Better protections for contractors

Summary of public consultation

June 2020

Executive Summary

In New Zealand, employees receive a range of minimum employment standards, set out in employment law. These include the right to be paid at least the minimum wage, various types of leave, and protection against unfair dismissal.

Contractors work under commercial and competition laws. They have fewer rights and protections, but generally enjoy greater levels of choice and flexibility in their work lives in return. They operate their own business, can work for multiple organisations, and have control over how their work is done.

Contracting arrangements can be good for both firms and workers. However, the Government is concerned that there may be some situations in which they don't work for everyone.

From November 2019 to February 2020, the Government consulted the public on better protections for contractors. Public feedback was sought on eleven options for change, which range from targeted operational improvements through to more significant changes to the employment relations and employment standards (ERES) system. These options aim to:

- Ensure all employees receive their statutory minimum rights and entitlements.
- Reduce the imbalance of bargaining power between firms and vulnerable contractors.
- Ensure system setting encourage inclusive economic growth and competition.

Consultation on these options included the release of a discussion document inviting written submissions, a 10-minute online survey for current contractors, and face-to-face meetings with key stakeholders around New Zealand. This document summarises feedback received during this consultation.

The COVID-19 outbreak means that major changes to the economy and labour market have occurred in the short time since consultation closed. Since the end of the consultation period, the Government has introduced a range of urgent protections for firms and workers as part of its response to COVID-19. Consideration is now being given to how to build on what was heard during consultation to meet the three aims above, and support mutually beneficial contracting relationships in a post-COVID world.

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Better protections for contractors

Overview

The Government wants all contractors in New Zealand to have access to decent work and conditions

In New Zealand, there are broadly two types of workers: employees and contractors

Employees receive a range of minimum employment standards laid out in employment law. This includes the right to be paid at least the minimum wage, various types of leave and protection against unfair dismissal. Contractors work under commercial and competition laws. They have fewer rights and protections, but generally enjoy greater levels of choice and flexibility in their work lives. They operate their own business, can work for multiple organisations, and have control over how their work is done.

Contracting arrangements can be beneficial to both firms and workers

Firms with uncertain demand for their products or services can benefit from offering flexible, short-term contracts. Workers may choose to accept work as a contractor to suit their individual lifestyle and preferences.

It is important that workers and firms can participate in the labour market in a way that works for them.

…but they do not work for everyone

Some workers are misclassified as 'independent contractors' so lack basic employment rights, and some workers are caught in the 'grey zone' between employee and contractor status. These workers may run their own business, but depend on one firm for most of their income and have little control over their work. Both types of contractors are vulnerable to poor outcomes. This is because they lack both the protections offered to employees by law, and the power to negotiate a better deal.

The changing nature of work, including the expansion of the 'gig' economy, may increase the number of workers engaged in low-paid contracting work in New Zealand.

Public feedback was sought on four groups of possible options for change

Options 1-3	Options 4-7	Options 8-9	Options 10-11
Deter misclassification of employees as contractors	**Make it easier for workers to access a determination of their employment status**	**Change who is an employee under New Zealand law**	**Enhance protections for contractors without making them employees**
1. Increase proactive targeting by Labour Inspectors to detect non-compliance 2. Give Labour Inspectors the ability to decide workers' employment status 3. Introduce penalties for misrepresenting an employment relationship as a contracting arrangement.	4. Introduce disclosure requirements for firms when hiring contractors 5. Reduce costs for workers seeking employment status determinations 6. Put the burden of proving a worker is a contractor on firms 7. Extend the application of employment status determinations to similar workers	8. Define some occupations of workers as employees 9. Change the tests used by courts to determine employment status to include vulnerable contractors	10. Extend the right to bargain collectively to some contractors 11. Create a new category of workers with some employment rights and protections

These options aim to:

- ✓ ensure all employees receive their statutory minimum rights and entitlements
- ✓ reduce the imbalance of bargaining power between firms and vulnerable contractors
- ✓ ensure that system settings encourage inclusive economic growth and competition.

Methods of engagement (November 2019 – February 2020)

- releasing a public discussion document which sets out our understanding of the issues facing vulnerable contractors in New Zealand, and eleven possible options for change
- creating a 10 minute online survey for contractors to tell us about their working conditions
- running face to face workshops and meetings to receive detailed feedback on the pros and cons of different options.

The purpose of the consultation was to:

- refine our understanding of the nature and scale of the problems being experienced by contractors
- gather perspectives on the benefits, costs and risks of different options and how they could be improved to deliver better outcomes for people in New Zealand
- understand the potential impacts for workers, businesses, firms and the public.

Better protections for contractors

Engagement highlights

137 written submissions
...from a range of individuals and organisations.

1,485 people in New Zealand responded to our survey
....from a range of regions and backgrounds. Of those who responded, 1,216 people currently work as a contractor.

14 face to face workshops and meetings
...reaching 156 people from affected businesses, workers, worker groups and operational staff around New Zealand.

The online survey and face-to-face engagement enabled us to reach people all around New Zealand

AUCKLAND
- 6 face to face meetings with employers, worker groups, operational staff and experts
- 434 survey responses

NORTHLAND
- 15 survey responses

WAIKATO
- 96 survey responses

TARANAKI
- 20 survey responses

BAY OF PLENTY
- 61 survey responses

MANAWATŪ-WHANGANUI
- 37 survey responses

GISBORNE / HAWKES' BAY
- 26 survey responses

WELLINGTON
- 6 face to face meetings with employers, worker groups and experts
- 266 survey responses

SOUTHLAND
- 1 face to face meeting with employers
- 18 survey responses

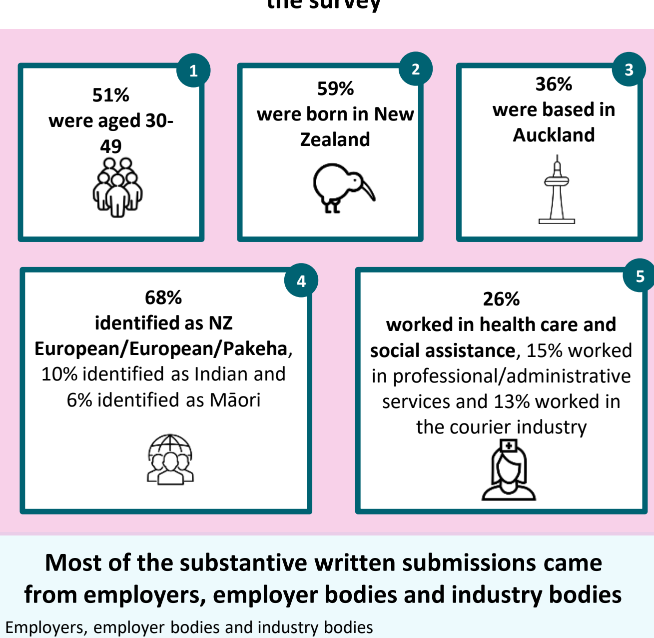
NELSON/TASMAN/MARLBOROUGH/ WEST COAST
- 20 survey responses

OTAGO
- 47 survey responses

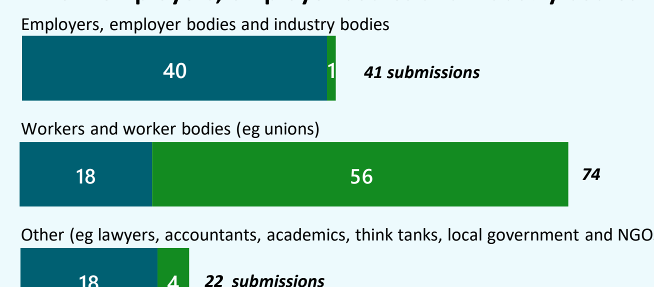
CANTERBURY
- 1 face to face meeting with employers
- 106 survey responses

Only current contractors were asked to provide demographic information (1,216 people). Of these, 70 survey participants did not disclose where they were based.

Contractors from a range of backgrounds responded to the survey



Most of the substantive written submissions came from employers, employer bodies and industry bodies



= **substantive** (provided feedback on the options, often at least a page in length)

= **short** (focussed on support for or opposition for the proposed changes, without giving feedback on options, often only a few sentences in length)

Options

Public feedback was sought on eleven options for change. These range from targeted operational improvements through to more significant changes to the employment relations and employment standards (ERES) system.

Options to deter misclassification of employees as contractors	1. Increase proactive targeting by Labour Inspectors to detect non-compliance 2. Give Labour Inspectors the ability to decide workers' employment status 3. Introduce penalties for misrepresenting an employment relationship as a contracting arrangement
Options to make it easier for workers to access a determination of their employment status	4. Introduce disclosure requirements for firms when hiring contractors 5. Reduce costs for workers seeking employment status determinations 6. Put the burden of proving a worker is a contractor on firms 7. Extend the application of employment status determinations to similar workers
Options to change who is an employee under New Zealand law	8. Define some occupations of workers as employees 9. Change the tests used by courts to determine employment status to include vulnerable contractors
Options to enhance protections for contractors without making them employees	10. Extend the right to bargain collectively to some contractors 11. Create a new category of workers with some employment rights and protections

Analysis of submissions

We split the submissions into three broad categories of workers and worker-aligned organisations, employers and industry-aligned organisations and others. The high-level breakdown is as follows:

Workers and worker-aligned organisations	**Workers, worker representative bodies and unions**
Employers and industry / employer-aligned organisations	**Employers, employer bodies and industry bodies**
Other	**Lawyers, accountants, academics, think tanks, NGOs, local government and interested individuals**

We recorded the sentiment of each submitter against each option using the following key:

- **Yes:** where the submitter made all positive comments about the option.
- **Conditional yes:** where the submitter supported the intent of the option, but had some concerns or reservations.
- **No:** where the submitter made largely negative comments about the option.
- **Silent:** where the submitter made no comments about the option.

N.B. We received some substantive submissions that provided feedback on the options, and some short submissions that focussed on support for or opposition to the proposed changes, without giving feedback on the options. Over 50 of these short submissions were from workers, and far fewer were from businesses. This is why there are a large number of submitters within the worker and worker-aligned organisations category that are silent on a number of the options.

There was a clear difference between how worker-aligned submitters and employer-aligned submitters viewed the scale of this problem

"This contract has been a nightmare and one that we relive every day because there is no escape. There are no rights for independent contractors and it is time for the Government to do something."

"Many of our clients simply will not pursue the issue because they find the process too difficult, expensive, and time consuming."

"Issues around contractors are only expected to increase as more players enter the gig economy… Groundwork should be set as soon as possible to further develop an effective system of classification and legislation for employers and workers to operate within."

Most workers and worker-aligned organisations – along with some employers, academics, lawyers, community organisations - said that contractors are vulnerable to exploitation and need better support from Government

These submitters believe that the lack of data on this problem shows that it is significantly under-reported, not that it does not exist

"The paucity of complaints about this issue reflects the same barriers… job security, the inherent power imbalance between an employer and worker, lack of information, lack of support, lack of time, time, lack of anonymity… People don't know their rights, don't complain, and are just grateful for a source of income."

"There is insufficient data to support a legislative change… to warrant a significant market disruption on the back of a small number of highlighted examples that may have been created by ill-informed, inexperienced or rogue employers all of who could be adequately dealt with under existing legislation."

Most employers and employer-aligned organisations said that there is not enough data to quantify this problem, and it is unlikely to be widespread, so does not warrant the proposed changes

These submitters believe contractors are used legitimately to meet changing business needs, and that contractors enjoy higher pay, choice and flexibility

"In many circumstances, a self-employed contractor will benefit from having only one customer who is invested in providing the opportunity for a consistent workflow and income and for growth of that income."

"All across New Zealand, businesses are employing contract labour, and doing so in a compliant way, with full understanding from both parties. It is a standard business practice, and one that should be readily encouraged where it suits the needs of the business. The vast majority are not doing so to 'cut costs', and all agreements are entered into with both parties being fully aware of their responsibilities. This part of the market requires no change or intervention whatsoever."

"… 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.."

In our survey,* contractors reported a wide range of working experiences, from very positive to very negative

53%
of respondents said one of their main reasons they became a contractor was to be their own boss.

66%
of respondents said they enjoy their independence as a contractor.

74%
of respondents relied on one firm for most or all of their income

66%
said it was likely they would rely on one firm for most or all of their income in the next year

75%
of contractors had to do some or all of the following: work certain hours and days; own/lease specific equipment; maintain confidentiality about pay and contract terms; pay financial penalties/forego payments in some circumstances; and, wear a company uniform

55%
of contractors were unable to negotiate any of the terms of their contract

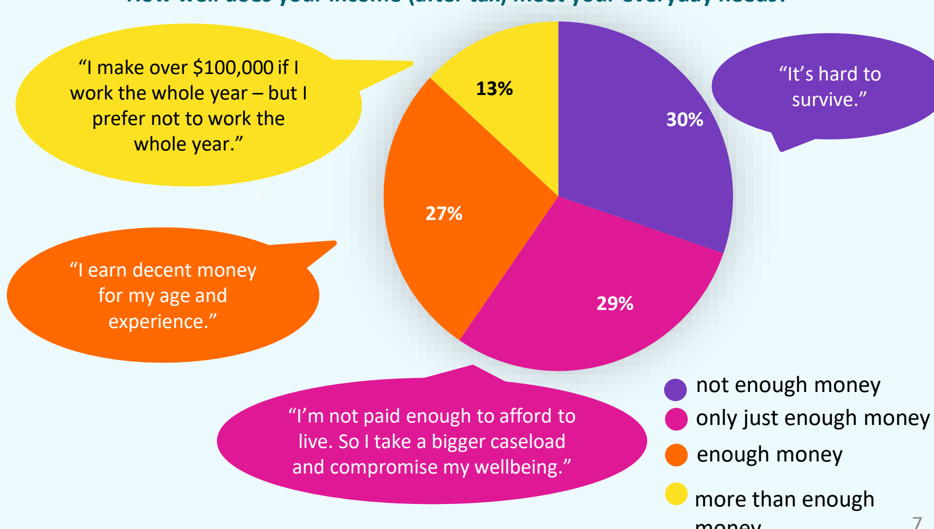
"Contracting allows me to be creative, innovative and stay ahead of change."

"I get to be accountable for my own performance, in an industry I love."

"I like managing my own expenses and doing what extra education and studies I feel would benefit my practise, instead of having to ask permission and fund study out of my family income if I want to do things a manager does not see the benefit of for the employer."

52%
of contractors self-identified as "vulnerable workers"

59%
of contractors said that their income (after tax) was not enough money or only just enough money to meet their everyday needs



*Prior to our consultation, very little data was available about the working conditions of contractors in New Zealand. To better understand this, we developed a survey that would allow individual contractors, who may not have the time to provide a detailed submission, to participate in this consultation. The data presented here is based on survey responses from 1,216 people who were currently contracting in New Zealand when they completed the survey. Like all government consultations, submissions were voluntary. This survey was not done using scientific methods, and should not be considered representative.

Better protections for contractors

Feedback on options

There were varying levels of support for the options put forward

	Workers and worker-aligned organisations (eg unions)	Employers and industry / employer-aligned organisations	Other – including lawyers, accountants, academics, think tanks, local government and NGOs
Option 1	✓✓✓	✓✓✓	✓✓✓
Option 2	✓✓✓	×	~
Option 3	✓✓✓	~	~
Option 4	✓✓✓	✓✓✓	✓
Option 5	✓✓✓	✓	✓✓✓
Option 6	✓✓✓	×	×
Option 7	✓✓✓	×	~
Option 8	~	×××	×
Option 9	~	×××	✓
Option 10	✓✓✓	×××	~
Option 11	×	×××	×

Key

✓✓✓	Widespread support for the option
✓	Generally high levels of support for the option with some exceptions (eg some highlighted concerns or reservations with the option or opposed it entirely)
~	Submitters were divided in their levels of support for the option
×	Generally low levels of support for the option with some exceptions (eg some supported the option)
×××	Widespread opposition for the option

- **There was widespread support – including from business - for more resourcing to enforce the current system (options 1, 4 and 5)**
- **There was widespread opposition to creating a new category of workers eligible for a limited set of rights and protections (option 11)**
- **There were mixed levels of support for the other options (options 2, 3, 6, 7, 8, 9 and 10)**
    - Workers and worker-aligned organisations saw these options as essential to deterring non-compliance and addressing the imbalance of bargaining power between firms and vulnerable contractors.
    - Employers and employer-aligned organisations – and a few worker groups and NGOs - strongly opposed these options on the grounds that they would increase costs and uncertainty, result in unnecessary litigation and negatively impact those who choose self-employment
    - Ultimately, employers and employer-aligned organisations feared the options could overreach and affect the wide variety of legitimate contracting relationships that currently exist

Full report

Consultation findings on the problem and options

Contractors with high bargaining power reported that they generally experience a positive cycle in contracts

“I have choices due to having highly marketable skills.”

It is easy for these workers to find contracts with reasonable terms and conditions, and to negotiate better terms and conditions

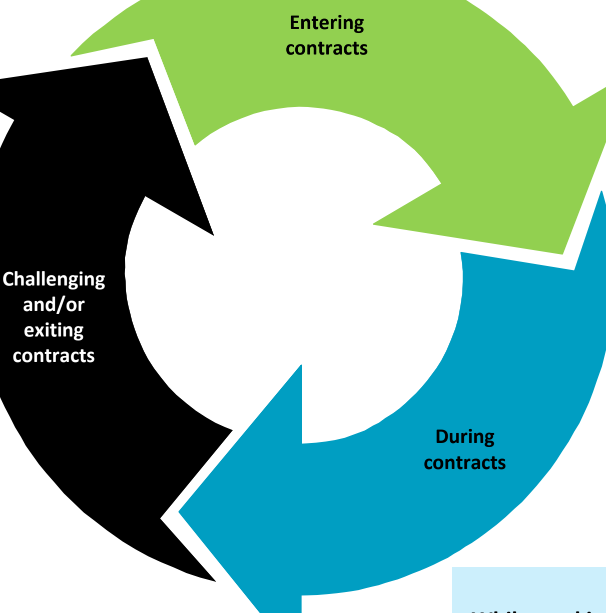
- The key thing is that these workers have options. This may be due to a combination of the following factors:
  - they are highly skilled
  - their work is in high demand
  - the market has multiple players engaging people to do the type of work they do, and/or
  - their contracts pay enough that they are comfortable with breaks between contracts to wait for a new contract they are happy with.
- Because they have other options, these workers have high bargaining power, so can negotiate better terms and conditions.
- Many of these workers also have a higher level of understanding than other contractors about the nature of contracting arrangements, and how to interpret the terms of a contract before agreeing to it.

“I’m well paid in an industry that values my skillset, and finding another contract is relatively easy.”

“I love the way I am working today, and wish I had chosen this route many years ago.”

If they are unhappy with the terms of their contract, or ready for a change, they find it easy to challenge or exit their contract

- Due to their high bargaining power, they are willing and able to challenge the terms of their contract if necessary.
- They have plenty of viable alternatives, so if their challenge is unsuccessful they are able to exit the contract and find new work.
- Due to successful negotiation at the beginning of the contract, they are unlikely to have signed up to restraint of trade clauses that prevent them from working for a competitor after the contract ends.
- If they are covered by a restraint of trade clause, this is generally accounted for in their pay so they can afford a gap between contracts.



“Being a contractor allows you to negotiate your terms. If these terms change, then renegotiation of terms also takes place.”

“My hours, my time off, where I work, are all up to me. I don’t have to negotiate, I can just stipulate.”

While working, they are generally happy with their terms and conditions.

- Workers receive sufficient take-home pay, and it is enough or more than enough money to meet their everyday needs.
- They have control and autonomy over their day to day work.
- They have sufficient protections and benefits, or their take-home pay accounts for their lack of protections and benefits compared to employees.
- They are comfortable raising any concerns with the firm that engages them.

However, the cycle reported by contractors with low bargaining power includes many obstacles and poor outcomes

"Most contractors I have assisted have little or no idea of what they will actually receive in the hand when they sign up to contracts or indeed the risks they face when signing contracts. They tend to be sold a dream based on rosy predictions and figures which only reveal gross (pre-cost and tax) revenue."

"There was no negotiation around rates paid to drivers and no negotiation when a new product was brought to the market."

It is easy for them to get into contracts that could be, or become, exploitative

- It may be the only option available to them (eg because of limited skills, because it's the business model used for particular work, because it's the only option where they live).
- They may not understand the differences between contracting and employment and the specific terms they have agreed to - eg actual take-home pay and the risks of taking on the contract.
- They may have been given misleading information and "sold a dream".
- They may be given a 'take it or leave it' contract with no room to negotiate.

There is no legal requirement for contractors to have a written agreement. 16% of survey respondents did not have one and **4%** did not know whether they had one.

Entering contracts

During contracts

Challenging and/or exiting contracts

"One day I was told I wasn't needed anymore and was replaced. I was effectively an employee and they were able to fire me for no reason because they hired me as a contractor."

"[The firm's] 'contract' rates of pay were on par with their staff … with no recognition of self-employed compliance costs or Provisional Tax at all."

While working, they experience poor terms and conditions

- Workers may receive low take-home pay (eg because of unilateral changes to contract terms, unexpected deductions and costs, higher risk than expected).
- They may be working long hours to make ends meet.
- They may have limited control and autonomy over their day to day work.
- There is a lack of (or perceived lack of) protections and benefits.
- They may be less likely to raise health and safety concerns.

They find it difficult to challenge or exit contracts

- They may not know how to challenge the terms of their contract or are unable or unwilling to because of the time, cost and potential repercussions.
- They may have tried to challenge the terms of their contract, but were unsuccessful in their efforts.
- They may have no viable alternative (eg because they depend on the firm economically or a restraint of trade clause prevents them from working for a competitor).
- They may have sunk costs or high levels of debt relating to the contract.

"Client doesn't want to 'rock the boat' as he has no job security…"

"I live in a small township.... Work opportunities are scarce at best. I do this because I have no other work prospects…I work every day of the year except statutory days and have done since being a contractor. 4am start, 5pm finish. I strongly feel exploited by this company, and I know other [companies in this industry] are not much different."

Consultation demonstrated that the 'contract lifecycle' plays out in different industries in different ways.

We have grouped different contractors together because they share similarities in terms of: work characteristics, type of work, market conditions and business models.

Group one: courier, telecommunications installation, and cleaning industries

Worker characteristic and type of work

- There are low barriers to entry in these sectors. Consultation suggested that a high proportion of workers in these sectors are migrants (often with English as a secondary language) and have limited skills and qualifications.
- Survey responses indicated that they become contractors because they like the idea of being their own boss, but often cannot negotiate the terms of their contracts.
- Workers often invest a large amount of capital (usually through taking on debt) in order to enter the sector.

Market conditions and business models, and their impact on workers

- Market conditions (eg few major players, 'race to the bottom' dynamics) mean that contractors in these industries can take on more risk and receive lower reward than expected.
- There are a lot of willing potential workers so few incentives for firms to raise pay and conditions and there is not much capacity for contractors to grow and progress.
- Workers often cannot exit these arrangements due to high sunk costs and associated debt, and no viable alternatives. *See pages 8 and 9 for more detail on these workers.*

Group two: midwifery, tertiary education, airline pilots and court translators

Worker characteristic and type of work

- Our consultation indicated that these workers are highly skilled and qualified and want to work in the sector they trained for.
- There are high barriers to entry and a number of qualified people competing for a limited number of jobs.

Market conditions and business models, and their impact on workers

- Like 'Group 1', there is not a wide market and workers have few options about how to do the work they have been trained for.
- In midwifery this is due to a public sector monopsony, and in tertiary education and airline piloting, this is due to a limited market, which drives down terms and conditions for workers.
- It can be difficult for contractors in these sectors to exit unsatisfactory arrangements as there are limited opportunities and their contracts are often the only possible way to do the work that they have been trained for. *See pages 11, 12 and 13 for more detail on these workers.*

Group three: building, construction, forestry and agriculture industries

Worker characteristic and type of work

- Like 'Group One', there are low barriers to entry in these sectors. The most vulnerable tend to be those who are younger and/or early in their career, particularly trainees or 'apprentices' in the construction sector, and contract milkers in the agriculture sector.
- However, there is more potential for growth and progression: consultation indicated that workers later in their careers tend to be satisfied with their conditions.

Market conditions and business models, and their impact on workers

- There is a high demand for workers in these industries, but consultation found that a rural culture of 'deals on a handshake' can leave early-career workers in agriculture agreeing to high-risk contracts without understanding what they have agreed to.
- Workers in these sectors are reluctant to raise issues and 'rock the boat', but conditions can improve as contractors progress in the industry, with workers later in their careers generally being satisfied with their pay and conditions. *See pages 14 and 15 for more detail on these workers.*

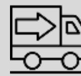
Group four: ride-share, and the creative and recreation industries

Worker characteristic and type of work

- Work in these industries is generally suited to contracting and is seen as appealing as they allow workers - in theory - to balance multiple contracts and be their own boss.
- Survey responses indicated that these workers are often not 'dependent' on their principal firm in the same way as Groups 1 – 3. Rather, they tend to supplement their income with a benefit, a 'day job' or someone else's income.

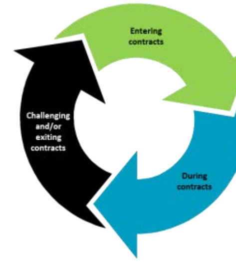
Market conditions and business models, and their impact on workers

- Consultation suggested that the key issues for these contractors centre around pay and control: there is not enough work available for all those who want to work in these industries and workers are often subject to more control than anticipated. Eg. rideshare platforms offer the same rate and conditions to all drivers and these cannot be negotiated.
- Workers in these industries can exit unsatisfactory contracts more easily than those in the other sector groupings as they are not 'dependent' on the principal firm in the same way. Nonetheless, they are unlikely to find work with substantially better terms and conditions in the same sector. *See pages 16 and 17 for more detail on these workers.*



Background

- There are 3,318 owner-drivers in New Zealand (Stats NZ, 2019), which represents more than 65% of road freight business in New Zealand.
- Business arrangements range from one-person-one-vehicle operators, to substantial operations with multiple vehicles and employees.
- Health and safety is a major concern – truck-related fatalities make up around 20% of the road toll in New Zealand, despite truck driving only making up around 6% of the total distance travelled by vehicles on road (data from the Ministry of Transport's "Truck crash facts").
- 157 courier and delivery drivers responded to our survey and we received feedback on courier and delivery drivers' conditions and pay through written submissions and face to face workshops.



Contract lifecycle for courier and delivery drivers

Entry

Couriers are "sold a dream" about what contracting will be like. We heard that people are told they can make $2000-$3000 a week as a courier, and will be 'business owners'. Of those who responded to the survey, 66% of couriers became contractors because they wanted to be their own boss, and 59% believed they would make more money as contractors. They believe they are starting from the bottom to work their way up, but we heard there is usually not much capacity to grow and progress.

…and contract terms and conditions are generally presented as non-negotiable in this sector. 52% of couriers who responded to the survey were presented with standard form contracts on a 'take it or leave it' basis. Only 15% of courier respondents said they were able to negotiate the terms of the contract they were offered.

During

…couriers work long hours, but some still struggle to make ends meet – Rates are per delivery, and may not sufficiently take into account the time it takes to deliver. In addition, we heard that couriers are subject to financial penalties (eg for damaged or late items) and unexpected deductions. 84% of couriers who responded to our survey work more than 45 hours per week, yet 51% don't make enough money to meet their everyday needs, and 30% make only just enough money to meet their everyday needs.

…and consultation found they have less autonomy in their working life than they expected, and little control over their working terms and conditions: 98% of couriers who responded to our survey had to wear a company uniform; 87% had to work certain hours and days; and 79% were not allowed to turn down work they are offered. 67% said their pay and hours could be unilaterally changed by the firm without consultation.

Challenge and/or exit

The majority of couriers who responded to the survey believe they are actually employees, but none have challenged their employment status. 60% of couriers who responded to the survey believed they were employees, but none had sought a determination of their employment status – 41% said this was because they were afraid it would cost them their job, and 32% said they didn't understand what was involved.

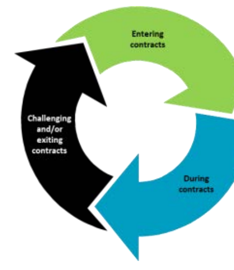
…and consultation found that couriers do not feel they can exit the sector, or move within it. 96% of couriers who responded to the survey had sunk costs relating to vehicles and vehicle expenses, and many had taken high-interest loans to cover these costs. This investment makes it difficult to exit the sector. 63% of respondents have a clause in their contract stating they cannot work for a competitor for a period after their contract ends, making it hard to transition to another job that enables them to make use of the same assets.

This cycle does not reflect conditions for courier drivers with high bargaining power: For example:

- Rural Delivery Contractors Association members have collectively bargained and contracted with NZ Post, and collectively negotiated their piece rate payment on an annual basis with NZ Post. Members of this association enjoy flexibility and high bargaining power.
- Freightways submitted that all of their group companies use company-specific pricing models to ensure that contractors can maintain good pay for their services. These vary from company to company but generally calculate what each courier earns based on distance travelled, hours worked and (average) costs incurred. Where a contractor falls below a daily earnings base (which is above the national minimum wage), a subsidy is paid to the contractor.

Background

- The cleaning industry is made up of approximately 26,000 commercial cleaners (data from Building Service Contractors), comprising employees, franchisees, contractors and ‘husband and wife’ businesses. In some places, there are long subcontracting chains, and those who are actually doing the work are unregistered, receive cash in hand, and are hard to trace.
- The membership of Building Services Contractors – the main industry body – is made up of approximately 15,000 of these workers.
- 20 cleaners responded to our survey and we received a number of submissions relating to cleaning contractors’ conditions and pay. A combination of franchisees, and cleaners who were engaged by a cleaning company, responded to the survey so this cycle captures both stories. Given the relatively small number of survey responses, it is important to note that the data presented below is not representative.



Contract lifecycle for cleaning franchises and contractors

Entry

Some people take on cleaning franchisees or contracts without understanding what they are signing up to. Of those who completed our survey, 28% of cleaners rated themselves a 0 or 1 out of 5 when it came to understanding their rights and obligations.

Some cleaners are in substance employees and didn’t choose to become contractors. We heard that some cleaning companies engaging employees as contractors in order to avoid obligations under part 6A of the *Employment Relations Act 2000*. 15% of cleaners who responded to our survey became contractors because they didn’t have a choice.

During

Cleaners’ take home pay can be lower than expected. We heard that cleaning contracts are often awarded to the lowest bidder, which creates a ‘race to the bottom’. Franchises often experience unexpected costs and deductions (including royalties to their head office) and employ people themselves who are working for less than minimum wage. 35% of our survey respondents in the cleaning industry said they do not make enough money to meet their everyday needs, and 20% said they make only just enough.

…and some have limited control and autonomy in their work. Employees who have been reclassified as contractors have very low levels of control and autonomy over their work as the nature of the relationship is in substance one of employment. Many franchisees also reportedly had much less independence than expected**.** We heard that the head office will quote prices for all work (controlling income), provide expected operating hours for the franchise, dictate which products franchisees should use and require particular signage and advertising.

Challenge and/or exit

Misclassified cleaners are reluctant to challenge their employment status. 25% of cleaners who responded to our survey believe they are actually employees, but none had sought a determination of their employment status. 60% of those who thought they were employees said they hadn’t challenged their status as they were scared of losing their job.

…and some cleaners cannot exit their contracts because they depend on the principal firm and lack alternatives – 75% of cleaners who responded to the survey have relied on one firm for most or all of their income over the last 12 months, and 60% have a clause in their contract stating they cannot work for a competitor for a period after their contract ends. Franchisees do not feel they can sell the business because of the sunk costs and borrowing involved, particularly when loans have come from the franchisor as ‘vendor finance.’

Background

- Our survey used ANZSIC (Australian and New Zealand Standard Industrial Classification) Codes to allow respondents to identify the industry they were contracting within. Although installing internet cables is classed as "Construction," under ANZSIC guidelines, many workers in this role selected the sector "Information media and telecommunications" when completing the survey. We were not able to confidently isolate a group of respondents as working in telecommunications installation, so do not have survey data for these workers. The cycle is based on a meeting with workers from this sector in 2019.

Contract lifecycle for telecommunications installation contractors

Entry

Market conditions and business structures can drive down conditions for workers at the bottom. We heard that the market is dominated by two main companies, who employ a large number of low-skilled workers, in a complex business structure that can hide poor conditions for workers at the bottom. Due to a race to the bottom, price-fixing and cost-cutting can lead to workers at the end of the chain being left in a vulnerable position.

…and workers are offered non-negotiable contracts. Workers reported that 'take it or leave it' contracts are common in this sector.

During

Workers reported that take-home pay is lower than expected, due to high expenses…Workers are required to buy and wear uniforms, buy and drive branded vans, and payment deductions (without consultation) lead to contractors losing $8000-$12000 a year. Some workers reported having to re-do jobs that were completed years ago, without receiving additional payment for this work. There is no minimum guarantee of income, or set amount of work.

…and they have a limited level of control over their working arrangements. Contracts reportedly include exclusivity clauses, which require contractors to only work for one firm, and unilateral variations are made to contract terms without consultation. Workers reportedly have minimal choice over hours worked or jobs completed, and have to work weekends without additional pay.

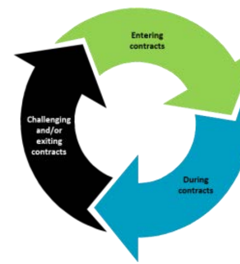
Challenge and/or exit

Workers are unable to negotiate one-sided contract terms. We heard that workers are unable to negotiate payment rates or significant changes to their contracts, and reported not being given the opportunity to negotiate a new standard form contract.

… but efforts have been made to challenge these working conditions. In 2016, an application was made by a telecommunications installation worker to the ERA for a determination of his employment status. His claim was unsuccessful. In 2019, contractors were considering preparing a class-action against Visionstream to argue that they are in fact employees.

Background

- There are around 3,200 midwives who hold an Annual Practising Certificate (APC). These midwives provide maternity care to on average 60,000 women and babies each year.
- Midwives can either be employed by a District Health Board (working rostered shifts within a maternity facility), or self-employed as Lead Maternity Carers (LMCs), contracted and paid directly by the Ministry of Health. Approximately 35% of all midwives in New Zealand (around 1,200 midwives) are self-employed LMCs (all data from New Zealand College of Midwives).
- 300 people working in 'healthcare and social assistance' completed our survey. The majority of these were midwives; free text responses show that at least 196 respondents were working as Lead Maternity Carers. However, survey data for this sector does include some other workers in the sector, such as general practitioners and speech language therapists. We also received a written submission from the New Zealand College of Midwives.



Contract lifecycle for midwives

Entry

Midwives cannot choose who they are contracted to. The Ministry of Health is the only funder for midwifery and sets the terms and conditions for lead maternity carers across the board (see Section 88 *Maternity Notice of the New Zealand Health and Disability Act 2000* (the Notice)).

…and due to this legislative framework, midwives are unable to negotiate the terms of their contract. 87% of survey respondents in healthcare and social assistance reported they were unable to negotiate the terms of their contract. This included midwife respondents as the Notice is a legislative instrument, so renegotiation or review of contract terms would have to go through Cabinet.

During

Midwives reported that their take home pay is low in comparison to the amount of work done. 67% of survey respondents in healthcare and social assistance worked more than 45 hours per week, but 34% said they did not make enough money to meet their everyday needs, and 42% made only just enough. We heard that the nature of the services midwives provide have expanded over time, and health needs have become increasingly more complex, but the terms and conditions in the Notice have not been reviewed since 2007.

…and many experience less control and autonomy than they expected. The service specifications set out under the Notice detail specific minimum care requirements for each woman. There is no ability for midwives to reduce services if payments do not keep pace with the costs of providing them. 83% of survey respondents in healthcare and social assistance said they were not able to request changes to their work, and 81% said they regarded themselves as vulnerable workers.

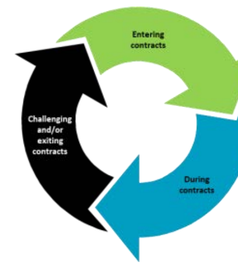
Challenge and/or exit

…challenging terms and conditions is a lengthy process. The Notice does not offer a mechanism for self-employed midwives to negotiate their terms and conditions or seek payment increases. The New Zealand College of Midwives submitted that they attempted to negotiate with the Ministry of Health on behalf of midwives for years, and then took a claim to the High Court against the Ministry of Health in 2015 when negotiation was unsuccessful. The court case was adjourned in favour of mediation, which has not reached a conclusion five years later.

…and many do not want to exit their working arrangements. We heard that midwives become contractors because they want to work as Lead Maternity Carers and offer continuity of care to particular families. This way of working remains the favoured or only option for the vast majority of LMCs, so they do not want to exit their contract, but do seek better terms and conditions.

Background

- COVID-19 has had a huge impact on the tertiary education sector, due to the lack of international students attending New Zealand universities; international students usually bring $5 billion a year to this sector (figure from the most recent *Economic Valuation of International Education* report.)
- 32 people from this sector completed our survey and we received a submission from the Tertiary Education Union. A number of other submissions also highlighted terms and conditions for contractors working in the tertiary education sector.



Lifecycle for contractors working in tertiary education and training

Entry

Contracting agreements can be useful in the tertiary education sector for short-term or intermittent work - for example, tutoring positions, consultancy, or lectureship on specialist subjects.

However, some people are not given a choice about becoming a contractor. For example, 25% of those in this sector who responded to our survey stated that they "didn't have a choice" about becoming a contractor. Submitters highlighted that tertiary institutions are increasingly engaging academic staff as contractors to manage costs and avoid employment-related obligations (including the terms of collective agreements), despite the work being substantively similar to that undertaken by employees. We heard that employees are made redundant and then offered the same work as a contractor, or they risk losing the work altogether.

During

…take home pay in the sector can be low, despite high skills and qualifications. Consultation indicated that contractors are offered a global fee for services which does not take into account the time required to teach, liaise with other lecturers, attend to students' pastoral care, set and grade assignments and examinations, and write course materials. Some respondents highlighted that their pay worked out to be below the minimum wage after taking into account these additional responsibilities. 26% of survey respondents in education and training said they did not make enough money to meet their everyday needs, and 37% said they made only just enough. Contractors also miss out on paid research time and professional development, which are two of the benefits employees in the sector enjoy

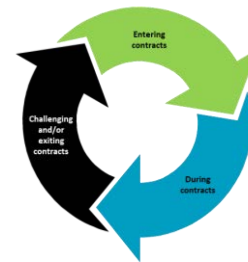
…and contractors working in the sector can experience limited control and autonomy. We heard that contractors' working conditions are the same as employees – they have no say over timetabling of classes, materials and the location are supplied, and the syllabus is prescribed and deadlines are set by the institution. Permission for time off is required, and they report to and are reviewed by the head of the department (who may have been their manager when they were employees).

Challenge and/or exit

…people working in this sector usually understand their rights and obligations, but are sometimes unwilling to challenge the terms of their contracts. Some submitters highlighted successes workers had had in challenging their employment status (through the support of a union). However, we also heard that some workers in this sector are unwilling to challenge their conditions due to scarcity of work in the sector – people fear losing their job or gaining a reputation of being difficult. When asked what they liked least about being a contractor, 59% of respondents said the lack of job security.

Background

- More than 500 trainee pilots enter the job market annually competing for a limited number of available jobs (data from NZ Air Line Pilots' Association).
- COVID-19 grounded 90% of the world's aircrafts, and hundreds of pilots in New Zealand are now seeking new jobs and careers.
- We did not receive any survey responses from pilots so the following cycle is based on a submission from the New Zealand Air Line Pilots' Association.



Lifecycle for contractors working as airline pilots

Entry

Contracting is the only option available to some pilots. There are a limited range of employment options for pilots in New Zealand's aviation industry, but more than 500 trainee pilots enter the job market annually. We heard that many of these pilots are only offered the option of contracting. Others are made redundant as an employee, but offered the same role as a contractor on reduced hours and/or conditions – because their role is so highly specialised and the market so small, they might not have any other options.

During

…and the market drives down terms and conditions for workers, so many pilots find take home pay is lower than expected. New Zealand's passenger airline industry is dominated by a few large players and the industry is highly sensitive to market forces, Negative impacts can be passed down to workers, or lead to restrictions on recruitment. Small general aviation firms operate at low margins because their customers have limited budgets, which results in lower pay for workers.

Challenge and/or exit

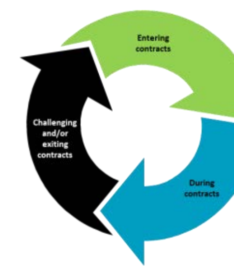
…but many pilots do not know how to challenge the terms of their contract. Submissions highlighted that these workers do not understand the difference between employment and contracting, the associated rights and obligations, and how to go about challenging unsatisfactory contracts.

…while others are unwilling to challenge their terms due to cost and time. We heard that the workers who would like to challenge the terms of their contract often lack the money needed to pay for legal services to resolve the issues. Legal action can also take months to years to resolve, which deters people from pursuing it.

Airline pilots are in 'Group 2' with midwives and tertiary educators, because they share the characteristics of being highly trained, highly specialised workers with limited options for work due to market conditions. However, they also share characteristics with 'Group 3' (construction, agriculture and forestry) because it is often those workers who are early in their career who are most vulnerable to poor outcomes in this industry.

Background

- Residential construction is dominated by SMEs, family businesses, and franchises, while commercial construction and infrastructure is run by large national companies.
- 66 people from this sector completed our survey and we also received feedback on conditions and pay in this industry through written submissions and face to face workshops.



Lifecycle for contractors working in building and construction

Entry

We heard that entry-level workers in building and construction don't have a choice about being a contractor. Young and early career workers tend to enter building and construction as 'apprentices,' but some are hired as contractors rather than on employment agreements. When asked why they became a contractor, 30% in this sector said, "I didn't have a choice."

…and a more informal attitude to hiring may mean that workers don't fully understand what they have agreed to. Only 42% of survey respondents in the building and construction sector have had a written contract, and of those who did have a written contract, only 36% asked for advice from another person before signing it.

During

…a range of working conditions can be seen in the building and construction sector. Many workers in the sector reported reasonable hours, pay and independence, but 40% of survey respondents in the sector said they work more than 45 hours per week, 21% said that they do not make enough money to meet their everyday needs, and 34% said that they make only just enough money. Those in entry-level roles are often paid lower "apprentice rates" to account for the fact they are being trained.

… and apprentices do not have as much independence as others enjoy in the sector. Due to the training aspect of an apprentice contract, these workers don't have much control over their working hours and conditions. However, because some are classified as contractors they also miss out on minimum employment protections, which offer an important baseline for entry-level workers.

Challenge and/or exit

…but workers in this sector are unwilling to challenge their conditions as they don't want to 'make waves'. Consultation found a strong culture of not wanting to gain a reputation as a trouble-maker in the building and construction sector. Survey respondents were generally able to talk to their boss about changes to their daily work in a more relaxed and informal way (68% felt able to request changes to their work), but they were unwilling to challenge the terms of the contract, or speak up in a way that might seem like causing a fuss - when asked what they would do if their contract was terminated unexpectedly, 30% said "nothing" and 30% said "find other work." In other sectors, workers were much more likely to say they would hire a lawyer, discuss the termination with the firm, or seek advice. Free text responses focussed on not causing trouble, seeing this as the greatest barrier to getting future work.

Background

- 48 people from this sector completed our survey and we received a number of written submissions relating to conditions and pay in this industry.

Lifecycle for contractors working in forestry and agriculture

Entry

Some roles in these sectors are best-suited to contracting. For example, contract milking is an important part of the agriculture industry, and is a pathway to farm ownership for workers. Contract milkers manage farms and pay a percentage of costs, and are paid a negotiated rate for the amount of milk produced. Some people enter contract milking through an apprenticeship.

…but entry-level workers may not understand the implications of what they sign up to. Young or early-career workers may not understand the realities of the contracts they are agreeing to. 'Handshake contracts' can mean workers don't have the opportunity to consider or seek advice before agreeing to their terms, and 47% of survey respondents in this sector said they didn't feel able to negotiate their contract. Information asymmetries exist, and some submitters highlighted that farmers or forest-owners sometimes mislead workers about the conditions and risks involved in their contract. Work in forestry and agriculture is often seasonal or time-limited, and income and cost forecasts can change dramatically due to unpredictable seasonal variation. Workers who are unfamiliar with this volatility may not take it into account before accepting a contract.

During

Survey respondents in agriculture and forestry reported enjoying the independence and flexibility of contracting, and only 10% said they didn't like anything about being a contractor. However, early career workers can experience poor outcomes:

…many in the sector have to work long hours to make ends meet - 78% of survey respondents in agriculture and forestry reported working more than 45 hours per week, but 24% did not make enough money to meet their everyday needs, and 34% made only just enough – those at the bottom end may be early career workers. In agriculture, contract milkers face unexpected costs, volatility of returns, and a financial penalty for low quality milk. In forestry, 'group contracts' can mean that a set contract price is divided between workers, regardless of time taken or number of workers involved.

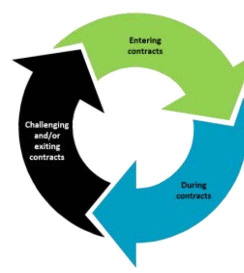
…and the structure of these industries can leave workers unprotected. Submitters told us that the structure of the forestry industry in New Zealand, with multiple levels of disconnect between the decision-makers and the workers, means it is difficult to challenge or enforce the rights and protections of workers in this industry, resulting in significant levels of worker death and injury. Submissions also said that a rural culture of 'deals on a handshake' can leave early-career workers in agriculture agreeing to high-risk contracts without understanding what they have agreed to. 49% of survey respondents in the sector said they consider themselves to be vulnerable.

Challenge and/or exit

…but workers in this sector are unwilling to challenge their conditions as they don't want to 'make waves' . Consultation found that there is a strong culture in forestry and agriculture of not wanting to cause trouble or gain a reputation as a trouble-maker (like in building and construction). 77% of survey respondents in this sector made most or all of their income from one firm over the last twelve months, and 42% said they don't feel able to request changes to their work.

Background

- Rideshare drivers are usually members of multiple rideshare platforms, but Uber dominates the market in New Zealand and globally, with around 7,700 drivers in New Zealand as of February 2020 (data from Uber submission).
- 40 people from this sector completed our survey and we received a number of submissions relating to ride-share drivers' terms and conditions.



Lifecycle for rideshare drivers

Entry

Rideshare drivers are not able to negotiate the terms of their contract. We heard that drivers have their rates and terms set by the platform and these cannot be negotiated.

…and drivers may not understand the full implications of what they have agreed to. Survey responses and submissions indicated that a number of rideshare drivers are low-skilled migrants, do not speak English as their first language, and may not understand their rights as a worker in New Zealand, and obligations as a contractor. Of those who responded to the survey from this sector, 80% were born outside New Zealand, and 58% were Indian. 100% of survey respondents in this sector did not seek advice before signing their contract.

During

Dominant companies drive down pay and conditions and smaller businesses are incentivised to do the same to compete. 56% of rideshare drivers who responded to the survey said they did not make enough money to meet their everyday needs, and 38% said that they made only just enough. This is partly due to oversaturation in the market which lowers the amount of work each driver gets. Submitters also highlighted that platforms can change terms – notably, by decreasing prices and reducing drivers' incomes, or by increasing their own commission – without consulting "partner" drivers. 61% of survey respondents in this sector said they consider themselves vulnerable.

…and rideshare drivers have limited control and autonomy, and their terms can be unilaterally changed. Platforms often dictate drivers' working arrangements. For example, by forcing drivers to accept trips without knowing the passenger's destination, and removing drivers from the platform for cancelling rides too often. We heard that drivers are also required to take a 'selfie' at the start of a shift to prove they are not subcontracting.

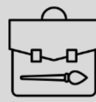
Challenge and/or exit

…but rideshare drivers are unable to challenge the terms of their contract. The nature of the relationship is complex - platforms state that they exist to facilitate a contract between drivers and riders, but in reality the platforms can wield control over drivers' working lives. Submissions highlighted that Uber has refused to meet or engage with driver advocacy groups, and legal recourse for an aggrieved driver can only be made through an international tribunal based in the Netherlands, severely limiting drivers' avenues for redress.

…and many rideshare drivers do not want to, or cannot, exit their contracts. Many rideshare drivers indicated that they want to remain as contractors because they value flexibility and ride-share driving is one of the few options available to low- or non-skilled workers, which means that there are limited viable alternatives for many of these people.

Uber and Ola submitted that very little control is exercised over drivers; they are free to work or not work, choose their own hours, accept or reject a ride at their own discretion, and they are not closely supervised. Both companies stated that their model is based on genuine two-way flexibility.

$ A survey in 2018 by the New Zealand Rideshare Drivers Network found that 76% of drivers had earned less than the minimum wage in the 6 months prior to the survey. They said that 18 months earlier, only 22% of drivers were earning less than the minimum wage, suggesting a decrease in earnings.



Background

- Workers in the arts and recreation sector include personal trainers, theatre actors and dance teachers.
- 43 people from this sector completed our survey and we received a number of submissions relating to pay and conditions in this industry.

Lifecycle for contractors working in the creative and recreation industries

Entry

A lot of work in the creative and recreation sector is best suited to contracting. In order to work in the area they're passionate about, these workers often have to build a portfolio career, as full-time roles are rare. When asked why they became a contractor, 49% of survey respondents in the creative and recreation sectors said they didn't have a choice.

… and demand for work and availability of willing workers drives down conditions in this sector. Many people work in this sector out of passion for their subject, and many are trying to build a CV of past work (or 'exposure') in order to open up further opportunities for themselves. We heard that there is high demand for work, but a limited amount of available paid work – this means firms do not need to offer high terms, conditions and pay to attract and retain workers, and firms have higher negotiating power than workers when drawing up a contract.

During

Take home pay in this sector is low, often due to low hours worked. Due to the limited availability of work, consultation found that people in this sector often struggle to find enough work to support themselves. 14% of survey respondents in this sector work less than 15 hours per week, and 31% work less than 30 hours. 42% of respondents in this sector said they do not earn enough to meet their everyday needs, and 36% earn only just enough. 20% of survey respondents in this sector said they depend on someone else's income to survive.

Consultation found that workers in this sector experience limited control and autonomy at work. Despite being in a line of work that is genuinely suited to contracting, many workers in this sector (particularly those in roles such as personal training, or arts teaching) end up in long-term contracts with small to medium-sized businesses, where the businesses treat the contractor like an employee. Submitters talked about personal trainers being told how much they could charge clients and when they have to see clients, having to wear uniforms, and attending compulsory unpaid meetings and professional development. Of survey respondents in the arts and recreation sector, 74% said they are required to work certain hours and days, and only 45% felt able to request changes to their work.

Challenge and/or exit

Some contractors in the sector reported that those engaging them refused to negotiate when they challenged their terms. Again, there is little incentive for firms to offer competitive rates or terms in these sectors, including when workers challenge a contract. Survey respondents who had challenged the terms of their contract highlighted that they had experienced no change, and then left the role. Despite the genuine contracting nature of the work, 61% of survey respondents in this sector said they would like someone (like a union) to negotiate on their behalf, and when asked to choose three "employee benefits" they would most like, 44% selected "the right to bargain collectively" – suggesting that low bargaining power is a major concern for these workers.

Contractors in arts and recreation often do not want to leave the sector, so stay despite poor conditions. The same reasons that workers entered this sector are often the reasons they stay in the sector. Some contractors may not be able to move contracts within the sector, due to the low availability of work and restraint clauses – 23% of survey respondents in this sector have a contract that states they cannot work for a competitor after their contract ends.

Options

Public feedback was sought on eleven options for change. These range from targeted operational improvements through to more significant changes to the employment relations and employment standards (ERES) system.

Options to deter misclassification of employees as contractors	1. Increase proactive targeting by Labour Inspectors to detect non-compliance 2. Give Labour Inspectors the ability to decide workers' employment status 3. Introduce penalties for misrepresenting an employment relationship as a contracting arrangement
Options to make it easier for workers to access a determination of their employment status	4. Introduce disclosure requirements for firms when hiring contractors 5. Reduce costs for workers seeking employment status determinations 6. Put the burden of proving a worker is a contractor on firms 7. Extend the application of employment status determinations to similar workers
Options to change who is an employee under New Zealand law	8. Define some occupations of workers as employees 9. Change the tests used by courts to determine employment status to include vulnerable contractors
Options to enhance protections for contractors without making them employees	10. Extend the right to bargain collectively to some contractors 11. Create a new category of workers with some employment rights and protections

Analysis of submissions

We split the submissions into three broad categories of workers and worker-aligned organisations, employers and industry-aligned organisations and others. The high-level breakdown is as follows:

Workers and worker-aligned organisations	**Workers, worker representative bodies and unions**
Employers and industry / employer-aligned organisations	**Employers, employer bodies and industry bodies**
Other	**Lawyers, accountants, academics, think tanks, NGOs, local government and interested individuals**

We recorded the sentiment of each submitter against each option using the following key:

- **Yes:** where the submitter made all positive comments about the option.
- **Conditional yes:** where the submitter supported the intent of the option, but had some concerns or reservations.
- **No:** where the submitter made largely negative comments about the option.
- **Silent:** where the submitter made no comments about the option.

N.B. We received some substantive submissions that provided feedback on the options, and some short submissions that focussed on support for or opposition to the problem definition, without giving feedback on the options. Over 50 of these short submissions were from workers, and far fewer were from businesses. This is why there are a large number of submitters within the worker and worker-aligned organisations category that are silent on a number of the options.

There were varying levels of support for the options put forward

	Workers and worker-aligned organisations (eg unions)	Employers and industry / employer-aligned organisations	Other – including lawyers, accountants, academics, think tanks, local government and NGOs
Option 1	✓✓✓	✓✓✓	✓✓✓
Option 2	✓✓✓	×	~
Option 3	✓✓✓	~	~
Option 4	✓✓✓	✓✓✓	✓
Option 5	✓✓✓	✓	✓✓✓
Option 6	✓✓✓	×	×
Option 7	✓✓✓	×	~
Option 8	~	×××	×
Option 9	~	×××	✓
Option 10	✓✓✓	×××	~
Option 11	×	×××	×

Key

✓✓✓	Widespread support for the option
✓	Generally high levels of support for the option with some exceptions (eg some highlighted concerns or reservations with the option or opposed it entirely)
~	Submitters were divided in their levels of support for the option
×	Generally low levels of support for the option with some exceptions (eg some supported the option)
×××	Widespread opposition for the option

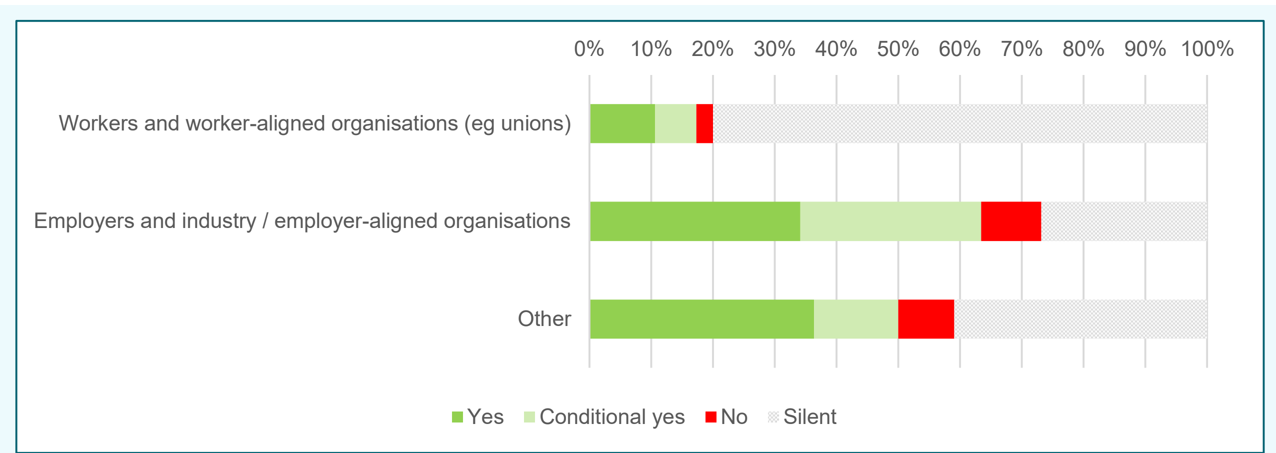
- **There was widespread support – including from business - for more resourcing to enforce the current system (options 1, 4 and 5)**
- **There was widespread opposition to creating a new category of workers eligible for a limited set of rights and protections (option 11)**
- **There were mixed levels of support for the other options (options 2, 3, 6, 7, 8, 9 and 10)**
    - Workers and worker-aligned organisations saw these options as essential to deterring non-compliance and addressing the imbalance of bargaining power between firms and vulnerable contractors.
    - Employers and employer-aligned organisations – and a few worker groups and NGOs - strongly opposed these options on the grounds that they would increase costs and uncertainty, result in unnecessary litigation and negatively impact those who choose self-employment
    - Ultimately, employers and employer-aligned organisations feared the options could overreach and affect the wide variety of legitimate contracting relationships that currently exist

Better protections for contractors

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

Snapshot: overview of option and level of support

Labour Inspectors enforce and monitor compliance with employment standards. They use investigations and audits to find breaches of employment standards and put them right. This option would involve Labour Inspectors scaling up their efforts to proactively target investigations where they think misclassification is happening.



Summary of feedback

There was widespread support for the Labour Inspectorate scaling up their proactive targeting efforts to detect and penalise non-compliance

"[This option] offers significant improved opportunity for detection of inappropriately classified workers and enforcing the law, with minimal unintended consequence for the broader economy."

"We are particularly keen to see anything that would help with levelling the playing field between employers and employees and between compliant and noncompliant firms. If anything, the playing field should tilt against non-compliant firms."

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

A range of ideas were put forward about how non-compliance could be better detected in the first place

A key challenge with the status quo is detecting non-compliance in the first place – there aren't easy mechanisms for firms, workers or unions to escalate issues to Labour Inspectors. Moreover, we heard that the MBIE call centre does not always redirect contractor complaints to Labour Inspectors because of their employee-focused remit. To help ensure inspectors focus on the right issues, in the right areas, a range of ideas were suggested.

- ✓ Establish clear mechanisms for people to report concerns – eg an anonymous whistleblowing channel.
- ✓ Focus on businesses that are not self-regulating and independently audited by an industry body.
- ✓ Give Labour Inspectors the powers to examine non-work arrangements (eg housing, transport and other expenses) as many cases of exploitation occur outside of the workplace, but still involve the worker's employer and/or a third party personnel company.

Better protections for contractors

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

However, there were differing views on key design choices

Focus on all cases of misclassification or only those cases where there is a high risk of exploitation?

- Workers and worker-aligned organisations favour Labour Inspectors focusing on all cases of misclassification regardless of whether it results in exploitation or not, but with additional priority being given to high risk cases.
- Employers and employers/industry aligned organisations and many of those in the 'other' category propose focusing only on cases of exploitation.

Focus on all cases of misclassification (even those that are a result of mistake or accident) or only cases of wilful and deliberate misclassification?

- Workers and worker-aligned organisations favour Labour Inspectors focusing on all cases of misclassification (whether accidental or intentional).
- Employers and employers/industry aligned organisations recommended focusing only on cases of wilful and deliberate misclassification.

Should inspectors be able to initiate action themselves without receiving a complaint from the affected worker(s)?

- Workers and worker-aligned organisations supported Inspectors having the power to initiate action because workers may be under duress from the employer and not raise complaints themselves.
- Employers and employers/industry aligned organisations opposed this on the grounds that it could undermine the ability of individual parties to negotiate an outcome that works best for them.

Views on implementation issues or risks

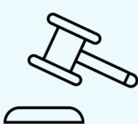
- Targeting misclassification could push people further into the cash-in-hand and informal economy
- Giving firms sufficient time to correct instances of misclassification – for example, allowing for a "grace period" focused on educating the employer before penalties are initiated.
- Thinking carefully about the set of powers Labour Inspectors have – eg some submitters stated that it would not be appropriate for Labour Inspectors to both investigate (option 1) and determine employment status (option 2).

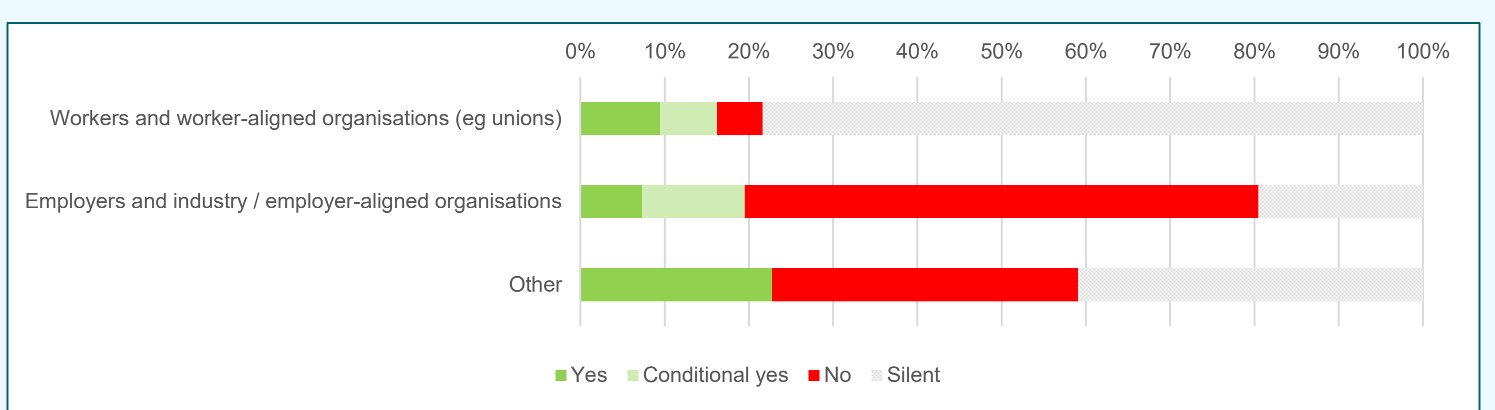
Better protections for contractors

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

Snapshot: overview of option and level of support

At present, only the Employment Relations Authority and the Employment Court can decide whether a worker is an employee or a contractor. This option would give Labour Inspectors the ability to do so as well.





Summary of feedback

Most workers and worker-aligned organisations were in favour of giving inspectors the power to determine employment status, highlighting the benefits of speed and lower costs for workers

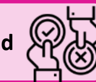
"This would provide a speedy and inexpensive means of determining status, rather than requiring vulnerable workers to be put to the cost and time of applying to the Employment Relations Authority."

Most employers and employer / industry aligned organisations said that giving Labour Inspectors the power to determine employment status would lead to inconsistencies, increased litigation and uncertainty for everyone involved

"The addition of Labour Inspectors to the decision-making tree, increases the number of opportunities for litigation on questions of status, thus increasing the costs to litigants and increasing delays in their respective productive work capacity. This in turn would diminish the value of Option 5."

"Determining employment status can be extremely complex, as demonstrated by the Bryson v 3Foot case…Allowing Labour Inspectors, who are not legally qualified, to be the final arbiters of these complex issues is likely to result in incorrect and/or inconsistent decisions. This in turn will increase uncertainty for workers and employers."

Legal experts, academics and think tanks were divided



Some argued that this option would:

- ✓ address uncertainty
- ✓ reduce costs and risks for workers
- ✓ better support the Labour Inspectorate's core functions

"[We] agree that [this option] will clarify current uncertainty. This change will better support a Labour Inspector's core functions."

Others argued that this option would:

- Increase complexity and litigation
- Undermine the separation of powers

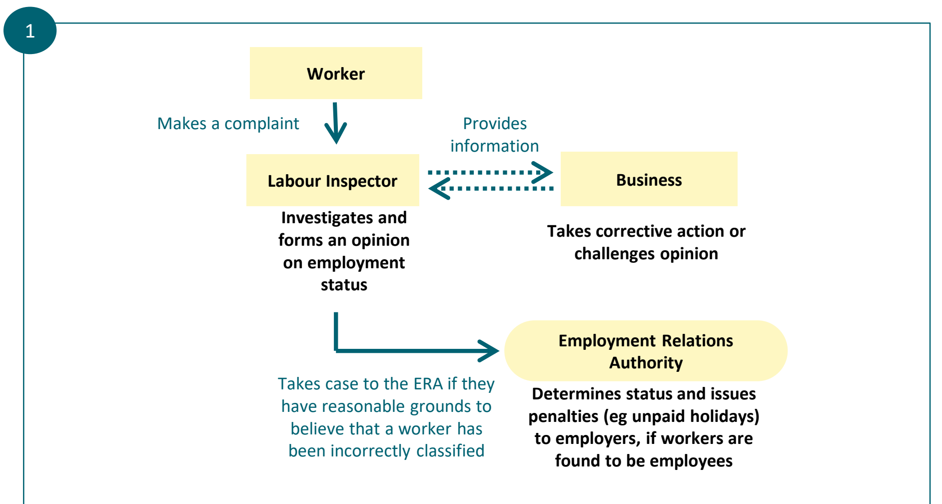
"It is unprincipled that public servants should decide on the contractual or status rights and freedoms of citizens, especially if there are not full rights of appeal from such decisions."

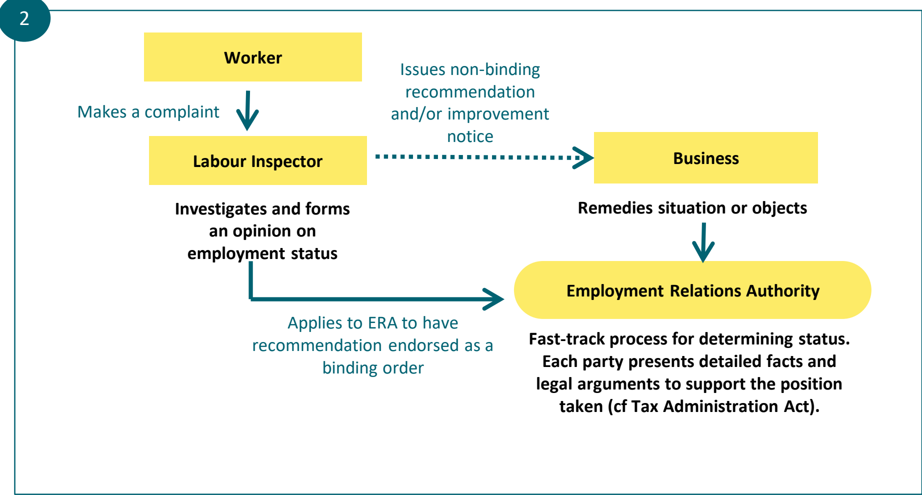
Better protections for contractors

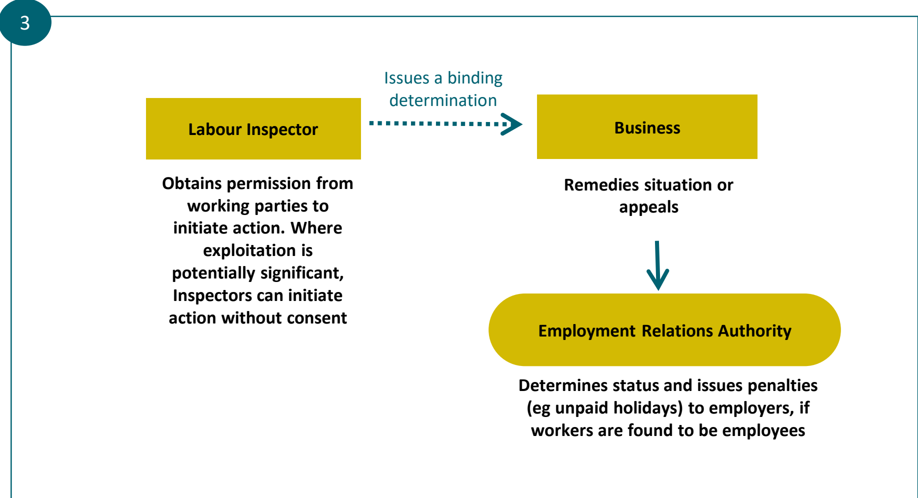
Option 2: Give Labour Inspectors the ability to decide workers' employment status

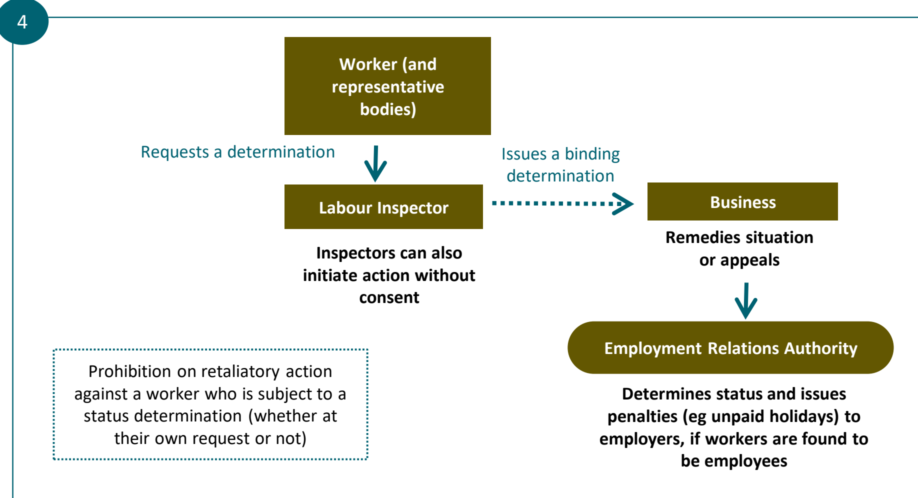
These different perspectives translated into different ideas about how this option should work in practice

Ideas 1-4: Least change to most change







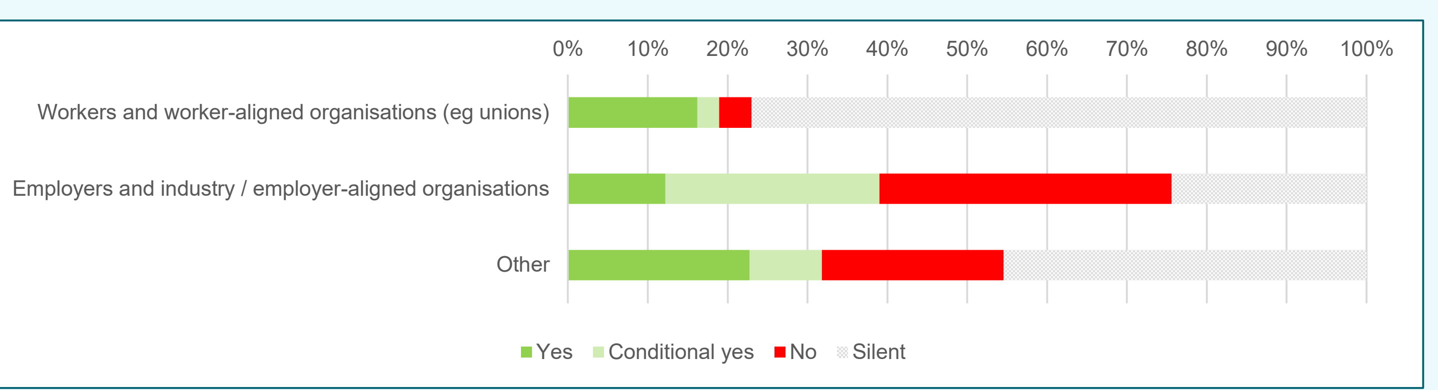


Better protections for contractors

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

Snapshot: overview of option and level of support

At present, firms who have misclassified workers are held liable for unpaid employment entitlements (eg the minimum wage, holiday pay), but there is no separate penalty for the misclassification itself. This option would create a new penalty for firms who misclassify employees as contractors.



Summary of feedback

Some supported greater penalties on the grounds that it would send a clear signal and reduce the financial incentive to misclassify workers

"The motivation for misrepresenting employment relationships is to save money by not paying entitlements such as sick leave and holiday pay and by paying hourly rates as low as possible, and sometimes less than the minimum wage. The best way to deter such conduct is to ensure that it becomes financially disadvantageous."

"…we cannot endorse a law being broken whether intentional or not."

"Repeat offenders should be publicly named as part of the process."

Some stated that penalties would not be an effective deterrent and are unlikely to work in practice

"Penalties will not stop rogue employers from employing contractors on a less-than-living-wage basis, as just like with tax fraud, the implication will be that they "won't get caught"."

"It would be problematic attempting to determine whether misclassification was intentional or not, and this would only drag out the determination process, with unnecessary investment of resources into the legal process by both firms and Labour Inspectors."

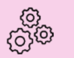
These submitters said that efforts should instead be directed towards detecting and punishing non-compliance in the first place

"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."

Better protections for contractors

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

Feedback on key design choices



	Workers and worker-aligned organisations	Employers and employer / industry aligned organisations	Other – including lawyers, academics, think tanks and NGOs
Circumstances in which they apply			
Deliberate cases of misclassification	Yes	Yes	Yes
Accidental misclassification	Mixed - some unions only supported penalties in cases of deliberate misclassification	No	No
Worker consents to the arrangement	Yes	No	No
Who should be penalised			
Firm?	Yes	Mixed	Silent
Worker if arrangement is mutually consented to?	No	Mixed	Silent
Firms who have significant control or influence over another entity?	Yes - principal contractor liability for breaches in the supply chain and joint liability for labour hire companies and host employers	Mixed	Silent
Type and severity of penalty			
Penalties significant?	Yes - expected level of penalty must be set at a point which genuinely deters companies from non-compliance	Mixed – existing penalties (ie unpaid holidays) are sufficient. Alternatively, introduce graduated penalties which increase in severity depending on the level of exploitation	Yes – could introduce a substantive penalty for misclassification and treat unpaid PAYE and holidays as consequential breaches
Publication of breaches?	Yes – 'naming and shaming' of firms	Yes	Silent
Payable to the state?	Silent	Silent	Mixed – some were in favour of compensatory payments to wronged persons rather than penalties that are payable to the state

Views on implementation issues or risks

- Distinguishing between deliberate and accidental misclassification
- Relies on effective enforcement capability to detect and penalise non-compliance
- If a whole sector uses a particular non-compliant business model, issuing penalties could result in the collapse of an entire sector and lead to widespread job losses.

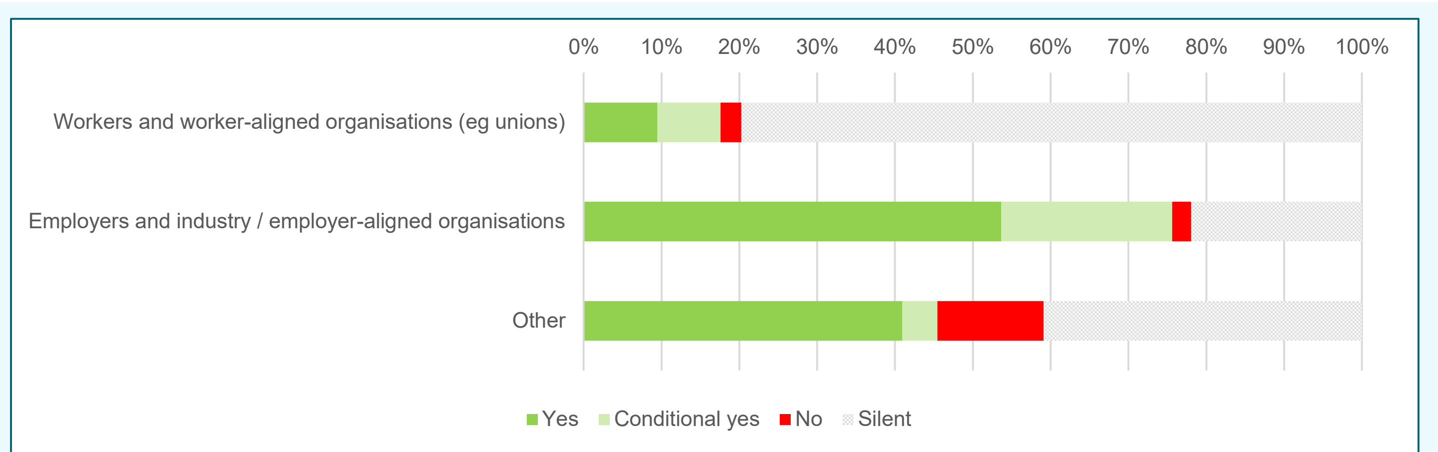
DRAFT

Better protections for contractors

Option 4: Introduce disclosure requirements for firms when hiring contractors

Snapshot: overview of option and level of support

This option would require firms to tell workers when they have been hired as a contractor, what their legal obligations are (eg paying their own tax) and where they can seek advice before accepting the contractual arrangement.



Summary of feedback

There was widespread support this option - particularly from employers and employer / industry aligned organisations – on the grounds that it would increase transparency and ensure contractors are properly informed about the realities of their contracts

"In [our] experience many problems that arise in dependent contractor arrangements arise out of the fact that what the expected net earnings (after costs) are is often very hard to identify. If the reality of what a contractor can actually expect and get 'in the hand' was revealed from the outset, then many issues contractors later face would be avoided."

"[We] considers that an obligation to disclose information and arrangements leads to increased visibility and accountability."

"Regulation to address the risks of bargaining power imbalance and unfair contract terms is best achieved by enhancing transparency and information in the bargaining and contracting process."

Some employers and employer / industry aligned organisation highlighted that they already fulfil this obligation to some extent…

"Disclosure already happens within the real estate profession. Section 51 of the REAA requires any written agreement between an agent and salesperson to expressly state the relationship between the agent and salesperson."

"[We] already check that new contractors understand what it means to be a contractor and run their own business, including their tax obligations. New contractors are also encouraged to seek their own advice."

Better protections for contractors

Option 4: Introduce disclosure requirements for firms when hiring contractors

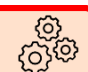
However, there was disagreement about the effect upfront disclosure should have on the workers' ability to challenge the terms of their contract or employment status

- Employers and employer / industry aligned organisations highlighted that greater disclosure at the start should have some "binding force" and prove the "intention" of the parties at the outset of the agreement to prevent future litigation.
- Workers, worker aligned organisations and legal experts opposed upfront disclosure being used as evidence of the "intention" of the parties on the grounds that many vulnerable workers may not still fully understand what they have signed up to. Workers may also fear that the job will be given to someone else if they challenge the firm's decision regarding status upfront.

A small number of organisations said that this option is unlikely to be effective at all and could even be "gamed" to avoid compliance

"We consider that in general disclosure statements are a failed regulatory tool, particularly in reaching vulnerable people who are most in need of protection. People are overwhelmed by privacy statements, terms and conditions, and other detailed documents - and tune them out. We are concerned that disclosure is overused because it is seen as being low cost and relatively easy to implement, but in fact it is often a symptom of the wider problem of under-regulation. People are overwhelmed with legal documents because our under-regulated marketplace provides so many opportunities for abuse. Disclosure simply does not do a good job of protecting vulnerable people from abuse and is not strong enough to be the foundation of any regulatory system."

Feedback on key design choices



Type of requirement

There was consensus that the requirement should be simple and easy to comply with.

- Eg a standard form template could be provided by Government to ensure consistency of information and cost-effectiveness (similar to the opt in/opt out requirements for Kiwisaver or the "Active Choice Form" for new employees).
- Requirement could be legislated or a voluntary code of practice could be issued along with best practice guidelines.
- A grace period could be built in to allow businesses time to comply with any changes.

Compliance could be monitored to help Government collate information about the number of workers who are engaged by the organisation, but are not employees

- When a new principal-contractor relationship is formed, the principal could be required to submit a form to MBIE or IR confirming that the disclosure (and any other) requirements have been complied with within a set time period (eg 30 days).
- These could be verified independently to ensure they meet requirements.
- Information about new contractors could be shared with unions to help them organise contractors the way they can with employees (eg workplace access).

Who it should apply to

Some submitters supported a 'restricted' version of the option:

- Applies to: sole traders or individuals on a contract term that is likely to be ongoing or in excess of a twelve-month term; those on standard form contracts; or those entering a new contract.
- Does not apply to: limited liability companies that employ multiple workers; sole traders engaged to perform a "one-off task" - e.g. paint a fence or repair machinery; or new contracts.

Other submitters supported a more 'extensive' version of the option:

- For example, where it applied to existing contracts and other parties involved in the hiring process (eg labour hire firms).

Implementation issues or risks:

- A key issue relates to who this applies to and where the line is drawn. If the requirement only applies to sole traders, but not companies, this may encourage firms to require vulnerable contractors to set themselves up as limited liability companies

Feedback on key design choices

What it should cover

Most submitters supported disclosure of basic information about the contractors' duties, rights and obligations in plain English. This includes:

- Employment status, why the work is better suited to a contracting arrangement and the differences between employees and contractors.
- A description of the work/services to be provided and/or a statement of the key performance indicators that the contractor has been engaged to achieve.
- Length of the contract and renewal terms, if applicable.
- Details on how the contractor will be remunerated (e.g. hourly rate or piece rate) and on what basis the price may be adjusted.
- Contractors' rights, including information about where they can go to for independent advice and how they can challenge their employment status.
- Contractors' obligations – eg tax, ACC, KiwiSaver, health and safety, code of conduct, warranties and/or indemnities.
- Details on how the contract can be terminated by either party.
- Any limitations on either party's liability under the contract.

Some argued that disclosure should include a transparent commitment on both sides to honour the contracting arrangement. Eg:

- An undertaking on the part of the principal firm not to impose specific hours of work or dictate specific working conditions.
- An acceptance on the part of the contractor that they are aware of their employment status and the associated rights and obligations.

Some argued that disclosure should be extended to provide information about the "true" risks and costs involved in running the contractors' business. Eg.

- Payment terms and how pay / commission is calculated and what money might be reasonably expected 'in the hand' on a weekly basis (or whatever the pay cycle is) when compared to a similar employee hourly wage.
- Disclosure of the true costs involved in operating the contractor business. These costs could be independently audited.
- Disclosure of the true risks involved and how this could change the contractors' monthly income.
- A true representation of the hours that are required to be worked to earn a certain level of income and an indication about how these can be changed

Implementation issues or risks:

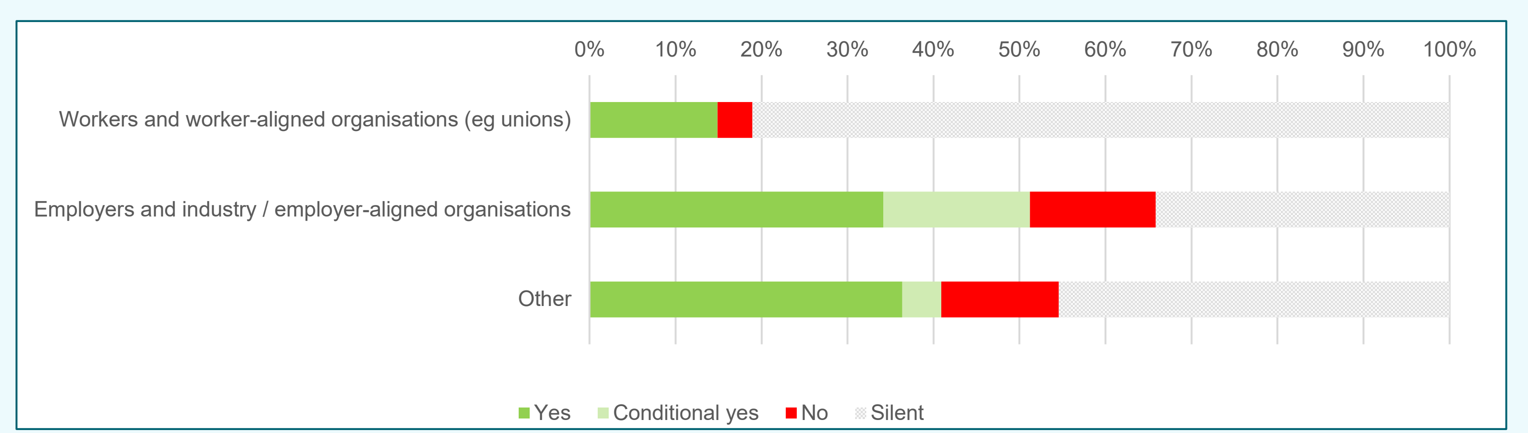
- A balance would need to be struck between a principal providing sufficient information to allow a contractor to make an informed decision, but without requiring disclosure of commercially sensitive information which could put the principal at risk of disadvantage in the market.
- Providing information on the "true" costs or risks may be difficult to comply with if the principal firms do not know themselves, especially if they have held an arms-length relationship with the contracted work for some time.

Better protections for contractors

Option 5: Reduce costs for workers seeking employment status determinations

Snapshot: overview of option and level of support

We have heard that cost is a barrier to workers challenging their employment status. This option would make it less costly for workers to take legal action – for example, by reducing or waiving application fees for the Employment Relations Authority.



Summary of feedback

There was widespread support for reducing costs and streamlining the process for workers seeking employment status determination

"[We] agree 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 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."

"We agree that reducing costs would make the process more approachable for workers, however this would need to be coupled with better access to information so that workers are confident that they have a case before they opt to challenge their status."

...but some argued that reducing application fees to the Employment Relations Authority would not significantly help workers access justice

"While this may benefit workers who are willing and able to seek employment status determinations, the incentive does not sufficiently address workers' worries about facing negative consequences for determining or challenging their employment status."

"The cost of filing fees in the ERA is already low. The main barrier to entry down the ERA route is the litigation cost or, absent the ability to hire a legal adviser, the lack of ability by individuals or small companies to fight these types of battles which can be complex and hard fought, particularly where there is a precedent value."

Instead, the focus should be on improving access to independent advice and advocacy and protecting workers from any retaliatory action (eg dismissal, intimidation, blacklisting)

"While work status is being determined, employers should not be permitted to dismiss workers or terminate their contracts. This is essential to ensure that fear of job loss does not preclude workers from challenging or seeking determination of their employment status."

Better protections for contractors

Option 5: Reduce costs for workers seeking employment status determinations

Feedback on barriers to justice and how they can be addressed

Barrier	How it can be addressed
Fear of losing their job, intimidation, bullying and harassment and other repercussions	• Protections from retaliatory action – ie workers should not be permitted to be dismissed or have their contracts terminated while work status is being determined.
Legal fees	• Significant investment in either legal aid or community law centres to improve access to advice and advocacy at no cost to the worker. • Remove the need to have lawyers represent the workers – ie consider employment advocates as the first port of call. • Create an intermediary authority (like the tenancy tribunal) where employees can test their employment status with their employer at a relatively low cost without generating a binding decision. Parties could represent themselves and the system could be based on more of an inquisitorial rather than adversarial system.
Fear of being publically named in an ERA determination, which could make it harder to find another job	• Anonymise party names in Authority determinations so parties are not discouraged from pursuing issues due to fear of publicity or 'blacklisting'.
Application fees associated with getting an employment status determination at the ERA or Court	• Low filing fees or adopting a general no costs regime. It would be practically difficult to change court fees as they are interlinked through the judicial system (including non-employment related disciplines).
Establishing, quantifying and documenting the evidence to be presented by the parties to the legal action	• Template court documents available online.

Views on implementation issues or risks

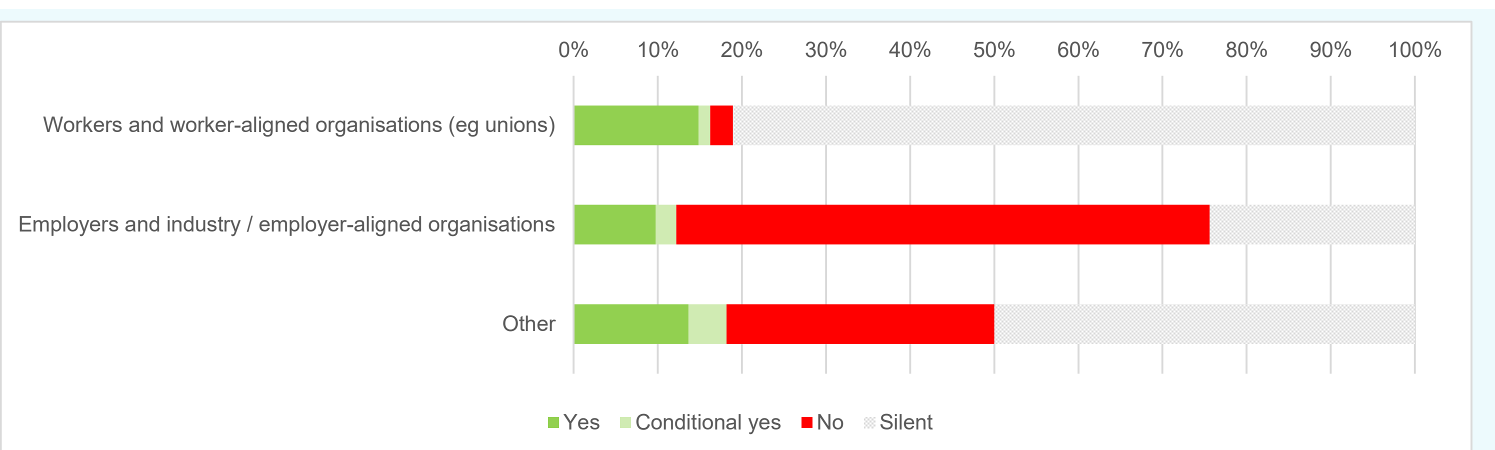
- Considering who bears the costs instead. Employers and employer bodies cautioned against offsetting the reduction of costs for contractors by an increase in costs to principals.
- Managing any resulting burden on the ERA and Court and minimising frivolous claims, which can increase litigation costs for all parties involved.

Better protections for contractors

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

Snapshot: overview of option and level of support

Generally, any worker who takes legal action that involves determining their employment status needs to prove that they are an employee. This option would reverse that burden, and make the firm have to prove that the worker they have engaged is not an employee.



Summary of feedback

Workers and worker-aligned organisations strongly supported placing the burden of proving a worker is a contractor on firms in employment status disputes

"[We] supports this option. This is for two reasons. The first is that there is a large power imbalance between firms and workers, with the firm having the power advantage. Secondly, the firm has all the information relating to worker status. This includes hours worked, employment agreements or contracts, pay rates, tax, ACC, work performed, induction and health and safety briefings, clothing and equipment and by whom it is provided, and information about holidays and sick leave…Workers simply do not have this information and it is a significant task on its own for a worker to attempt to obtain all the details needed to bring a claim about employment status."

"A vulnerable worker with little resources should not have to bear the burden of proof. If the Labour Inspectorate makes an initial determination that the worker has been misclassified, the business should bear the responsibility and costs of disputing that determination."

Employers and employer / industry aligned organisations strongly opposed on the grounds that it would result in excessive costs for firms and reverse the legal presumption of "innocent until proven guilty"

"This would be an excessive burden on employers and does not provide for dynamic companies to expand quickly through the use of contractors which may later be employed. The potential costs of court actions could be crippling to small companies in proving that the relationship is that of a true contractor."

"Legally speaking, a reverse onus of proof also reverses the legal presumption of innocence until guilt is proven…Putting the burden of proof on the employer when tied to increased penalties (Option 3) is likely to discourage use of contractors in favour of full-time employment. While this may be the objective of some, it would effectively restrict or remove the range of options available to business to respond to global trends in the use of labour. The efficiencies inherent in a flexible approach would be diminished or lost and the ensuing impacts on cost effectiveness would likely be very significant."

Better protections for contractors

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

Issues around workability and the risk of overreach were also raised

"From an operational perspective gathering reliable data from contractors can be problematic. Often these jobs are of a short duration so the job could be over before the information has been supplied. Waiting for such information would restrict the firm's ability to serve its customers and/or service any contractual arrangement that may have."

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

In light of this, some recommended that the burden of proof should lie with neither party. Instead, the ERA and Court should take an inquisitorial approach

"The concept of placing a burden on either party assumes an adversarial system where the court is an impartial referee. However, that is not the only option. In other places such as France and Italy, the courts can be inquisitorial. In an inquisitorial system the court is actively involved in investigating the facts of the case. This is particularly useful for the courts to be able to ask questions and find additional information that might not otherwise be presented. An inquisitorial system is similar to how the Disputes Tribunal works, and could provide a system where the obligation to prove their case is not a burden on either party."

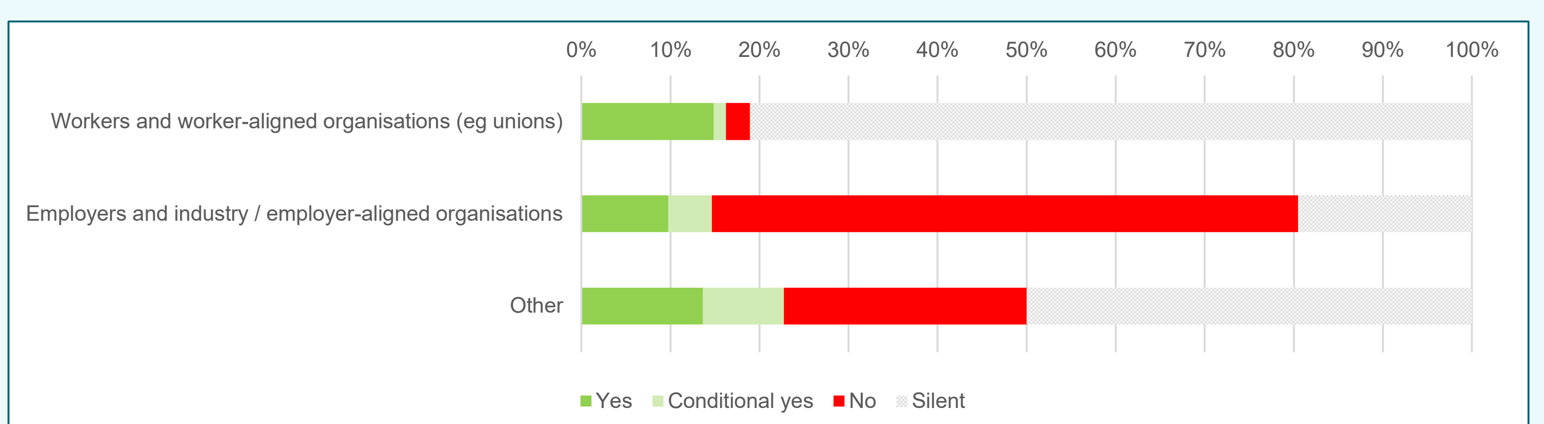
"It is important to note that there is, in reality, no onus of proof in applications to determine employment status. The Authority especially, but also the Court, investigate and consider all relevant factors and make decisions based on a weighing of these, without imposing an onus or proof on either 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."

Better protections for contractors

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

Snapshot: overview of option and level of support

Currently, when the Employment Relations Authority or Employment Court makes a decision about workers' employment status, that decision only applies to workers who are a party to that legal case. This option would broaden the applicability of these decisions to similar workers, even if they were not party to the legal action.



Summary of feedback

Workers and worker-aligned organisations were generally supportive of extending the application of employment status determinations to workers in fundamentally similar circumstances

"Determinations from the Employment Relations Authority and the Employment Court should extend to all similar workers in the same business and potentially the same industry. Option 1 would give the Labour Inspectorate the ability to target troublesome industries already, and this process would also interact with Option 8 to address employment status at the level of occupation."

"It will save time and money not to hear every case and make a determination based on each case. It follows the principle of judicial precedent."

Employers and employer / industry aligned organisations strongly opposed this option on the grounds that it would erode parties' freedom of contract and impose "one size fits all" arrangements across a diverse range of working relationships

"This approach assumes 'one size fits all', which is not the case. Contractual arrangements differ from each other – sometimes to an insignificant degree but often to a substantial degree…Each arrangement needs to be considered on its own facts. There is a real risk of uncertainty and increased costs for hiring businesses and across sectors and industries if this proposal is introduced."

"…if introduced an isolated case has the potential to affect contractual employment relationships throughout the economy, increasing compliance costs further not only to firms, but to Government also."

"Massively amplifying decisions of lower courts across the wider economy when further arguments and appeals are ongoing will increase uncertainty and disruption. Unreasonable risk would increase further if labour inspectors themselves are able to make these economy-wide declarations (option 2)."

Better protections for contractors

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

Legal experts, academics and think tanks were divided

A range of alternative ideas were put forward to limit the scope and reach of this option, while supporting the objective of making it easier for workers to access a determination of their status

Some were strongly in favour…

"Yes, there are thousands of "contractors" who are in fact employees. This situation will be rectified. Employers must bear the cost of redress… It would be nonsensical if one contractor is declared an employee, and then every other contractor in that company doing similar work has to take another, separate case to reverse their status."

…others strongly opposed and highlighted concerns around workability

"The degree of similarity will need to focus not just on occupational role/duties, but also on the manner in which the "employer" engages with the workers in terms of selection for work, allocation of work, mode of payment, whether the worker uses their own assets in the role, and all the other tests for contractor/employee differentiation. We see this as a very difficult drafting task."

Limit scope and reach

- Limit the applicability to people doing exactly the same job for the same company
- Limit who holds the power to extend determinations (eg Employment Court, but not the ERA).

"The conditions between the two parties would have to be the same, e.g. both automotive technicians, both doing the same job day to day, both on the same contract. To make this easier to apply, the application could extend to similar circumstances, and it could be up to the employer to defend any case that they do not see as being fundamentally similar. This opt-out potential rather than opt-in would streamline the process somewhat."

Streamline the process for workers

- Enable contractors from the same workplace, with similar circumstances, to cite previous cases to prevent having to litigate from "square one".
- Create a *presumption* of an employment relationship for similar workers within a firm, but not automatically extend to them.
- Allow a 'class' of workers on materially identical agreements to take action in the ERA or court to claim that they are employees, not contractors.

"This would enable workers to have sufficient confidence that the ERA would likely find them to be employees if they also desired to seek a determination of their status."

Views on implementation issues or risks

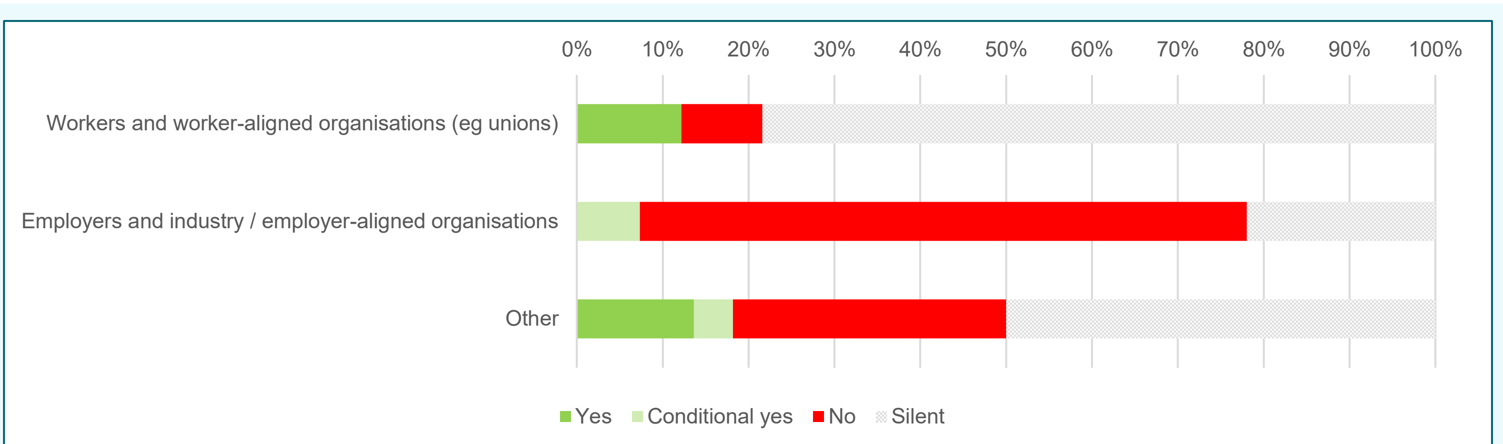
- Determining the reach of this option, i.e. how closely related others must be to a decided case's participants, to be bound by the decision affecting those participants.
- Could create uncertainty and disruption if decisions are in the process of being appealed in the ERA.
- Could have huge financial implications for companies and lead to bankruptcy (depending on how far back arrears can be calculated). This could lead to companies liquidating to avoid paying their employment obligations.

Better protections for contractors

Option 8: Define some occupations of workers as employees

Snapshot: overview of option and level of support

Whether a worker is an employee or a contractor normally depends on the real nature of the relationship between parties. However, there are some occupation-based exceptions to this. For example, homeworkers are specifically defined in the Employment Relations Act as employees. This option would involve legally defining certain occupations as employees. This means the law would require certain types of work to be done through an employment relationship.



Summary of feedback

Workers and worker-aligned organisations were mixed in their levels of support for defining some occupations of workers as employees

Some were strongly in favour of expanding the category of employee to cover vulnerable and dependent contractors

"There should be a presumption of employment. It must be made extremely rare and difficult to rebut that presumption, or problems of misclassification will persist, and workers will face pressure to consent to contractor status for fear of losing work and income."

Others argued that this option would reduce flexibility and make it difficult for workers to negotiate arrangements that work for them

"...this would result in an unwieldy and complex situation where neither the employee nor employer has sufficient flexibility to tailor circumstances to suit their specific needs."

"Reclassifying owner drivers generally as employees...would simply misrepresent the nature of their contracting arrangements, override their right to freedom of contract, and take away the benefits they enjoy as self-employed individuals or entities, for which they have bargained and are heavily invested in. Such an outcome would be unjust...RDCA Contractors' work arrangements are different to that of courier drivers'... RDCA Contractors do not depend on a single source of income, as courier drivers often do. RDCA Contractors are also able to negotiate their contract with NZ Post collectively, thus increasing their bargaining power...The distinction is of enormous consequence to workers like RDCA Contractors and their ability to enjoy the fruit of their bargain and investment as independent contractors. Option 8 thus raises line-drawing difficulties with regards to determining which groups of contractors should be classified as employees."

Better protections for contractors

Option 8: Define some occupations of workers as employees

Most employers and employer / industry aligned organisations strongly opposed this option on the grounds that it would override freedom of choice, result in unintended consequences and be unworkable in practice

"Requiring supply chain businesses to engage drivers as employees would lead to the consolidation of the supply chain industry. They would have to own the trucks too and that would only be achievable for the largest of the sector players and would raise barriers to entry to other businesses without the same access to capital resources."

"This option again completely overrides and ignores individuals who choose to be a contractor."

Legal experts, academics and think tanks were divided

Some supported this option in certain circumstances

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

...while others doubted whether this option could actually work in practice

"Process will be bureaucratic and slow. An opt-out option would be essential, but it could also be an avenue for abuse, where employers tell employees they are contractors and need to "tick here" to opt out."

"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."

Views on how it could work in practice

A range of ideas were put forward for deeming workers to be employees by the following:

Occupation	• Security guards, care and support workers, cleaners, construction workers, drivers and couriers, food preparation workers, and information technology technicians • Schedule 1A of the Employment Relations Act could be used to define the occupations.
Pay	• People earning below a certain threshold (eg the minimum wage).
Age	• Workers under the age of 18
Position	• Entry level positions – eg. apprentices and interns

Views on implementation issues or risks

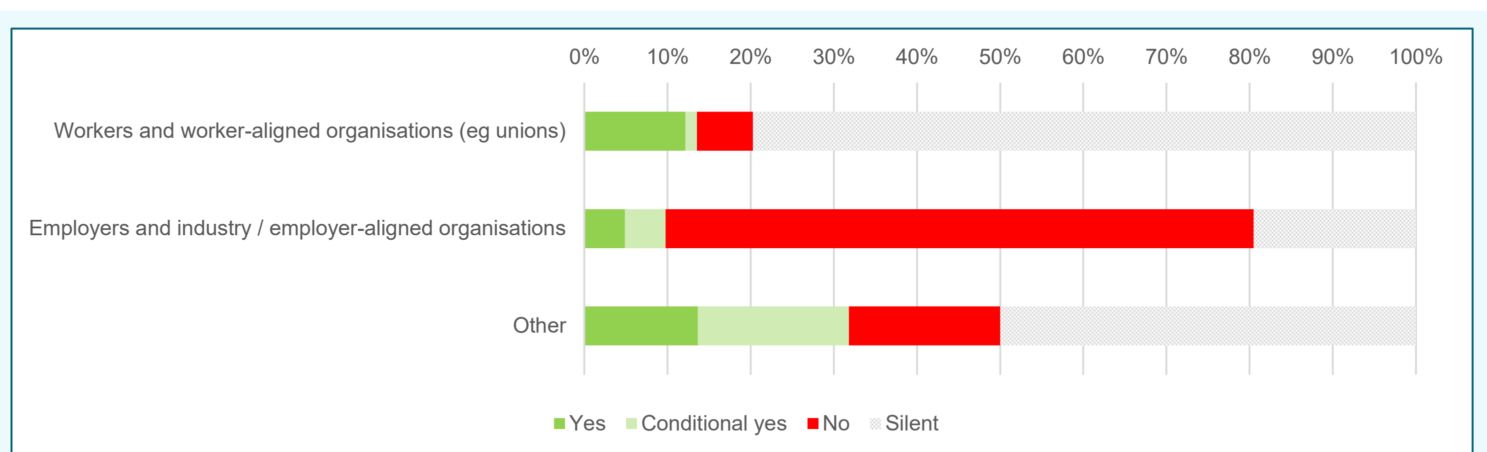
- Selecting occupations is likely to raise line-drawing difficulties given the diversity of arrangements that could exist within an occupation.
- Opt-out could be an avenue for abuse – eg firms pressuring workers to "opt out" of employee arrangements.

Better protections for contractors

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

Snapshot: overview of option and level of support

Generally, a worker's employment status depends on the real nature of the relationship they have with the firm that has hired them. Over time, the courts have developed a series of tests to guide them in determining a worker's employment status. This option would modify the existing tests, which are used by the Employment Relations Authority and the Employment Court to figure out whether a worker is an employee or a contractor.



Summary of feedback

Some submitters – mainly workers and worker-aligned organisations – were in favour of modifying the existing tests for determining employment status

However, the majority of submitters argued this option could undermine people's desire to work as contractor…

"…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."

"… in many instances that we have advocated, the dependent contractor is happy to be a contractor and indeed being an employee would create issues for them and their principal in terms of delivering the service."

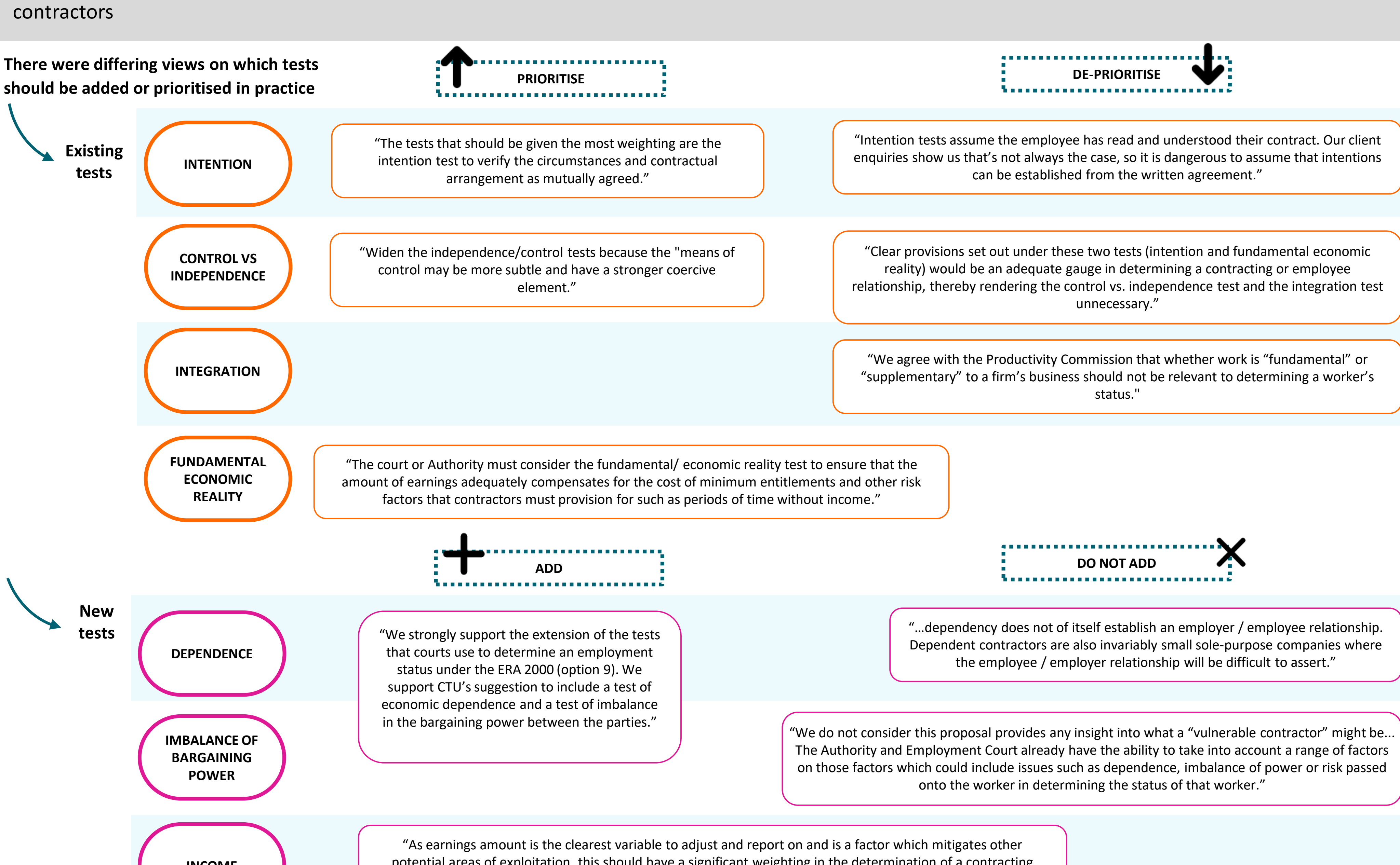
…and result in unnecessary uncertainty and complexity

"Changing the existing legal tests raises a significant risk of a long period of extended litigation and uncertainty while employment institutions settle on how those revised tests should be applied."

"MBIE's proposal is unnecessary and would only serve to muddy the waters further…Giving priority to some factors over others would detract from an often holistic approach which needs to be taken in these situations to assess the true nature of the relationship. No facts are the same in any one case, and all factors need to be considered in light of the situation in its entirety."

Better protections for contractors

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

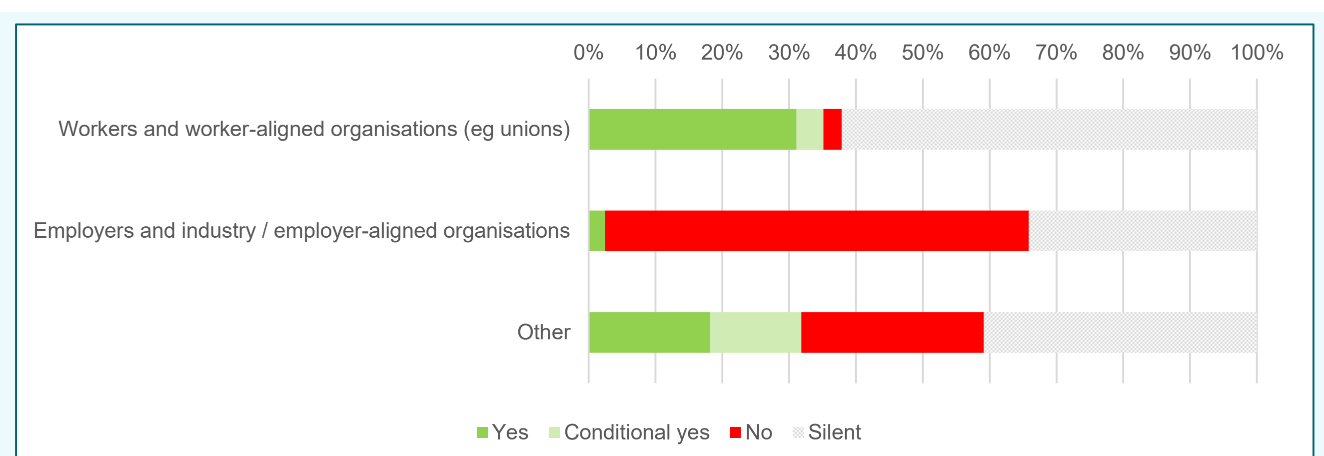


Better protections for contractors

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

Snapshot: overview of option and level of support

Currently, employees can bargain collectively about their terms and conditions of employment. Contractors cannot do so, because this would amount to anti-competitive behaviour prohibited by the Commerce Act. The Commerce Commission has a process through which it can authorise collective bargaining outside employment relationships, but applications for such authorisations are rare. This option would allow contractors to bargain collectively without needing a case-by-case authorisation from the Commerce Commission.



Summary of feedback

Most workers and worker-aligned organisations strongly supported extending the right to bargain collectively to some contractors to improve their bargaining power

"Any contractor who is funded by a **monopsony** should be afforded the right to collectively bargain in order to achieve a fairer balance in the negotiating process, as the concept of competition law is invalid under these circumstances."

"We support this initiative and see the solution as being the introduction of an implied duty to permit collective bargaining in situations where there are a group of low pay dependent contractors who are all on the same **standard-form contracts**."

Nearly half of the contractors who responded to the survey would like someone to negotiate on their behalf

"It would be helpful if the right to bargain collectively were introduced for **small contractors who do not employ their own workers**."

Submitters highlighted that there are different ways this could be achieved:

- ✓ Include contractors in Fair Pay Agreements
- ✓ Establish provisions in mainstream collective contracts permitting their application to some self-employed workers and labour hire workers
- ✓ Permit self-employed workers to engage in collective action that would otherwise be unlawful
- ✓ Develop industry or occupation specific collective bargaining regimes for self-employed workers (in addition to the FPA system for employees).

Some workers and worker-aligned organisations also expressed support for 'weaker' forms of collectivism

"We would like to see measures that reduce the fear that may result from overly broad non-disclosure, non-compete, or non-solicitation agreements. This is a concern in cases of contractors who feel they will suffer repercussions from discussing basic terms, conditions, and remuneration with other contractors who are 'competitors' for the same jobs."

Better protections for contractors

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

In contrast, most employers and employer / industry aligned organisations strongly opposed this option – arguing that it would undermine competition, innovation and freedom of contract

"Collective bargaining will reduce competition and take away a contractor's ability to individually negotiate a package that suits them."

"…it would be unlikely that contractors would want to take up the option to bargain collectively as this idea is counter to the idea of independence. For example, our contractors would not want the individual earnings and benefits that they've negotiated under their contract necessarily shared with others."

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

These submitters also highlighted that this option may be difficult to implement in practice

"Introducing the ability or even requirement to allow contractors to bargain collectively would, apart from anything else, involve developing new bargaining organisations and imposing on unwilling organisations terms and conditions they might be unable to meet."

Similarly, legal experts and others highlighted concerns around overreach and workability

"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."

"Main risk is around overreach. The approach of the Australian Competition and Consumer Commission to the possible introduction of a class exemption allowing collective bargaining for businesses with an aggregated annual turnover of less than a specified amount, would go some way to avoiding such overreach."

Views on implementation issues or risks

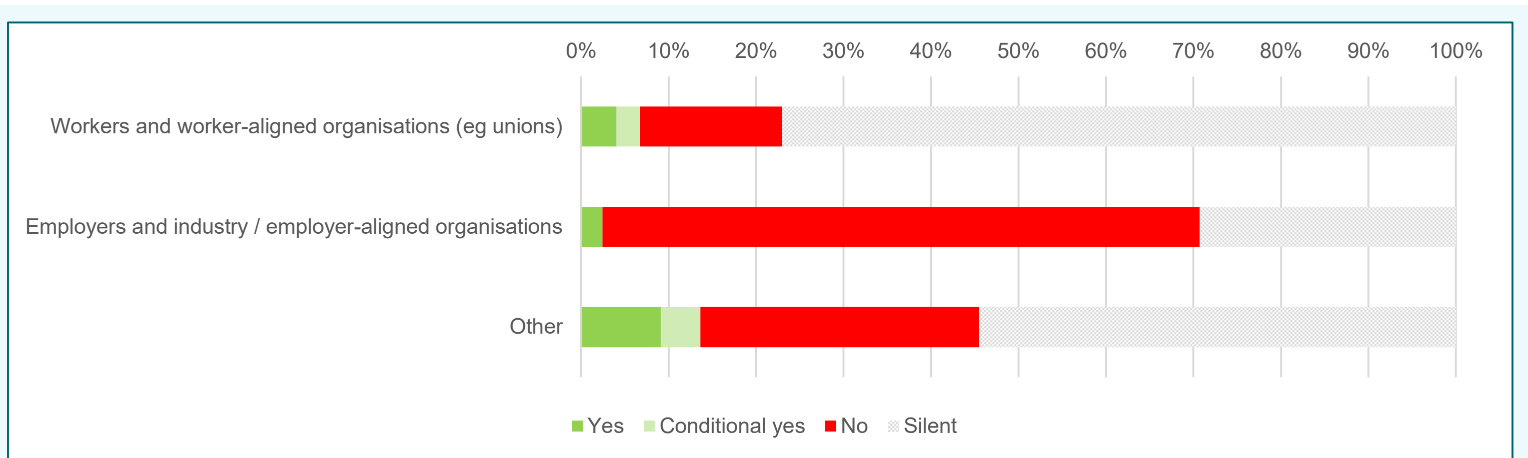
- Deciding which contractors should be included (eg contractors funded by a monopsony, small contractors who do not employ workers themselves, contractors on standard form contracts or sole trader contractors dependent on one firm for most of their work).
- Deciding who should be responsible for representing workers at the bargaining table (eg unions or other entities that reflect the interests and position of contractors).
- Identifying who exactly contractors would bargain with (eg with individual customers or an industry representative group) and whether any terms agreed bind all potential principals who might engage contractors from the group, even if principals had not engaged in the collective bargaining and were not members of the industry representative group.
- Setting the representation threshold – ie the number of people that are needed to trigger the initiation of bargaining.
- Determining whether a duty of good faith should apply and whether it should extend beyond the bargaining period.
- Risk that independent contractors will not self-organise sufficiently to engage in collective bargaining.

Better protections for contractors

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

Snapshot: overview of option and level of support

This option would create a new, third category of workers (eg 'dependent contractors') in between employees and contractors.



Summary of feedback

The vast majority of submitters opposed the creation of a third category of workers on the grounds that it would increase complexity and could easily be exploited to reduce rights and protections for contractors

"This option risks establishing a new class of workers with reduced rights and protections, thereby undermining existing workers' rights."

"This proposal risks the government achieving the opposite of what it intends. By creating a middle ground between contractors and employees, rather than lifting the rights of contractors, the government may actually see employees being shifted to this new category."

"[T]his would add to, rather than reduce, uncertainty and ambiguity."

"We observe that the difficulties which have occurred in Italy, a much larger economy than that of New Zealand, would likely be compounded with a smaller economy and less deep institutions."

However, a minority of organisations supported this option and argued that it could work well for particular groups of contractors

Midwives

Gig workers

Courier drivers

Contractors in the supply chain logistics industry

"This takes the middle ground, and addresses the issue of capital intensive industries which use contractors, such as the supply chain logistics industry."

Better protections for contractors

Other ideas raised during the consultation

CHANGE THE DEFINITION OF CONTRACTORS AND EMPLOYEES IN LEGISLATION

Tighten the definition of "employee" and "contractor"

- Provide clear examples or tests where an individual is unambiguously always an employee, examples where they are always a contractor, and examples of situations where more care must be taken to determine appropriate classification.

Expand the definition of employee

- Introduce a presumption of an employment relationship for all "grey zone" workers.
- Consider contractors who work for an employer for more than eight months as an employee.
- Establish minimum thresholds, eliminating those who do not meet the thresholds from the contractor sphere and placing them into the employee framework.
- Amend the Employment Relations Act to include a definition of "worker," similar to that in the UK *Employment Rights Act 1996* s230. All legal relationships that embody the characteristics associated with a contract of service are treated as if they are contracts of service and the worker is an employee.

PRACTICAL SUPPORT, TOOLS AND ADVICE

For employers

- Run mandatory workshops for employers setting out the differences between employees and contractors.
- Issue template contracts and clear guidance on inappropriate practices.
- Provide a checklist for firms to complete and work through with their contractor, ensuring that there is a clear understanding of the relationship.
- Permit firms to request a review of a work arrangement from MBIE to determine whether it would be best performed through an employment or contracting relationship.

For workers

- Provide an opinion on employment status at the start of the working relationship which can be used as evidence during any legal proceedings (could be provided by IRD or intermediaries such as the Citizens Advice Bureau).
- Improve access to free legal advice prior to signing an employment agreement or contract for services.
- Provide a "how-to" guide that details the process for contesting sham contractor arrangements. This should be available in different languages (including NZSL) and a variety of formats for workers with all levels of literacy.
- Create tools to help workers identify the appropriate employment relationship for them.
- Use existing 'touch-points' to encourage understanding of a worker's rights. For example, independent contractors would normally engage with ACC and Inland Revenue which provides opportunities for MBIE to convey information. Eg. if you are making your own ACC payments you could be provided information about how to determine if you're actually an employee.
- An educational website page for young people – co-designed with young people - about the differences between contractors and employees. This web-page should contain practical examples and guidance.

For both parties

- Create a flow chart/online tool/app (am I an employee or a contractor?) for both parties to step through independently. This could be similar to the IR flowchart that helps you determine your tax code. This could be mandatory to complete alongside accepting an employment agreement/contract and could then be relied on for tax and employment law purposes.
- Create a cross-government 'one-stop' shop for guidance on setting up a contracting relationship that includes things like tax, ACC etc. Must include information for both worker and employer.
- Ensure alignment of definitions and information between MBIE, Inland Revenue, Mediation Services, the Employment Relations Authority, Employment Court, Community Law Centres and the Labour Inspectorate.

Better protections for contractors

Other ideas raised during the consultation

RIGHTS, PROTECTIONS AND BENEFITS FOR CONTRACTORS

Pay

- Contractors to be paid a rate (at least double the minimum wage) that takes into account the need for contractors to pay their own tax and compensates for the lack of entitlements (eg holidays, KiwiSaver contributions). This would remove the financial incentive for employers to classify employees as contractors.
- A duty to ensure that the contractor is reimbursed for all of their reasonably incurred costs associated with the provision of the services.
- Annual contract reviews with remuneration reviews.

Collective agreements, collective bargaining and strike action

- Enable workers in labour hire relationships to be covered by collective agreements.
- Give contractors a right to strike.
- Extend "light" collectivism to contractors – eg ability to discuss pay and conditions, ability to collectively access advocacy and representation.

Good faith obligations

- Duty to treat the contractor fairly and act in good faith.
- A duty to consult and agree all material contract changes, particularly around payment terms.

Maintenance of law

- Duty to ensure contract terms or the manner in which contract terms are enforced does not place the contractor in a position where they are breaking or will be at risk of breaking the law

Reasonable notice of termination

- Duty to ensure reasonable notice is provided when a contractor's services are no longer required.

Access to training and job support

- Access to training and microcredentials for contractors.
- Assess whether MSD's job brokerage service can assist workers who are identified as vulnerable by the Labour Inspectorate.

Incentivise employers to give workers rights and protections

- Employers who treat their contractors fairly could receive a 'good employer' accreditation.
- Adopt the Productivity Commission's recommendation that firms could apply to MBIE to seek certification that workers in defined roles are contractors, provided the firm's business model meets specified criteria.

Protections for specific types of workers

Labour hire: workers brought in through labour hire arrangements to government roles should have the same conditions as employees on the relevant collective agreements.

Contract Milkers: amend the *Sharemilkers Agreement Act 1937* in order to provide for a minimum standard in Contract Milking agreements and introduce a 'Guaranteed Minimum Return' which would enable a minimum return for the Contract Milker in the event of an adverse season (due to weather or biological factors).

Apprentices: amend the official Code of Good Practice for Apprenticeships relating to apprenticeships in contract employment.

Better protections for contractors

Other ideas raised during the consultation

IMPROVE ACCESS TO JUSTICE AND DISPUTE RESOLUTION

Reporting pathways

- Introduce various methods for anonymous and accessible whistleblowing e.g. Employment NZ phone line, surveys, a phone app.
- Use compliant private industry leaders to encourage anonymous whistle-blowers to report bad players.

Fund community law centres, unions and other intermediaries

- Fund community law centres to increase their capacity to assist clients who are in sham contacting arrangements.
- Give at-risk communities the ability to speak with community leaders who can represent exploited workers.
- Provide resources for unions to perform the additional role of representing contractors as non-members.

Employment Relations Authority and Employment Court

- Increase resourcing and introduce a streamlined process for dealing with employment status.
- Extend mediation services to parties not in an employment relationship under section 144A of the ERA 2000.
- Enable parties to go straight to a hearing, rather than mediation.

Disputes Tribunal

- The Disputes Tribunal could hear complaints (this would necessitate jurisdictional adjustments as the Disputes Tribunal can generally only hear claims involving up to $30,000).

New Tribunals

- Create a "Contractors Tribunal" where contractors can air their grievance and resolve it at little cost.
- Establish a national safety tribunal for industries where safety is impacted due to competitive tendering. This tribunal could make orders relating to the minimum wage, resolve disputes, approve collective agreements, and conduct research into remuneration matters concerning safety in the specific industries. We would need to look at injury and fatality rates and the extent to which core work is contracted out to decide which industries to target.

INVEST IN BETTER TARGETING AND ENFORCEMENT

- Require employers to disclose workforce breakdown by employment status.
- Introduce a "traffic-light" triage system, based on income, so that enforcement efforts focus on arrangements which are most likely to be exploitative (eg contractors earning $30 or less per hour).
- Social media campaigns and roadshows targeted at workplaces within at-risk industries.
- Enforce or expose bad practices, and make it clear that employing contract manual labour should not be used to cut costs.

MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT
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New Zealand Government