

Submission

By



to the

Transport and Industrial Relations Select Committee

on the

Minimum Wage (Contractors Remuneration) Amendment Bill 2015

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MINIMUM WAGE (CONTRACTORS REMUNERATION) AMENDMENT BILL

INTRODUCTION

1. Business New Zealand opposes the Bill and welcomes the opportunity to make a submission on it. BusinessNZ wishes to appear before the select committee to talk to its submission.

RECOMMENDATIONS

2. **BusinessNZ recommends that the Bill not proceed in any form.**

GENERAL ISSUES

1. The Bill is impracticable, uneconomic and breaches basic legal principles. In particular:
 - a. The Bill will impact far more widely than just on the business community; it will in fact impact across much of the general community and require it to assume responsibilities that many will not be able to fulfil. It will impose administrative burdens on many who will find it difficult to meet the proposed legislative requirements, e.g. the long term ill and the elderly and their families.
 - b. The Bill does not take account of the nature and dynamics of contracting and commercial work generally, especially the three major approaches to payment for contracted services:
 - i. Hourly rates – time based (fees, wages etc)
 - ii. Piece rates – volume based (payment per item or unit produced or handled)
 - iii. Fixed price for completed work – outcome based (often referenced to quotes)
 - c. The Bill interferes with the principle of freedom to contract, which underpins all commerce and the economy in general. The Bill will render volume and outcome based approaches to remuneration liable to interference by virtue of an attempt to equate them to employment situations which are mainly time based. This is evident in proposed section 4B(b) which provides that matters to be taken into account in establishing the rate of remuneration include whether the principal and specified person have agreed on a reasonable timeframe within which the service is to be provided. This essentially converts the services specified in Schedule 2 of the Bill into the equivalent of hourly paid employment, notwithstanding the fact that many contractors wish to work under a contractor model on a contract for services.

- d. The Bill is inconsistent with the position that New Zealand has previously taken internationally, as it contravenes ILO Recommendation on the Employment Relationship 2006 (No 198). Article 4(a) of that Recommendation recognises the legitimacy of self-employment and Article 8 states that national policy should not interfere with true commercial and civil relationships. The New Zealand Labour Government voted for this recommendation in 2006.
 - e. Comprehensive enforcement of the Bill's provisions will be impossible to achieve without very significant increases in regulatory capacity. Enforcement therefore is likely to be based on grievances and complaints of non-compliance and therefore will mostly benefit only those (probably few) who take and win a case. In other words, the proposed law will be used by a minority seeking redress and ignored by the majority who will, by ignoring the law, in legal terms, effectively create a large, though artificial, black economy.
2. The costs to the Crown and to the community are likely to far outweigh the benefits.
 3. BusinessNZ is not aware of any country that has introduced a similar approach; its theoretical underpinning appears to be untested. While some countries (e.g. the US) have a federal minimum wage for contractors, this tends to relate to the wages that must be paid to employees of firms that win government contracts, as opposed to the remuneration obtainable by someone who is a primary party to a contract for services.
 4. Ultimately the Bill is a more of an attempt to address wage level concerns for a select group of occupations than it is to address concerns over the nature and value of contracting for services generally. It therefore represents a partisan and political solution to the concerns of those groups rather than being a balanced consideration of the wider economic issues that would be created by its introduction. For this reason alone it should not proceed.

SPECIFIC ISSUES

5. In addition to the general concerns expressed in paragraphs 1-4 above, there are also a number of more specific practical difficulties in applying the provisions of the Bill.

Interference in commercial contracts

6. The Bill will interfere in an otherwise valid commercial relationship if a contractor is legally forced to deliver piece rate paid items or fixed price output within a timeframe sufficient to equate the payment to at least the rate of remuneration specified as a result of the Bill. If this timeframe is less than the date originally contracted for, the

government has essentially entered the contractual relationship and altered it.

7. The consequences of forcing a time element into contracted outcomes are significant, including the possibility of encouraging unsafe practices by contractors in order to meet artificial deadlines. It is likely that outcomes will be gamed, e.g, there will be incentives to delay work with the expectation that more payment will be forthcoming for the extra time. Delays in contract performance or cost overruns arising from minimum wage claims would be inevitable. These in turn could lead to contract performance complaints, claims for compensation and the like, which normally leave neither party the winner.
8. Overall, the Bill appears to be trying to fix something that isn't broken. A key objective of the Bill is to put a stop to the notional principal who engages contractors rather than employees, to get around the current minimum pay legislation.
9. The member who introduced the Bill said in his closing 1st reading remarks;

“There are many countries that have a minimum rate of remuneration rather than a minimum wage. If you only have a minimum wage, people can get around it and can abuse the most vulnerable in society by not paying them fairly. That is all this bill tries to do.”

10. This creates the impression that the Bill is predicated on the notion that the current Minimum Wage Act does not prescribe a minimum rate of remuneration; instead it stipulates a minimum wage. This is simply untrue. The Court of Appeal has made it clear that the Minimum Wage Act provides for *rates* of remuneration (hourly, daily, weekly and fortnightly) which cannot be averaged¹.
11. Moreover, any breach of the current Minimum Wage Act, caused by improperly treating someone as a contractor rather than an employee, can already be challenged. Section 6 of the Employment Relations Act defines an employee. The Courts can and do make the distinction and, where a breach is found, make the principal liable for back pay, holiday pay, penalties for breaches around KiwiSaver obligations and tax payments plus interest and penalties. The issue of exploitation therefore is already quite adequately dealt with by the IRD and the judiciary and does not require the introduction of an unworkable minimum rate for true contractors. The Bill therefore is attempting to impose something that already exists, and in so doing is upsetting some of the most fundamental aspects of business.

¹ *Idea Services v Phillip Dickson CA 405/2010.*

Legal illogicality

12. The Bill is legally illogical since its specific provisions contradict the Bill's primary objective of ensuring contractors receive at least the specified minimum rate of remuneration.
13. This is because, in determining whether or not the Bill's requirements are complied with, proposed section 4B(b) requires that consideration be given to "*whether the principal and specified person have agreed on what is a reasonable amount of time for the specified person to provide the service*", i.e., time is the denominator into which any proposed remuneration is divided to obtain a rate of remuneration.
14. Thus, the Bill will require *negotiation* over the denominator, creating obvious opportunities for the end result to be "managed" to suit. As an attempt to curb exploitation this provision fails at the first hurdle as it requires the parties to the contract to either *guess* how long the work will take or, possibly worse, for the principal to *dictate* how long it will take. Opportunities for gaming are inevitable. So is the potential for conflict and litigation.

Difficulties and costs of policing

15. The resources required to audit the remunerative circumstances of all the specified persons covered by Schedule 2 are almost certainly beyond the current capacity of regulatory authorities. It therefore is more likely that enforcement will occur only when someone takes a complaint, making it possible that infringement of the Bill's provisions will go largely unchallenged.
16. All the occupations specified in proposed Schedule 2 will suffer negative consequences if the Bill is introduced. However, the potential consequences extend beyond the face value of the specified occupations in Schedule 2. These are far broader than they appear on face value. For instance, the construction and building services industry encompasses almost every trade, and many tradespeople also undertake or rely on work of a repair or maintenance nature for clients outside the narrow definitions of "building" and "construction".
17. Application of the Bill's provisions will therefore depend on the nature and purpose of work being done at the time, not just the fact that tradespeople are generic to the building and construction industry. One consequence of this will be the need to differentiate between the various aspects and purposes of work before determining whether or not the Bill's provisions apply; this is the stuff of bureaucratic nightmares, to say nothing of the potential for dispute and litigation. This same argument may be applied to almost all the categories of specified persons listed in Schedule 2.
18. Taxation will also become an issue; one that is not mentioned, let alone addressed, by the Bill. If a generic minimum rate of remuneration is created, irrespective of whether a person is an employee or a

contractor, the line between whether the employer/principal pays the employee's/contractor's PAYE becomes blurred because the Bill will blur the legal distinction between employee and contractor.

Multiple clients

19. Related to the points above is the fact that true contractors usually work for more than one client even within the same specified service. Typically, contractors earn an adequate income from several clients even though the income from any one client might not meet the threshold set by the Bill. Enforcing the proposed time-based approach will impact directly on every client, and likely increase the cost to all of them. Such impacts are likely to be most severe on small businesses, as they do not have the scale and resilience of larger organisations. The contractor may then inadvertently lose that business.

Contracting is a legitimate form of business

20. The Bill ignores the international reality that contracting is a legitimate business model; one in which many contractors have a significant personal investment in their businesses. These contractors in the main do not view themselves as society's "most vulnerable"; rather, they view themselves as business owners by choice. To categorise them all as requiring protection is patronising and unnecessary. Any proposal to do so also demonstrates a lack of understanding of the role played by contracting in the wider economy. This is illustrated by the examples in paragraph 15 below.

IMPACT OF THE BILL'S PROVISIONS ON SPECIFIED SERVICES

21. An illustrative example of negative consequences is provided for each of the specified services; doubtless there are many more.

a. Building and Construction Services

It is common practice in the building and construction industry for work to be quoted and paid for on a finished job basis. This enables jobs to be costed and budgeted for and avoids cost overruns based on variable factors including weather related delays. This is especially important for cash strapped homeowners who require financial certainty. The Bill's provisions, however, make time based labour costs a significant factor in a fixed price, with a high probability that the quoted final price will be negatively affected. The result could easily be a chilling of enthusiasm for new building or renovation at the very time the country is facing a need for more affordable housing.

b. Cleaning services

Domestic cleaning (even if it is provided by a major commercial company) would seem to be exempted from the Bill by virtue of clause 6, which defines the principal to a contract as a person

who engages a specified person (i.e. named in schedule 2) under a contract for service to provide a service, and the service is not for personal, domestic or household use or consumption. This is despite the fact that much domestic cleaning is done by commercial companies. Commercial cleaning is managed mainly on a per job or weekly “price” rather than on an hourly rate basis. Cleaning companies normally price work taking into account the average time taken and the materials and equipment required. The consequences of introducing a time-based approach to remunerating such work will vary but will include such diverse results as principals demanding a reduction in the amount paid where the time taken is less than estimated, or inflated quotes by cleaners who seek to protect their ability to pay the remuneration rate specified as a result of the Bill. The same situation is likely to arise in many of the country’s roughly 2,500 schools that use local people on contract to clean the school and where the contract is on a fixed price per term basis.

c. *Courier Services*

The courier industry is a segment of the broader transport industry and the two business models are fundamentally similar. In the main, independent courier contractors are engaged on the basis of “pickup, haul and deliver”. The courier segment itself has several sub-segments. The largest is the “network” courier segment, where items are picked up from A by one courier and delivered to B by another courier either locally or elsewhere in the country. In between these functions depots, trucks, planes and so forth are required to underpin the service. This segment typically remunerates couriers on piece rates. Another primary segment is the “point-to-point” segment, where an item is picked from A and delivered to B by the same courier. In this segment couriers are often remunerated by way of a pre-agreed revenue split between the contracting company and the courier or on a job-by-job basis.

Both these sub segments have existed from the outset of the modern courier industry in the 1960s without drivers being exploited.

Independent contractors in this industry make business decisions based on their equity investment in vehicles (leased or owned, new or second-hand), maintenance plans, operating costs including their and their employees’ labour and general overheads.

Investment and other business decisions are unique to each contractor and the type of contract. However, the generic time-based model proposed by the Bill would not recognise an independent contractor’s unique input costs, nor would it incentivise productivity. Instead, it is likely to disincentivise productivity, leading directly to higher costs and reduced service

levels. Related compliance costs would be difficult, time consuming and costly to administer. Inevitably these higher costs would be passed on to customers and consumers.

Market intervention such as this would be destructive to the courier industry, its customers and the many thousands of couriers who have invested in their own businesses and are currently working productively and positively in the industry.

d. *Food catering services*

Food catering services are commonly associated with functions or events, as well as providing permanent in-house services; workers engaged in these types of event are usually paid on a time basis. However there are other forms of catering service where workers are not paid on a time worked basis, and these will also be affected. One such is primary schools that contract local families to provide school lunches, usually on a cost recovery plus margin basis. Orders are variable from week to week; the time taken to prepare the lunches varies accordingly. The Bill therefore may substantially increase the costs to schools and parents of this valuable service and render it non-viable.

e. *Fast food delivery services*

Fast food delivery is mostly paid for via the delivery service charge added to the purchase price. The person doing the delivery typically is an employee whose duties include both delivery and mainstream preparation and service in the fast food premises. Delivery duties are commonly shared among employees on a rostered basis. The delivery service charge typically covers costs of the time, fuels and vehicle operation; it is not normally remuneration in the hands of the employee whose remuneration is based on an hourly rate. It is therefore likely that the Bill's provisions will simply increase the base remuneration costs to the fast food industry if the rate set is higher than the industry average. In this context, the Bill may be regarded as a back door attempt to push up basic rates in the industry. If so, the inclusion of fast food delivery services in the schedule to the Bill is inappropriate as the main effect of inclusion is to undermine the ability of fast food business owners to price their goods and services to meet the market.

f. *Newspaper or pamphlet delivery services*

"Non-addressed" mail distribution (e.g, catalogues, pamphlets and community newspapers) is a well-established, high volume, low margin industry.

In New Zealand the non-addressed mail distribution industry employs hundreds of full time employees and small business

contractors and over 10,000 delivery contractors. Contracted deliverers work part time. The part time nature of letterbox delivery, the flexibility provided in undertaking the work and how it is remunerated (piece rate) is an attraction for many of the people that choose to do this job.

Subscribers to a delivery service may face additional costs if the newspaper is forced to alter amount-based delivery contracts to take account of time based minimum hourly rate requirements. For instance, a payment of \$(x) for delivering (y) pamphlets by (z) date is an outcome based price for on time delivery of (y) pamphlets. The total payment can also readily be equated to a piece rate per pamphlet. But it can only be equated to the minimum wage if it is converted to a time-based *rate* of payment, i.e. if the time spent in delivering them is low enough to make the number of pamphlets delivered per hour equivalent to, or better than, the minimum wage. Yet this must be done before the Bill can achieve its purpose.

The ramifications reach much further than groups specified in the Bill; they directly impact upon associated businesses and their employees as well. For instance, there will be unintended consequences for:

- i. The financial viability of free community newspapers, charity pamphlets, community and local body notices.
 - ii. The advertising industry which designs and manages pamphlet and newspaper based advertising,
 - iii. The printing industry that depends on the volume created for all forms of advertising and communication through this channel,
 - iv. The freight and courier industry which delivers the many thousands of tonnes of freight around the country.
 - v. Rural delivery contractors who supplement their addressed letters delivery income (from New Zealand Post) with unaddressed letterbox deliveries and community newspapers.
- g. *Personal home care support to an individual in the individual's house*

At first glance it is difficult to ascertain why this category of work is included in the Bill as clause 6 excludes, from the definition of a "principal", work that is done under a contract for service where the service is for the principal's personal, domestic or household use or consumption. Inclusion of in-home support therefore appears to be more in the nature of an attempt to bolster the wages paid to in-home care workers. Were it to be decided that in-home care was not caught by the exclusion in paragraph 6, it would need to be noted that many of those requiring care (and who would be the principal in the contract for service), by definition, may be incapable of keeping the detailed records (e.g time sheets) required by clause 11 of the Bill.

Furthermore, in an instance where the requirement for care ceases because the person cared for dies, the 6-year record-keeping requirement will become a burden on the estate.

h. *Public entertainment services e.g. actors, musicians or singers*

Entertainers are most commonly remunerated on an event or “gig” basis (except buskers who rely on donations). As most entertainment events have a timeframe within which they are to be performed it is possible for payments to be calculated on a time basis. However time extensions such as encores may take the agreed time beyond that which would ensure the minimum wage rate for performers. Enforcing the Bill’s provisions arguably will create extra costs and compliance burdens for organisers, who probably will have presold tickets and therefore be unable to recover any overrun from customers. Consequently, event organisers are likely to factor in extra time to pricing of tickets, driving up the costs of attending an event.

i. *Manufacture of clothing, footwear or textiles*

In New Zealand the manufacture of footwear and textiles is sourced mainly from overseas or via relatively large scale domestic businesses. Workers in these sectors typically are remunerated on an hourly basis. The impact on them of the Bill would therefore seem to be a simple increase in wages if the average wages for work in the industry are below the threshold set by virtue of the Bill. On the other hand, workers engaged in cottage industries producing goods such as clothing are normally paid on a piece rate basis based on the market value of the goods produced. The Bill’s likely effect of increasing manufacturing costs of such items is likely to drive production offshore or create a black economy for them. While it is clear that the inclusion of this category is an attempt to avoid sweated labour situations, such as occur in some countries, it does not address work that is equally susceptible to such practices, e.g. handcrafts and knitted goods that are made and paid for on the same basis. Furthermore, it will be nearly impossible for this to be monitored, as cottage industry manufacturers are also the workers.

j. *Telemarketing and Market research services*

Telemarketers are paid in a variety of ways; commonly they are paid a basic hourly rate or retainer and required to meet call quotas. Sales made are typically recognised via commission or bonuses. The base hourly rate is often low, with the expectation that sales successes will boost total remuneration to reasonable levels. The Bill’s provisions are likely to force time-based base rates up, without any guarantees of a better rate of sales success. This will negatively impact the fundamental basis of such businesses.

Market research services on the other hand are already paid mainly on an hourly basis. The Bill's effects therefore are likely to be similar to those in fast food delivery services (above) and security services (below).

k. *Licensed security guards*

Workers in the security industry's roughly 1,400 businesses are largely paid on an hourly basis already. The effect of the Bill on such services is likely to be similar to that on fast food delivery, and market research services i.e. the Bill will increase base remuneration costs to the industry if the rate set is higher than the industry average. As with fast food delivery services, the Bill may be regarded here as a back door attempt to push up basic rates in the industry. If so, the inclusion of security services in the schedule to the Bill is inappropriate.

l. *Services in forestry related to planting pruning or felling*

Forestry services are predominantly contracted for on a volume or area basis, usually under time constraints in order to meet production or export demands from customers. Forestry is also a commodity producer, subject to tight margins and vulnerable to fluctuations in exchange rates. Requiring forestry services providers to adopt time-based rates of remuneration is likely to render many uneconomic. Another likely and potentially tragic consequence is that time pressures would increase in an industry already prone to workplace accidents that occur under production pressures.

l. *Truck driving services delivering goods*

The arguments presented in subparagraph (c) above, in relation to courier services, apply here too. The majority of commercial drivers in New Zealand are owner/drivers, including those who drive branded vehicles. Typically, they contract to deliver goods on a load by load basis and will negotiate an arrangement with the principal that ensures their capital and operating costs are covered, including a remunerative margin. However all aspects of such deals are dynamic. Costs of capital, fuel and maintenance vary, and therefore affect the remunerative margin. It is simply not possible for transport firms to control such variability as the factors are largely outside their control.

One effect of the Bill would be to require such firms to introduce uneconomic remunerative margins in order not to breach the Bill's minimum remuneration requirements. Another would be to force firms to take drivers on (inevitably fewer) as employees even though the associated economics is the very reason they currently choose not to do so. Either way, the Bill will materially affect the cost efficiency of the transport industry. The flow-on

effects to the general economy are likely to be of proportionate magnitude.

SUMMARY AND RECOMMENDATIONS

22. The Bill is attempting to solve concerns of low pay for a select group of service providers by imposing a new business model on whole industries and the economy in general. This is a fundamentally inappropriate response to the stated concerns. Where “contractors:” are inappropriately classified as such, the existing mechanisms of the Employment Relations Act are available to redress them. Generic issues of industry pay levels will not be solved by the means proposed.
23. The Bill is impracticable, economically damaging and legally illogical. In light of this, and the wider reasons canvassed above, **BusinessNZ recommends that the Bill not proceed in any form.**

A handwritten signature in blue ink, appearing to read 'Paul Mackay', with a long horizontal flourish extending to the right.

Paul Mackay
Manager Employment Relations Policy
Business New Zealand

BACKGROUND INFORMATION ON BUSINESS NEW ZEALAND

Business New Zealand is New Zealand's largest business advocacy organisation.

Through its membership, comprising its four founding member organisations (EMA Northern, EMA Central, Canterbury Employers' Chamber of Commerce and the Otago-Southland Employers' Association), over 70 affiliated trade and industry associations and more than 100 of New Zealand's largest corporates, Business NZ represents the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the entire New Zealand economy.

In addition to advocacy on behalf of enterprise, Business NZ contributes to Governmental and tripartite working parties and international bodies including the International Labour Organisation (ILO), the International Organisation of Employers (IOE) and the Business and Industry Advisory Council to the Organisation for Economic Cooperation and Development (OECD).