction of a new category of worker.

That said, we are not opposed to the introduction of additional protection mechanisms for vulnerable workers, so long as the mechanism used to identify them is relevant and sufficiently targeted as to ensure it is does not remove flexibility and choice for contractors and employers who choose to work the way they do.

As outlined in our broad comments at the beginning of this submission, RCSA is open to exploring an income-based traffic light triaging system as a way of better navigating the grey space of contracting arrangements and identifying vulnerable workers who fall within it.

We have significant concerns with breadth of tests flagged in the discussion paper and of the consequences they pose for the broader economy. While they may provide relevant information for triaging activity, simple dependence and integration tests do not adequately target vulnerable situations in a way that would support additional employment rights and protections (and restrictions) as they unwittingly incorporate a large number of contractors who are choosing to work the way they do.

We believe a traffic light triaging mechanism that overlays income on existing dependence and integration tests may be specific enough to consider whether protections for workers could be enacted where a contractor meets dependence and integration tests and is earning under $30 per hour. Essentially, providing a 'floor' so that there is less incentive to use contracting as a means for avoiding minimum entitlements.

So while RCSA has concerns around the complexity and implications of creating a new category of worker, we also recognise the need to protect vulnerable individuals who may be working for an employer who is taking advantage of flexibilities in contracting arrangements to pay beneath a minimum level of entitlement than would exist for an employee. The challenge is to ensure that any such protections are targeted in a way that doesn't remove freedom, choice and flexibility from the vast majority of contract workers – many of whom would trigger red flags under tests outlined in the discussion paper - who are working under arrangements of their choosing and preference.

About RCSA

RCSA is the peak industry body for recruitment, staffing and workforce solutions in Australia and New Zealand representing over 3,000 Corporate and Individual Members.

RCSA promotes and facilitates professional practice within the recruitment and staffing industry. It sets the benchmark for industry standards through representation, education, research and business advisory support to our member organisations and accredited professionals who are bound by the ACCC authorised RCSA Code for Professional Conduct through membership.

RCSA is a proud member of the World Employment Confederation, the voice of the employment industry at global level, representing labour market enablers in 50 countries and 7 of the largest international workforce solutions companies.