CHARTERED ACCOUNTANTS
AUSTRALIA + NEW ZEALAND

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Employment Standards Policy
Labour and Immigration Policy
Ministry of Business, Innovation & Employment
P O Box 1473
Wellington 6140

Submitted on-line at www.mbie.govt.nz/contractorsconsultation

Dear Sir or Madam

Submission on Better Protections for Contractors

Chartered Accountants Australia and New Zealand (CA ANZ) welcomes the opportunity to provide a submission to MBIE on the Discussion Document. Appendix A provides our detailed submission and Appendix B provides more information about CA ANZ.

Key Points:

- We accept that there are circumstances in which contractors are vulnerable to exploitation and subject to unacceptable working conditions and therefore applaud the Government's decision to engage in this consultation process.
- We encourage MBIE to gather robust evidence that will define and quantify the problems the Discussion Document seeks to address before decisions are made in relation to implementing any of the proposals.
- We believe the Government must strike an appropriate balance between addressing exploitative behaviour and protecting bona fide arrangements that have been entered into in good faith.
- In our view some of the proposals are too far-reaching and create significant risk of unintended consequences and collateral damage. Any initiatives that are introduced must be targeted at egregious behaviour and must not affect productivity and innovation in the business sector detrimentally.
- We are broadly supportive of the proposals that seek to deter misclassification of employees as contractors (options 1-3) and to make it easier for employees to access a determination of their employment status (options 4 – 5). We have reservations about option 6, which would move the burden of proof to firms, and do not support option 7, which would seek to extend the application of employment status determinations. We do not support options 8 and 9, which would seek to change who is an employee under New Zealand law nor options 10 and 11, which would enhance protections for contractors without making them employees. Broadly we are supportive of those options that focus on education and enforcement and opposed to those options that would change the current law and settings.

Should you have any questions about our submission or wish to discuss it, please contact Peter Vial or Karen McWilliams via email at peter.vial@charteredaccountantsanz.com or karen.mcwilliams@charteredaccountantsanz.com.

Yours sincerely

Peter Vial FCA
Group Executive
New Zealand & the Pacific

Karen McWilliams FCA
Business Reform Leader
Advocacy & Professional Standing

Appendix A

Better Protections for Contractors

Although the problems the Discussion Document seeks to address are not quantified by reference to robust, empirical evidence, we accept that some contractors in New Zealand are vulnerable and very likely to be missing out on basic employment rights. For this reason, we applaud the Government's decision to initiate public discussion of the issues, challenges and opportunities that arise in the complex but critical area of employee and contractor arrangements.

We encourage MBIE to make every effort to gather robust evidence that will define and quantify the problems the Discussion Document seeks to address before decisions are made to amend, discard or implement each of the eleven proposals. The misclassification of employees as contractors and the vulnerability of 'grey zone' workers' to poor working conditions may be 'hidden' problems by their very nature but policy changes to address them will only work if they are evidence-based.

We support the Government's commitment to ensuring contractors are treated fairly. However, in doing so, the Government will need to ensure it achieves an appropriate balance - between addressing exploitative behaviour, which only a small minority of the businesses that use contractors are likely to engage in, and not disrupting or disadvantaging contracting arrangements that the majority of businesses enter into in good faith and in compliance with the law. We believe some of the proposals are too far-reaching and create significant risk of unintended consequences and collateral damage to sound and compliant contractor arrangements. The challenge for the Government is to ensure that its initiatives in this area are targeted at the egregious behaviour of the few and do not affect businesses' productivity goals and appetite for innovation – and ultimately the country's economic growth.

Of the eleven options set out in the Discussion Document for strengthening rights and protections for vulnerable contactors we are broadly supportive of those that seek to deter misclassification of employees as contractors (options 1-3) and of some of those that seek to make it easier for employees to access a determination of their employment status (options 4 – 5). We have reservations about option 6, which would seek to move the burden of proof to firms and do not support option 7, which would seek to extend the application of employment status determinations to works in fundamentally similar circumstances. We do not support options 8 and 9, which would seek to change who is an employee under New Zealand law, and options 10 and 11, which would enhance protections for contractors without making them employees. Broadly we are supportive of those options that focus on education on, and enforcement of, the current law and policy settings and opposed to those options that would change the current law and settings in the absence of robust evidence that these are inadequate or flawed.

Options to defer misclassification of employees as contractors (options 1-3)

Option 1

The Labour Inspectorate is targeted with enforcing employment standards. This should include identifying non-compliance (where employees are misclassified as contractors) and taking robust enforcement action where necessary.

We acknowledge that misclassification can be difficult to detect but an adequately resourced Labour Inspectorate should be best placed to identify misclassification. We assume that the Inspectorate has evidence (anecdotal if not empirical) of the industries, sectors and locations where misclassification is prevalent or more likely to occur. We assume also that other Government agencies may have relevant information about non-compliance which could be shared with the Labour Inspectorate.

The existing powers of the Labour Inspectorate to gather and share information and challenge firms' behaviour should be strengthened to the extent necessary. That said, any extension of those powers needs to be mindful of the natural justice and privacy obligations to which regulators are subject.

The Government will need to ensure that the Labour Inspectorate is adequately resourced and its inspectors appropriately empowered and trained to undertake this additional enforcement work.

The Labour Inspectorate should take a risk-based approach to its compliance programme. We are pleased that the Discussion Document acknowledges that there may be cases of misclassification without exploitation – an indication that the (correctly) targeted behaviour involves a third dimension: an imbalance of bargaining power. We recommend that the focus be on misclassification where there is an element of, or high risk of, exploitation.

We recommend that the Labour Inspectorate is transparent about both its targeting and its enforcement activity. Transparency and publicity will assist in educating businesses and workers about the law, the Government's expectations and the risks and downsides of non-compliance. Information is a good deterrent.

The Discussion Document asks whether the Labour Inspectorate should be able to challenge how a firm has hired its workforce even if individual workers do not want to make a complaint themselves. We suspect such a scenario would be rare but we do not favour excluding the right of the Inspectorate to initiate such a challenge in appropriate circumstances (of exploitation or imbalance in bargaining power).

Option 2

The second option would give Labour inspectors the ability to determine whether a worker is an employer or contractor. We would support this proposal only if the worker and the business that had engaged the worker had a right of appeal to the Employment Relations Authority or the Employment Court in respect of the determination. Provided those bodies were able to dismiss frivolous or vexatious appeals and only had to consider appeals with some merit, we believe this option would still make it faster, cheaper and easier for many workers and businesses to obtain employment status decisions.

As the Discussion Document acknowledges, the introduction of such a mechanism would have to be premised on the availability of adequate resourcing and appropriate training for the Labour Inspectorate. If this proposal is implemented we would strongly recommend a post-implementation review after the approach has been in place for say two years.

Option 3

We are in favour of option 3, which proposes introducing penalties for misrepresenting an employment relationship as a contracting arrangement, provided the new penalty is only imposed where there is an intentional breach. The penalty should not be imposed where there is a genuine mistake, misunderstanding or confusion. In these latter cases the existing consequences for businesses (liability for unpaid wages and holiday pay) should suffice as sanctions.

For this option to be effective MBIE will need to ensure that the penalty is well publicised and that examples of the breaches are widely shared (on an anonymous basis where necessary to protect the privacy of affected individuals) so that the penalty has a deterrent effect – on top of the deterrent effect of the existing liability on businesses for unpaid employment entitlements.

Again we strongly recommend a robust post implementation review to identify and measure the effect of the additional penalty.

Options to make it easier for works to access employment status determinations (options 4 - 7)

As the Discussion Document notes, uncertainty and the cost and the time involved could be high barriers for workers considering taking action to determine their employment status. There is good sense in ensuring these barriers are reduced and employment status determinations are more accessible.

Of the four proposals in this group we are most in favour of options 4 and 5 – introducing disclosure requirements for firms when hiring workers and reducing costs for workers seeking employment status determinations. We have concerns about option 6 – moving the burden of proof that a worker is a

contractor to the hiring business. We are not in favour of option 7 – extending the application of employment status determinations to workers in fundamentally similar circumstances.

Option 4

The introduction of disclosure requirements for firms engaging contractors will impose compliance costs on those firms. Those costs should not be excessive, particularly if the Government /MBIE provides firms with standard form information which they can pass on to contractors. That standard form information needs to be clear, unequivocal and concise – confirming that the person is being engaged as a contractor and the obligations that result from that status. It should also confirm that employment rights and obligations do not arise under the arrangement and the implications thereof. The standard form document should also confirm that contractors are advised to seek independent advice and are able to challenge their status. It should list / provide links to other relevant resources.

The provision of standard form documentation will not only ease the compliance burden on firms but will also ensure that the information provided to contractors is consistent, relevant and updated when necessary. We encourage MBIE to develop the documentation in conjunction with the private sector (businesses and workers), to test it robustly with firms and contractors in different sectors, and to provide it in multiple languages.

If this proposal is implemented, we favour a comprehensive education and publicity programme designed to reach existing contractors as well as new contractors.

Option 5

In principle we support the proposal to remove one barrier to workers' ability to have their employment status determined by reducing the costs involved in seeking such a determination.

The application and hearing fees for employment status determinations from the Employments Relations Authority or the Employment Court are only a component of the total cost. In many cases we suspect that the application and ERA hearing fees will be much smaller than the fees charged by lawyers and other advisers.

This proposal needs to be considered in conjunction with the broader education and enforcement proposals in options 1 – 3. In isolation, given the other costs involved cannot be reduced by regulation, it may make little difference. As noted in the Discussion Document, the most vulnerable contractors may still not take legal action because of their lack of knowledge about legal avenues and their fear of repercussions. Accessibility will require additional education and support as well as a reduction in fees.

Option 6

We have concerns about option 6 whereby the onus of proving a worker is an employee would be reversed and the firm would be required to prove that the engaged worker is a contractor and not an employee.

We note that this has been tried briefly in Canada but unsuccessfully – with the 2017 amendment to impose the burden on the employer being reversed by the Making Ontario Open for Business Act 2018. The name of that Act speaks for itself. New Zealand too needs to be open for business and Ontario's experience offers a salutary lesson.

An alternative to reversing the burden of proof could be for the ERA and the Employment Court to take a more inquisitorial approach – with neither party bearing the burden of proof per se. This could reduce the hurdles faced by workers without imposing an additional burden and compliance costs on the employing businesses.

Option 7

We do not support option 7. 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. These differences can occur even as between contracts with the same hiring business and certainly occur when the hiring business is different but the sector or industry or type of work is the same. 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.

Furthermore, at common law court decisions have precedential value, of which industries and sectors take note in considering their own arrangements. In our view, there is no reason for, or evidence supporting the need for, the addition of a layer of complexity and regulation to long established practice.

Options to change who is an employee under New Zealand Law (options 8 and 9)

We do not support options 8 and 9 – defining some occupations of workers as employees and changing the tests used by courts to determine employment status to include vulnerable contractors.

As the Discussion Document acknowledges, these options would fundamentally shift the boundary between an employee and a contractor and change how employment status is determined. There is no evidence that the problems are of the magnitude to justify such fundamental and, in this context, radical shifts affecting a large number of existing arrangements. What is required are proposals that target exploitative behaviour rather than proposals that disrupt or delegitimise sound and compliant contractual arrangements between parties with effective bargaining power.

Both of these options would also have implications for the way arrangements are treated for tax purposes.

Option 8

Legally defining workers in certain occupations as employees assumes a 'one size fits all' approach, which we do not believe is appropriate. This is a fundamental shift which would erode parties' freedom to enter into contractual arrangements of their choice. It would also result in increased compliance costs and, as the Discussion Document acknowledges, could lead to job losses and other deleterious effects on the economy.

Rather than legally defining certain occupations as employment arrangements a much better approach would be to target education and enforcement at specific sectors of concern.

Option 9

The common law tests for determining employment status have evolved over a considerable period both in New Zealand and in other common law jurisdictions. We would not support any move by the Government to amend these tests. It is for the courts, as they consider the cases before them, to determine how the existing tests should evolve, taking into account changes in the law, commercial practice, and societal expectations.

We are not in favour of codifying the existing common law tests. The common law needs to be able to evolve organically as new decisions are made in this area. In the absence of robust, empirical evidence that the law is not working effectively, there is no justification for modifying, adding to, or codifying the existing tests.

Options to enhance protections for contractors without making them employees (options 10 and 11)

We do not support options 10 and 11 – extending the right to bargain collectively to some contractors and creating a new, third category of worker with some employment rights and protections.

Option 10

Although there are undoubtedly circumstances in which contractors are vulnerable and susceptible to poor working conditions, extending collective bargaining rights to contractors and imposing the outcomes on hiring firms seems to run counter to the very nature of a contractor relationship and the freedom to contract inherent in it.

One option worth considering is increased education and publicity to raise awareness of the existing process whereby the Commerce Commission can authorise collective bargaining outside employment relationships. We understand use of that process is currently very limited. Australia's Competition and Consumer Commission could be approached about sharing its experience including with its planned class exemption.

Option 11

We do not support the proposal to create a third category of worker. In our view this would add to, rather than reduce, uncertainty and ambiguity. As the Discussion Document acknowledges, this proposal could result in the creation of two 'grey zones' instead of one. We note the reference to Italy's experience in this area, which appears to have been unsuccessful in achieving its objectives. The OECD has also indicated this option is likely to be the most difficult to implement.

Appendix B

About Chartered Accountants Australia and New Zealand

Chartered Accountants Australia and New Zealand (CA ANZ) represents more than 125,000 financial professionals, supporting them to build value and make a difference to the businesses, organisations and communities in which they work and live. Around the world, Chartered Accountants are known for their integrity, financial skills, adaptability and the rigour of their professional education and training.

CA ANZ promotes the Chartered Accountant (CA) designation and high ethical standards, delivers world-class services and life-long education to members and advocates for the public good. We protect the reputation of the designation by ensuring members continue to comply with a code of ethics, backed by a robust discipline process. We also monitor Chartered Accountants who offer services directly to the public.

Our flagship CA Program, the pathway to becoming a Chartered Accountant, combines rigorous education with practical experience. Ongoing professional development helps members shape business decisions and remain relevant in a changing world.

We actively engage with governments, regulators and standard-setters on behalf of members and the profession to advocate in the public interest. Our thought leadership promotes prosperity in Australia and New Zealand.

Our support of the profession extends to affiliations with international accounting organisations. We are a member of the International Federation of Accountants and are connected globally through Chartered Accountants Worldwide and the Global Accounting Alliance. Chartered Accountants Worldwide brings together members of 13 chartered accounting institutes to create a community of more than 1.8 million Chartered Accountants and students in more than 190 countries. CA ANZ is a founding member of the Global Accounting Alliance which is made up of 10 leading accounting bodies that together promote quality services, share information and collaborate on important international issues.

We also have a strategic alliance with the Association of Chartered Certified Accountants. The alliance represents more than 870,000 current and next generation accounting professionals across 179 countries and is one of the largest accounting alliances in the world providing the full range of accounting qualifications.

Australia: 1300 137 322
New Zealand: 0800 4 69422
service@charteredaccountantsanz.com

Outside of Australia: +61 2 9290 5660
Outside of New Zealand: +64 4 474 7840
charteredaccountantsanz.com