Submission on *Better Protections for Contractors* discussion document

Submission To: Employment Standards Team
Labour and Immigration Policy
Ministry of Business, Innovation and Employment
Via email: contractorsconsultation@mbie.govt.nz

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FIRST Union welcomes the opportunity to submit on the Ministry of Business, Innovation and Employment public consultation document *Better Protections for Contractors* and recognises that urgent and comprehensive action is needed to address the exploitation of workers who are engaged as contractors.

1. Summary of recommendations

The union submits the same position as the New Zealand Council of Trade Unions (NZCTU) and further recommends that commercial contracting generally be regulated for the protection of workers.

1. The existing law must be fully enforced to prevent misclassification of workers and the Labour Inspectorate should be expanded to undertake this additional enforcement.
2. The category of employees should be broadened so that in future all 'misclassified' and virtually all 'grey zone' workers are employees.
3. The right to collectively bargain should be extended to contractors as a vital mechanism to protect themselves against exploitation. Unions should be responsible for such bargaining.
4. FIRST Union supports Options 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 but emphasises that the focus on reform should be on broadening the employee category to protect more workers.
5. FIRST Union opposes option 11 in the discussion document.
6. FIRST Union proposes further options to protect employees impacted by commercial contracting arrangements.

2. Context of industries and issues represented by FIRST Union

FIRST Union represents more than 30,000 workers in Aotearoa across the transport, logistics, manufacturing, retail, finance, commerce and other sectors. A significant number of workers in the sectors we cover are detrimentally affected by current contracting arrangements that reinforce power imbalance in business-worker relationships.

In this submission, we will discuss specifically the ways in which workers in the following industries and occupational groups are disadvantaged:

- Truck driving
- Courier driving
- Ride-share driving
- Forestry
- Sheep shearing
- Logistics
- Manufacturing
- Construction

There are two broad trends in how workers can be disadvantaged through contracting arrangements.

The first is where workers are classified (often incorrectly) as independent contractors and denied employment rights and protections as a result, making them particularly vulnerable to exploitation.

Workers engaged in FIRST Union's coverage of truck driving, courier driving, ride-share driving, and sheep shearing are often misclassified as individual contractors.

The second is where workers are employed by a single contractor but disadvantaged by the nature of the commercial contract between the contractor and the economic employer.

Commercial contracting arrangements, in some cases, negatively impact the health and safety and remuneration of workers, particularly those that are the product of a competitive tendering process. These impacts are most prevalent in high-risk industries such as forestry and transport.

Disadvantage is also created where the worker is employed by a third-party contractor, but the real employment relationship is between the economic employer and the worker, such as in triangular employment or labour-hire arrangements.

In this submission, we will discuss these two broad trends separately, but their interconnectedness must be acknowledged. The first is discussed in section 2 (below) and the second in section 4 (broader considerations).

3. Impacts of misclassifying workers as independent contractors

There are many negative impacts of misclassifying workers as independent contractors. They can be broadly summarised as:

- Workers who are misclassified as independent contractors often receive less than the minimum standards in employment law.
- They often become heavily indebted with liability due to the shifting of work-related expenses from the 'employer' to the worker.
- The practice undermines employment law and traditional forms of employment.
- Companies that do it have an unfair competitive advantage over those that correctly apply the law.

Owner-drivers

Truck (heavy traffic) and courier drivers are made up of both self-employed contractors (owner-drivers) and direct employees. Owner-drivers tend to own the vehicle, tools and any other equipment they use for their job.

The industries are dominated by several large commercial entities that engage thousands of drivers using the same contracting model.

The model is designed to pass on commercial risks of a business to drivers while retaining control over them and the delivery of services. Most transport businesses that contract drivers control the type of vehicle required to be purchased, sometimes where the vehicles are purchased from, the signage, the courier's uniform, the type of equipment required, whether the courier is to buy or lease the equipment, the price they get per item, who they pick up from and deliver to, and their day-to-day (or even hour-to-hour) activities. Drivers have no interface with customers other than physical delivery and no control over pricing and business methodology.

Drivers are locked into commercially oppressive contracts, arguably for productivity reasons, but the reality is that this equates to the intentional avoidance of meeting employment obligations, including union membership, collective bargaining rights, holiday pay and other minimum standards.

Ride-share drivers

App-based ride-share drivers are attracted to the work by its supposedly flexible hours. However, drivers often end up having to reorganise their personal lives around the work in order to make enough money.

Even then, the money is sub-standard. The (New Zealand) Rideshare Drivers Network conducted a survey of Uber drivers in July 2018 that found a majority of drivers (53%) undertook ride-share work on a full-time basis and most (76%) earned less than the minimum wage in the six months prior. Further to this, the survey showed that drivers' pay had decreased in the 18 months prior, as a result of the market becoming 'saturated' with drivers and Uber decreasing fares and therefore their pay.

As of August 2019, Uber had 6,500 drivers registered in New Zealand. The company has since entered six new cities, taking its number of operating cities in this country to 13.

Sheep shearers

Farm owners and managers generally contract out the shearing of sheep to contractors. These contractors then employ shearers and wool handlers to perform the work. These employees are generally engaged on a seasonal and casual basis, and many roles are remunerated at piece rates (per sheep).

In the last five years, investigations by the Labour Inspectorate found that many of these contractors had failed to pay holiday pay correctly and, as a result, the industry has made significant changes to improve its practices.

However, many of these contracting companies have recently begun misclassifying their workers as contractors in order to improve their margins and competitive edge. These workers are reliant on the contracting company for work and do not have the skills or know-how to run their own business.

This disadvantages workers and creates an unfair competitive advantage over the companies that are providing their workers the correct entitlements under employment law.

4. Recommendations on the 'options for change'

FIRST Union believes a package of the options outlined in the discussion document would significantly improve the working lives of contractors in New Zealand, including those referred to above. Closing current legal loopholes and creating a safety net are necessary to address the growing levels of worker vulnerability and exploitation through contracting models.

FIRST Union broadly supports O*ptions 1-10* in the discussion document.

> ***Option 1*** – **Increase proactive targeting by Labour Inspectors to detect non-compliance**
> FIRST Union supports that this option be implemented immediately as no legislative change is needed to put it in place. The efficacy of this option is contingent on appropriate resourcing of the Labour Inspectorate. This requires additional recruitment of Inspectors.

The work of monitoring new laws and detecting breaches relating to misclassification of contractors must not be done at the expense of other areas of work by Inspectors but must be a priority.

There should be clear reporting mechanisms for workers and unions with concerns around particular industries or businesses. Unions should be able to make complaints or raise concerns on behalf of workers due to the risk contractors face of losing current work or future opportunities.

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

FIRST Union supports this option with the condition that it is subject to a right of appeal. This would address the existing problem of vulnerable workers being required to shoulder the cost and time of applying to the Employment Relations Authority. Again, effective enforcement of this option would require that Labour Inspectors be sufficiently resourced and trained.

FIRST Union additionally submits that unions should be involved in procedures for determining employment status. Unions are already better equipped for canvassing and reporting the issues directly affecting vulnerable contractors than Labour Inspectors due to their direct engagement with workers on the ground. In current work contexts, unions are more skilled, resourced, knowledgeable and experienced in responding to and acting on workers' issues. Further, trade unions are recognised by the International Labour Organization as democratic, self-organising institutions of working people wishing to advance their rights as workers and citizens and this principle should be acknowledged in the results of the consultation. FIRST Union supports increasing resources of the Labour Inspectorate alongside better communication and working relationships with unions in identifying and enforcing employment status determinations.

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

FIRST Union supports this option as an essential mechanism for protecting vulnerable workers. There should be significant penalties for misrepresenting employment relationships as contracting arrangements. Employers make calculated, profit-driven decisions in misrepresenting employment relationships to evade the costs of employee entitlements such as sick leave and holiday pay, and to pay the lowest hourly rates possible. In some contracting arrangements, this can equate to below the minimum wage. In order to disincentivise the misrepresentation of employment relationships, is imperative that the financial and other consequences of not complying with labour law exceed the risks and costs associated with improperly and unlawfully engaging workers. As above, this requires oversight and enforcement for the penalty to be an effective deterrent. FIRST Union agrees with the suggestion in the discussion document that there should also be penalties for parties with significant control or influence over employers that misclassify employees and breach minimum standards.

The discussion document raises situations where the onus is on workers coming forward to challenge their employment status and misclassification. Given the power dynamic and financial dependency of workers, it cannot be expected that workers coming forward is an ineffective means to address the widespread issue of misclassification.

Option 4 – **Introduce disclosure requirements for firms when hiring workers**

FIRST Union supports requirements for disclosing contractor status in job advertisements on the condition that any advice given at the start of engagement cannot be taken into account if the worker challenges their employment status. Status should be determined based on the nature of the work and the working relationship.

This will be an important means to collect more relevant data on the prevalence of contractor work that is currently difficult to define or access. Additionally, it permits workers to make more clearly informed decisions about the nature of the work being offered.

Option 5 – **Reduce costs for workers seeking employment status determinations**

FIRST Union submits there should be no cost for workers seeking determination of employment status. Workers should be provided with free advice about their likely employment status. Processes for initiation should provide anonymity for workers to determine whether their case is worth pursuing.

It is also important there are requisite protections in place to guard against workers potentially losing their job if they seek a determination, particularly if they then lose the case. 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.

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

FIRST Union supports this option. Where a worker alleges that they have been misclassified as a contractor, the firm should be required to satisfy the Employment Relations Authority or the Employment Court that the worker is not an employee. If a business is unable to meet this onus, the worker should be classified as an employee.

Option 7 – **Extend the application of employment status determinations to similar workers**

FIRST Union supports this option. 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 above 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.

Option 8 – **Define some occupations of workers as employees**

FIRST Union supports this option. Section 6 of the Employment Relations Act 2000 currently designates homeworkers as employees. Additional categories of workers should be placed in section 6 and designated employees.

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

FIRST Union supports this option. In line with the NZCTU proposal, the reach of test of employment status in section 6 of the Employment Relations Act 2000 should be extended to codify the common law tests of fundamental/economic reality, control and integration. Two additional factors should be added: economic dependence and imbalance of bargaining power. These additional factors are non-exhaustive.

Option 10 – **Extend the right to bargain collectively to some contractors**

FIRST Union supports this option. A system should be established to facilitate truly independent contractors to bargain collectively. Unions should be responsible for this bargaining. This right would not replace the priority of eradicating and penalising misclassification of workers, as employees are already entitled to collective bargaining.

In its current form, all tendering processes include a wage component; this is tantamount to bargaining the wage rate. Similarly, the government has already recognised and committed to redress the negative impacts of 'race to the bottom' procurement policies and competitive tendering on workers and society. Meaningful protections for workers in industries subject to competitive tendering must include regulated minimum standards to ensure that pursuit of contracts and profits does not impact on minimum wage thresholds or the health and safety of workers.

The Government has signalled its intention for Fair Pay Agreements to cover contractors, not just employees, in a particular industry and that inevitably brings contractors into a collective bargaining framework. In some industries, that would be the most beneficial mechanism to address pay issues, and in other industries it may not be the most appropriate process. In any case, collective bargaining over and above an FPA would be maintained for employees, so should be extended to contractors where appropriate.

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

FIRST Union *strongly opposes* creating a new category of workers. This option risks establishing a new class of workers with reduced rights and protections, thereby undermining existing workers' rights. International experience, as outlined in the NZCTU submission section 17, demonstrates that this approach erodes essential workers' rights. This also risks incentivising employers to hire these workers with reduced protections, and therefore costs, in preference over permanent, legally defined employees with full workplace rights and entitlements. Rather than establishing a third category, the Government should act to ensure that almost all workers of uncertain status are in future recognised as employees.

5. Broader considerations: impacts on workers of unethical commercial contract arrangements

Within this category, FIRST Union has two primary concerns about the impact on employees due to the nature of being engaged by a single contractor performing work for an economic employer. The first is the increased impact on safety due to cost cutting to win competitive tenders. Mega-retailers and other major customers have the economic power to drive rates down, putting workers under tremendous pressure to cut corners when it comes to safety. This is most prevalent in industries such as forestry and transport, where competitive tendering can directly influence cost cutting in other areas such as wages and safety measures.

The second is where workers are engaged by a third-party to perform work that is directed by the economic employer but are not recognised as direct employees of the economic employer. These triangular employment, or 'labour-hire', arrangements are most prevalent in industries such as construction, manufacturing and logistics.

How commercial contract arrangements can compromise safety

In forestry

The structure of the forestry industry's operations in New Zealand creates widespread challenges to enforcing workers' rights and protections. These include significantly high levels of worker death and injury, lack of basic amenities such as toilets, working conditions below minimum standards, and no access or obstructed access to unions. Workers and their representatives have little or no ability to communicate with forest owners and others with economic decision-making power due to the industry's contracting structure, which takes the following form:

- Forest owners (often based overseas)
    - Forest management companies
        - Contractors (acting as team leaders or supervisors)
            - Forestry workers (often employees of contractors but sometimes independent contractors themselves)

It is also the experience of FIRST Union that the contractors responsible for employing the workers are reluctant to increase workers' pay and conditions, in some cases even where legally required, in fear of not being able to recover the cost from the economic employer.

In transport

Truck-related fatalities make up around 20% of the total road toll in New Zealand, despite truck driving only making up around 6% of the total distance travelled by vehicles on roads. Decades of evidence from judicial and coronial determinations, academic studies and government-commissioned inquiries show that systems of remuneration resulting in low pay encourage unsafe practices in the road transport industry; long hours, unpaid waiting times, low wages failing to attract enough drivers to service the demand for road transport and inexperienced drivers have all been identified as key issues leading to poor safety outcomes for HT drivers.

These issues have come about largely due to competitive tendering that requires companies bidding for work to cut costs in order to retain or attract business. Low rates paid to transport operators

translate to lower rates of pay for drivers. This results in unrealistic route times, long hours, and narrow delivery windows which together pressure drivers to speed, overload, forego vehicle maintenance, or drive fatigued.

In addition, low rates encourage the subcontracting of less profitable work, which can then again be subcontracted to ever smaller firms and owner-drivers at even lower rates. Mega-retailers, forest owners and other major clients should be accountable for their whole supply chain.

A possible option for change

FIRST Union believes a possible solution for industries where safety is impacted due to competitive tendering is the establishment of an independent national safety remuneration tribunal. The tribunal would ensure that businesses in the supply chains of classified industries are contracted in a way that protects the conditions that could have an impact on the safety of workers or the public. The tribunal could make orders relating to minimum wages and conditions for workers, resolve disputes between workers, their employers/engagers and businesses within the supply chain, approve collective agreements between workers and companies, and conduct research into remuneration matters concerning safety in the specific industries.

The intention would be to hold the economic employers at the top of the supply chain, who set rates and conditions, accountable for safety along the entire supply chain.

Unions or industry bodies could make applications to have a specific industry or supply chain added to the tribunal's remit. The criteria could be injury and fatality rates and the extent to which core work is contracted out.

How triangular employment and labour-hire arrangements disadvantage workers

Contracting arrangements are similarly used to avoid liability of employment and reduce workers' ability to enforce protections in employment law around job security. This is most prevalent in situations where core work is contracted out to a third-party employer (labour-hire company). The 'real' employment relationship is between the worker and the economic employer, however it is risky for a worker to seek reclassification to their correct employer because their employment can be terminated with little or no notice under the guise of the work being casual or dependent on the commercial contracting arrangement.

Changes to the Employment Relations Act 2000 last year, as a result of the Triangular Employment Bill, did not provide a practical remedy to this.

A possible option for change

FIRST Union supports the ability for employees whose work is directed by an economic employer to be able to elect employment with that employer, much the same as a worker on a fixed-term agreement can (see section 66 of the Employment Relations Act 2000). For example, where the term of employment is indefinite or undefined, or noncompliant with s66, the worker can elect to be a permanent employee of the economic employer.

In conclusion, FIRST Union reiterates that urgent and comprehensive action is needed to address the exploitation of workers who are engaged as contractors. Furthermore, workers should be better protected by the law from the negative impacts of commercial contracting arrangements.

FIRST Union wishes to expand on the above in an oral submission.
