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International Labour Policy  
Labour and Immigration Policy  
Ministry of Business, Innovation & Employment  
Wellington 6140

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## Submission on addressing temporary migrant worker exploitation

The Institute of Directors (IoD) appreciates the opportunity to comment on the Ministry of Business, Innovation & Employment's (MBIE) [consultation document](#) on addressing temporary migrant worker exploitation.

The consultation document forms part of the Temporary Migrant Exploitation Review being carried out by MBIE. We support the goal of the review aimed at reducing the exploitation of temporary migrant workers and the following objectives:

- **Prevent** the occurrence of workplace (and other) conditions that might enable temporary migrant worker exploitation
- **Protect** temporary migrant workers in New Zealand and enable them to leave exploitative employment
- **Enforce** immigration and employment law to deter employer non-compliance through a fit-for-purpose offence and penalty regime.

The review is important in terms of protecting human rights, but also in ensuring that there is an even playing field in business and labour markets.

Our submission focuses on options raised in the consultation document under the "prevent" objective. Notwithstanding our comments here, the IoD may make further comments as the review progresses.

### About the Institute of Directors

The IoD is New Zealand's pre-eminent organisation for directors and is at the heart of the governance community. We believe in the power of governance to create a strong, fair and sustainable future powered by best practice governance.

Our role is to drive excellence and high standards in governance. We support and equip our members who lead a range of organisations from listed companies, large private organisations, state and public sector entities, small and medium enterprises, not-for-profit organisations and charities.

Our Chartered Membership pathway aims to raise the bar for director professionalism in New Zealand, including through continuing professional development to support good governance.

### Options to prevent exploitation

Temporary migrant workers are particularly vulnerable to exploitation in workplaces.

The consultation document states that exploitation is generally understood to mean the breach of minimum employment standards for workers in employment law under the Holidays Act 2003, the Minimum Wage Act 1983 and the Wages Protection Act 1983. Section 351 of the Immigration Act

2009 also defines exploitation of a temporary worker as serious breaches of those Acts and also where an employer seeks to coerce and control a migrant.

MBIE is considering reforms in relation to the law as it applies to subcontracting, franchising, and labour hire business models. In the consultation document, it puts forward the following four options as part of the “prevent” objective of the review:

1. Making people with significant control or influence over an employer legally responsible when that employer breaks the law
2. Requiring certain subcontractors and franchisees to meet additional criteria under the Employer-Assisted visa gateway system
3. Creating a labour hire licensing system
4. Banning people who have been convicted of exploitation offences under the Immigration Act 2009 from directing or managing a company (under the Companies Act 1993).

### **Option one**

There are accessory liability provisions under the Employment Relations Act 2000 that enable persons “involved in a breach” of certain minimum employment standards to be held liable for the breach, in addition to the relevant employer. These provisions have mainly been used in relation to company directors.

However, the liability provisions do not capture circumstances where a party (eg external organisation) pressures the employer more broadly to adopt practices reliant on, or otherwise resulting in exploitation.

Accordingly, under option 1, MBIE is considering broadening the range of parties who are captured by the liability provisions to include persons that have a significant level of control or influence over an employer that breaches employment standards. This approach is modelled on Australian law that passed in 2017 for franchisors and holding companies. Australia’s 2019 Migrant Workers’ Taskforce has also recommended extending these requirements to include all situations where businesses contract out services to persons and this has been accepted in principle by the Australian Government.

MBIE suggests that there will be several tests to determining liability, including for example:

- Did the person have significant control or influence over the employer’s affairs?
- Did the person or a company officer know that the breach of employment standards would occur, or could reasonably have been expected to have known?
- Did the person take reasonable steps to prevent a breach of employment standards occurring?

### **Option four**

Under the Companies Act 1993, people can be automatically banned from directing or managing companies for 5 years if they commit certain offences (eg certain dishonesty offences). MBIE is considering extending the list to include people who have been convicted of exploitation offences under the Immigration Act 2009.

### ***IoD comments***

#### ***Option one***

To reduce exploitation, New Zealand needs fit-for-purpose employment laws including offences and penalties.

The first option in the consultation document would be a significant change extending responsibilities and could apply to many New Zealand entities. We agree with the commentary in the consultation document that there would be considerable compliance costs for some entities

with significant control or influence over other entities. As part of the review, we encourage MBIE to undertake further analysis to ascertain the extent of the problem in each business model (as far as possible in New Zealand) and learn from the experience in Australia since the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 was introduced.

It may ultimately be necessary to implement the first option in some limited cases. However, the threshold of control and influence should be high and there needs to be reasonable and proportionate defences.

We note that there is a trend of laws and regulations extending directors' personal responsibilities and liability. For example, see the recent proposed due diligence duty on directors and officers under the Credit Contracts Legislation Amendment Bill. Directors are increasingly wary about the broadening scope of responsibilities they face and the associated personal and reputational risks. In the 2019 IoD/ASB [Director Sentiment Survey](#) report 40% of directors (up from 33% in 2018) agreed that the scope of director responsibilities is more likely to deter them from taking on a governance role now than 12 months ago. New Zealand needs skilled and experienced leaders. It needs leaders willing to take on the responsibility of guiding organisations, and making challenging choices and decisions that will result in a strong and sustainable future.

Any proposal to increase directors' responsibilities and impose personal liability deserves careful, and considerable, attention. There has to be a holistic and system-wide view that takes into account existing director responsibilities and liability, and balances this with the need for, and importance of, non-executive directors and good governance. Care is also needed to ensure that honest and diligent directors are not unfairly prejudiced.

#### *Option four*

We encourage MBIE to consider director and management banning orders under other regimes and to take a system-wide view of such orders (including the length of bans) to ensure a consistent and proportionate approach in banning people who have been convicted of exploitation offences under the Immigration Act 2009.

We appreciate the opportunity to comment on behalf of our members and would be happy to discuss this submission with you.

Yours sincerely



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