



**Minimum Wage  
(Contractors  
Remuneration)  
Amendment Bill**

**Submission to the Transport  
and Industrial Relations  
Committee**

September 2015



**For a better working life**

New Zealand Public Service Association

Te Pūkenga Here Tikanga Mahi

# Minimum Wage (Contractors Remuneration) Amendment Bill

## Submission to the Transport and Industrial Relations Committee

### Introduction

#### *Who we are*

The New Zealand Public Service Association *Te Pūkenga Here Tikanga Mahi* (the PSA) is the largest trade union in New Zealand with around 62,000 members. We are a democratic organisation representing members in the public service, and the wider state sector (the district health boards, crown research institutes and other crown entities, state owned enterprises, local government, tertiary education institutions and non-governmental organisations working in the health, social services and community sectors).

#### *We support the intent of this bill*

The PSA welcomes this opportunity to submit on the Minimum Wage (Contractors Remuneration) Amendment Bill. As a union we are concerned about the exploitation of workers, no matter who they are employed by and we support the intent of this bill, which sets out to improve the lot of those who are engaged as contractors but are paid at less than the minimum wage.

The PSA is an affiliate of the New Zealand Council of Trade Unions (CTU) and endorses the submission of the CTU on this bill.

### General submissions

#### *Growth in insecure work*

#### **Low pay an aspect of insecure work**

For the past 30 years there has been a steady growth in non-standard work arrangements, including temporary, casual and labour hire workers and a substantial increase in the use of independent and dependent contracting. Growing insecurity is also a feature of our membership. For example the number of fixed term employees has been growing in the public service (from 7.1% in 2009 to 8.4% in 2014), home support work is largely assignment based and contracting out of services is a constant threat.

#### *Low pay is part of the wider issue of insecure work*

The bill does not attempt to address the range of challenges that workers in insecure work face – it sets out to address the particular problem of ensuring that workers engaged as independent contractors in particular industries get paid no less than the minimum wage for their work. However it is important to remember that the problem the bill is wanting to address is part of the wider issue of insecurity, which is characterised by:

- “Uncertainty over how long the job lasts if the job can be terminated with little or no notice, or there is no contract for on-going work, or there is a high risk of job loss
- Limited worker control or voice over hours of work, tasks, safe work practices, and work arrangements
- Low pay and/or fluctuating pay
- No or limited access to benefits such as sick leave and domestic leave
- No or limited opportunities to gain skills
- Lack of rights, such as protection against discrimination and unfair dismissal, and a lack of union representation”<sup>1</sup>.

All of these factors apply to the workers whose needs are the focus of this bill, but it is only the most exploitative levels of pay that it will address.

*Evidence of low pay for contractors*

**Low rates of pay**

There is considerable anecdotal evidence that the rates being paid to workers engaged as contractors are low. Darien Fenton gave several examples in a 2011 article in the New Zealand Journal of Industrial Relations<sup>2</sup>, including owner-operator truck drivers, courier drivers and Telecom’s (now Spark) lines engineers in Auckland and Northland.

In addition Statistics New Zealand keeps some statistics on remuneration of self-employed through the Linked Employer-Employee Data (LEED). We note that the CTU submission draws on this data to demonstrate that from 2009 onwards the median earnings of ‘own-account’ workers were slightly less than those of a full-time employee on the minimum wage and between two-thirds and three-quarters of the median primary income of salary and wage earners. This suggests a problem with low remuneration for contracted workers.

*There is contracting within our coverage but we don’t know about levels of remuneration*

**Issues within the coverage of the PSA**

Approximately 5% of the PSA’s membership are paid on or just above the minimum wage. Most of these are home support workers who go into the homes of vulnerable elderly and disabled people to provide personal care, and some domestic duties. The work is complex and highly responsible but the wages are low and many of the workers do not have regular hours or job security.

While our members in this sector are employees, we do know that within the home support sector that the use of contracting arrangements is a problem. We are aware of at least one provider that engages 50% of its home support staff as

<sup>1</sup> New Zealand Council of Trade Unions *Under Pressure: A Detailed Report into Insecure Work in New Zealand* <http://union.org.nz/sites/union.org.nz/files/CTU-Under-Pressure-Detailed-Report-2.pdf> p.3

<sup>2</sup> Fenton, D. *Insights into contracting and the effect on workers*, New Zealand Journal of Industrial Relations 36(3): 44-58

contractors and the other 50% as employees, but we are unaware of the rates that are being paid to those workers. Similarly we are aware that some people with disabilities who engage their support workers directly under the individualised funding programme are using contracting arrangements rather than directly employing them in order (they hope) to avoid the obligations that come with an employment relationship. Once again we do not know the rates that are being paid.

*ILO recommends combating disguised employment arrangements*

### **Disguising the employment relationship**

While low pay is the issue being addressed, it wouldn't be the same issue if the relationship between principal and agent was an employment relationship rather than a contractual one. This would also help address the range of issues arising from insecure work as identified by the CTU in *Under Pressure*.

The ILO in R198 article 4 states that national policy should at least include measures to combat the issue of disguised employment arrangements and article 17 remove arrangements that act as an incentive to disguise the relationship.

We therefore support the recommendation of the CTU that the committee consider the expansion of the definition of 'employee' beyond minimum remuneration protections alone.

## **The provisions of the bill**

We think this bill is an important step in addressing one of the problems arising from insecure work but we have some comments on particular provisions.

*We recommend that 'specified person' be changed*

### **Specified person**

'Specified person' is not a term that would be understood by people engaged in the contracting process. We support the recommendation of the CTU that 'specified person' be changed to one of:

- Agent or personal agent
- Contractor or personal contractor

*The bill does not address contractors' reasonable costs*

### **Establishing actual rate of remuneration**

We see some value in addressing the actual rate of remuneration paid, given the imbalance in bargaining power between the principal and the agent. One of the problems with the bill is that it would only ensure that the minimum wage would apply. What it doesn't do is ensure that compensation is offered for the extra costs that a worker engaged as a contractor might incur, for example the courier company case study set out in Darien Fenton's article, where courier drivers have to provide their own vehicle and pay for its branding with the company. We are not aware whether any of the workers engaged as individual contractors in home

support are in the same situation but would not be surprised given that most home support workers engaged as employees are required to use their own vehicles without adequate compensation.

*We recommend different criteria for 4B*

A provision such as is intended by the proposed section 4B raises the possibility that this problem might be addressed but what is actually proposed offers little that would make a difference. We recommend either that 4B be deleted from the bill or it contain reference to factors such as the market rate payable as if the contractor was an employee and the legitimate costs of the contractor e.g. ACC, use of vehicle.

#### **Agreed reasonable time to provide services**

We note and support the points raised by the CTU with regard to proposed section 11AC which provides that additional remuneration cannot be recovered when the principal and contractor have agreed on a reasonable amount of time and the actual time exceeds the reasonable amount agreed. The provision is not clear as to what is meant by reasonable – a hypothetical person with a reasonable degree of skill and ability or the characteristics of the particular contractor (who may be slower). There are also questions about the impact of events beyond the contractor’s control.

*We recommend a new subsection 11AC(3)*

The PSA therefore supports the recommendation of the CTU for a new subsection 11 AC(3) which addresses these points.

#### **Services listed in Schedule 2**

Of the services listed in schedule 2 we only have members working as ‘personal home-care support to an individual in the individual’s house’, although it is possible that some others, such as licensed security guards or workers providing ‘food catering services’ could be engaged by providers who in turn contract to provide services to public sector organisations. The challenge of this list is whether it is comprehensive and whether it might create an incentive for avoidance and debates about demarcation. It would be preferable if the provisions in the bill extended to all workers regardless of their service or industry and we support the recommendation of the CTU to that effect.

*We recommend the bill applies to all services*

#### **Authority to represent**

Neither the contractor nor the principal under this bill will have the right to representation provided for in the statute. This is particularly important in the case of the contractor and we support the recommendation of the CTU that either s.236 of the Employment Relations Act 2000 be amended or a new section be added to the Minimum Wage Act 1982 to permit contractors and principals to authorise others (such as union officials or lawyers) to take action on their behalf.

*We support the right to representation*

**For further information about this submission contact**

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