Compliance risks in the construction industry: temporary (migrant) workers and triangular employment relationships

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Introduction

1. Between 2016 and 2022, demand for construction-related occupations is projected to increase by approximately 56,000 employees. Temporary workers provided by third party labour hire agencies have long been used to meet resource demands in the construction industry. Now, many of these workers are temporary migrant workers required to meet these demands. However, in recent years cases of migrant construction workers stranded in New Zealand have hit the headlines. In March this year, New Zealanders became especially attuned to the vulnerability of permanent and temporary migrants.

2. Concerned about exploitation of temporary workers, the Government proposes to regulate these relationships. In 2017, the Government announced the Employment Relations (Triangular Employment) Amendment Bill (**Bill**), which proposed enhanced protections for employees employed by one employer, but working under the control and direction of another. The Bill received royal assent on 27 June 2019 and has become the Employment Relations (Triangular Employment) Amendment Act 2019 (**Act**). Triangular employment relationships are usually arranged on a temporary basis to fulfil the host organisation's short-term labour needs. However, increasingly, construction projects appear to be planned to use a significant proportion of temporary workers for the life of the project. These complicated arrangements increase the risk of non-compliance with employment law and, where temporary migrant workers are used, immigration law also.

3. This essay examines how the regulation of triangular employment relationships may address the exploitation of temporary workers and, in particular, the emerging issue of the exploitation of temporary migrant workers in the construction industry, which media and stakeholders are increasingly turning their attention to. It then turns to consider how the Act may impact industry participants, particularly those who have never factored in these kinds of risks before.

Background

Employment in the construction industry and the use of temporary workers and temporary migrant workers

4. The construction industry is experiencing substantial growth. In 2016, it was estimated that 515,000 people were employed in construction-related occupations, which encompasses a wide range of occupations, from the main labour supply source in the construction sector to truck drivers working on construction activities.[1] The Ministry of Business, Innovation and Employment (**MBIE**) have predicted that between 2016 and 2022 demand for construction-related occupations is projected to increase by approximately 56,000 employees to a total of 571,300 employees.[2] MBIE have predicted that the nationwide increase in construction investment, expected to peak at $42 billion in 2020, will increase demand for construction-related occupations to at least the end of 2022.[3]

5. Temporary migrant workers are often employed to address these skill shortages. The number of people issued with work visas in New Zealand has grown every year since 2009/2010, as the market gradually recovered from the global financial crisis.[4] In the 2016/2017 period, 209,178 people were issued with work visas, which was a 9% increase from the 2015/2016 period.[5] The Canterbury earthquake rebuild drove this growth initially, followed by the general boom in construction activity, particularly in Auckland.

6. In the 2016/2017 period, out of the 32,976 people approved for an Essential Skills work visa, 10,552 were technicians and trade workers and 5,605 were labourers.[6] For the 97% of people approved for an Essential Skills work visa who specified a region of employment, 38% selected Auckland and 18% selected Canterbury.[7] The technician and trades workers group also made up of 41% of Essential Skills visa approvals with job offers in Auckland.[8] In this period, the Philippines was the largest source country for people on Essential Skills visas, with 6,286 people approved, which made up 19% of approvals. The second largest source country was India, with 4,881 approved.[9]

7. In December 2016, out of the 2,059,900 paid employees working in New Zealand, there were 219,600 temporary employees, which included fixed term, casual, temporary agency and seasonal employees, as well as people who could not specify their employment type.[10] There were 10,200 temporary agency employees who were paid by, or through, labour hire agencies and placed by these agencies to work at the premises of a third-party customer.[11]

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[1] *Future Demand for Construction Workers* (Ministry of Business, Innovation and Employment, July 2017), at 8.

[2] At 5.

[3] At 5.

[4] *Migrant Trends 2016/2017* (Ministry of Business, Innovation and Employment, March 2018), at 21.

[5] At 21.

[6] At 26.

[7] At 26.

[8] At 27.

[9] At 25.

[10] *Employment relationships – permanent and temporary workers: December 2016 quarter* (Stats NZ, 2017), at 2.

[11] At 2.

This arrangement forms a triangular employment relationship. Temporary migrant workers are likely to make up a significant portion of temporary workers. These relationships are often, and sometimes deliberately, not clearly defined, especially when temporary migrant workers are used, in order to make the use of temporary workers as simple and efficient as possible for the host organisation.

8. Overall, it is difficult to determine how many temporary migrant workers there are working in New Zealand.

Definitions and examples of exploitation of temporary migrant workers

9. There have been increasing accounts and concerns regarding the exploitation of temporary migrant workers.[12]

10. In 2015, MBIE issued a report on vulnerable temporary migrant workers in the Canterbury construction industry (**2015 MBIE Report**). MBIE focused on the construction industry because MBIE stakeholders, which included businesses, unions and government agencies, considered the vulnerability of temporary migrant workers in the construction industry to be an emerging issue.[13] At the time of the research, the Canterbury earthquake rebuild was expected to require a large number of new construction industry workers over the next decade, with a significant proportion of these workers being migrants.[14]

11. The 2015 MBIE Report used the Immigration Act 2009's definition of exploitation, as well as other definitions of exploitation, including contraventions of the then Health and Safety in Employment Act 1992 (now replaced by the Health and Safety at Work Act 2015), to give context to its research.[15]

12. Section 351 of the Immigration Act 2009 addresses the exploitation of unlawful employees and temporary workers. It defines "temporary worker" as a person "who the employer knows holds a temporary entry class visa" or "who holds a temporary entry class visa and in respect of whom the employer is reckless as to whether or not the person holds a temporary entry class visa".[16]

Section 351 defines exploitation as:[17]

A. a serious failure to pay money payable under the Holidays Act 2003;
B. a serious default under the Minimum Wage Act 1983; and/or
C. a serious contravention of the Wages Protection Act 1983.

[12] Christina Stringer *Worker Exploitation in New Zealand: A Troubling Landscape* (The Human Trafficking Research Coalition, December 2016), at vii.

[13] Wendy Searle, Keith McLeod and Natalie Ellen-Eliza *Vulnerable Temporary Migrant Workers: Canterbury Construction Industry* (Ministry of Business, Innovation and Employment, July 2015), at 11.

[14] At 11.

[15] At 12.

[16] Immigration Act 2009, s 351(8).

[17] Immigration Act, s 351(1)(a).

13. The Immigration Act 2009 also defines exploitation as taking an action with the intention of preventing or hindering the employee or worker from:[18]

    A. leaving the employer's service;
    B. leaving New Zealand;
    C. ascertaining or seeking their entitlements under New Zealand's law; or
    D. disclosing to any person their circumstances of work.

14. The 2015 MBIE Report together with other recent research, including Dr Christina Stringer's report on worker exploitation in New Zealand and Catriona MacLennan's report for the E tū union on migrant Filipino workers in the construction industry, has found Filipino construction workers were the most vulnerable to exploitative practices. These reports identified numerous and repeated incidents of exploitation, which included:

    A. workers being threatened with dismissal in order to control the workers' actions;[19]
    B. workers paying recruitment fees to immigration agencies in the Philippines for help in obtaining work in Christchurch;[20]
    C. workers being significantly underpaid for their experience levels;[21]
    D. workers living in shared, overcrowded accommodation with other migrant workers;[22]
    E. illegal deductions from workers' pay for car use, housing, internet and other transport costs regardless of whether the worker used these services;[23] and/or
    F. uncertain and/or very few work hours despite what the workers' contracts may state or the minimum hours of work their visas required.[24]

15. The 2015 MBIE Report also referred to media investigations into the exploitation of temporary migrant workers in the construction industry. These included a *Newshub* investigation into a group of sixteen Filipino carpenters, welders and steel fixers that Allied Workforce, one of this country's largest labour hire agencies, brought to New Zealand to assist with Auckland's construction boom.[25] The investigation found that the workers had barely worked in the three months that they had been here. They also lived in overcrowded accommodation, which one of them described as being "like a prison cell".

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[18] Immigration Act, s 351(1)(b).

[19] Stringer, above n 12, at x.

[20] Searle et al, above n 13, at 8; Stringer, above n 12, at ix; Catriona MacLennan *Migrant Filipino Workers in the Construction Industry* (E tū, July 2018), at 12.

[21] Searle, McLeod and Ellen-Eliza, above n 13, at 36; MacLennan, above n 20, at 2.

[22] MacLennan, above n 20, at 2.

[23] At 5.

[24] At 5.

[25] Michael Morrah "Exclusive: Migrant construction workers languishing in crowded Auckland houses on illegal contracts" Newshub <www.newshub.co.nz/home/new-zealand/2018/05/exclusive-migrant-construction-workers-languishing-in-crowded-auckland-houses-on-illegal-contracts.html>.

16. Labour hire agencies and small employers in Canterbury grew exponentially due to the Christchurch earthquake rebuild, but many "did not have the processes and systems necessary when employing staff".[26] This made temporary migrant workers employed by labour hire agencies particularly vulnerable to exploitation.[27] This is because many labour hire workers are often employed on casual employment agreements or as independent contractors, without awareness of the entitlements and protections that employment law provides.

Addressing exploitation in triangular employment: the Employment Relations (Triangular Employment) Amendment Act 2019

17. At the end of 2018, the Government announced that MBIE will lead an "in-depth policy and operational review to better understand temporary migrant worker exploitation in New Zealand and identify impactful and enduring solutions".[28] Following this review, MBIE intends to provide recommendations to the Minister of Immigration and Workplace Relations and Safety, who expects to make decisions on the issue later in 2019. In the meantime, proposed legislative changes could assist in combating exploitation of temporary migrant workers.

18. On 1 February 2018, Labour List MP Kieran McAnulty introduced the Bill. He acknowledged former Labour MP Darien Fenton, who had drafted the original version of the Bill, which had initially been incorporated into the Employment Relations Amendment Bill (No 3), in 2008. McAnulty accepted that triangular employment relationships are increasingly popular and can be legitimate where they can provide labour to businesses that need it for a designated period, such as for the duration of construction projects, and often at short notice.[29] However, McAnulty stated, there are a "small but significant number of employers" who are deliberately using triangular employment relationships to exploit that absence of legislation in this area "for the purposes of undercutting wages and depriving those workers of particular conditions and rights that the rest of us who are in direct employment take for granted".[30] The resulting Act amends the Employment Relations Act 2000 (**ER Act**) to "ensure that employees employed by one employer, but working under the control and direction of another business or organisation, [...] are not subject to a detriment in their right to allege a personal grievance".[31]

19. On 17 December 2018, the Education and Workforce Select Committee issued its final report on the Bill, after considering 174 submissions on the Bill, which included 72 supporting it and 48 opposing it. The Committee made majority recommendations that the Bill pass with the Committee's amendments to it. The amendments included removing the collective agreement provisions, which sought to have employees covered by the same collective agreement as the employees of the controlling third party. The Committee considered these provisions would add

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[26] Searle, McLeod and Ellen-Eliza, above n 13, at 57 to 58.

[27] At 57.

[28] Honourable Ian Lees-Galloway "Stopping migrant worker exploitation – new research underway" (6 November 2018) Beehive.govt.nz <www.beehive.govt.nz/release/stopping-migrant-worker-exploitation-%E2%80%93-new-research-underway>.

[29] (21 March 2018) NZPD (Employment Relations (Triangular Employment) Amendment Bill – First Reading, Kieran McAnulty).

[30] (Employment Relations (Triangular Employment) Amendment Bill – First Reading, Kieran McAnulty), above n 29.

[31] (Employment Relations (Triangular Employment) Amendment Bill – First Reading, Kieran McAnulty), above n 29.

unnecessary complexity to labour hire arrangements, particularly in situations where an employee worked for multiple controlling third parties.[32]

20. The Committee also replaced the "secondary employer" terminology with "controlling third party" to make clear that the third party does not need to technically employ the employee, as the term "secondary employer" suggested. The Act defines a "controlling third party" as a person who:[33]

    A. has a contract or other arrangement with an employer under which an employee of the employer performs work for the benefit of the person; and
    B. exercises, or is entitled to exercise, control or direction over the employee that is similar or substantially similar to the control or direction that an employer exercises, or is entitled to exercise, in relation to the employee.

21. The most significant aspect of the Act is its expanded definition of a personal grievance, which allows an employee or employer to join a controlling third party to the employee's grievance claim by applying to the Employment Relations Authority (**the Authority**) or Court. When deciding whether to join a controlling third party to the personal grievance, the Authority or Court must grant the application if it is satisfied that:[34]

    A. the requirement to notify the controlling third party of the personal grievance in accordance with the notifying provision set out in the Act has been complied with;
    B. that an arguable case has been made out;
    C. that the party to be joined to the proceedings is a controlling third party; and
    D. that the party's actions caused or contributed to the grievance.

22. The Authority or Court also have powers to, at any stage of the proceedings, order at their own motion a controlling third party be joined to the proceedings.

23. If it is determined that the employee has a grievance and it is found that a controlling third party caused or contributed to the circumstances that gave rise to the grievance, then the Authority or the Court may order the controlling third party to reimburse the employee for lost wages as a result of the grievance and/or compensate the employee under section 123 of the ER Act. The Authority or the Court must award any remedies against the employer and against the controlling third party in a way that reflects the extent to which the actions of each contributed to the situation that gave rise to the grievance.

[32] Employment Relations (Triangular Employment) Amendment Bill (17-2) 2018.

[33] Employment Relations (Triangular Employment) Amendment Act 2019, s 4.

[34] Employment Relations (Triangular Employment) Amendment Act, s 6.

The case law context that the Act emerged from – independent contractors found to be employees

24. During McAnulty's introduction of the Bill, he referred to *Prasad v LSG Sky Chefs*[35] as providing an example of the ways triangular contractual arrangements "can be exploitative".[36] This case forms important context for the Act and is a key precedent for cases involving triangular employment relationships.

25. In this case, a labour hire company, called Solutions Personnel Ltd, which also traded as Blue Collar Ltd (**Solutions**), had engaged workers as independent contractors and supplied those workers to a host organisation called LSG Sky Chefs Ltd (**LSG**), as well as other companies. LSG is the world's largest provider of airline catering and in-flight services. Two independent contractors from Solutions (**the plaintiffs**), who were immigrants to New Zealand and spoke English as a second language, sought declarations from the Court under section 6 of the ER Act that they were at all material times LSG's employees. The Court concluded that the two "independent contractors" from Solutions were actually LSG's employees. This meant that the usual employment law protections and minimum standards applied, despite the parties having agreed at the outset that the individuals would be engaged as independent contractors and that the individuals' contractual relationship were with Solutions rather than LSG.

26. In forming this conclusion, the Court looked behind the independent contract arrangements to the real nature of the relationship between the plaintiffs and LSG as it operated in practice.[37] The Court held that the plaintiffs:[38]

    A. had no control over the way and where they did their work;
    B. had no economic interest in the way in which the work was organised;
    C. were subject to the strict direction and control of LSG supervisors at all times;
    D. had no say in the terms on which they performed the work;
    E. had no input into the documentation that described the relationship they had with LSG through Solutions, and with Solutions directly;
    F. did not produce invoices for their work;
    G. were required to wear LSG uniforms;
    H. were provided with training by LSG;
    I. were fully integrated into LSG; and
    J. they had no other real source of work.

[35] *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150.

[36] (Employment Relations (Triangular Employment) Amendment Bill – First Reading, Kieran McAnulty), above n 29.

[37] At [96].

[38] At [96].

27. The Court also held that there were mutual obligations between the plaintiffs and LSG as:[39]

    A. LSG expected that they would turn up to work each day it rostered them on, unless a prior arrangement had been made with it;
    B. the plaintiffs plainly expected that when they did show up to work they would be given work by LSG;
    C. both parties understood that the plaintiffs would personally do the work; and
    D. the plaintiffs received payment for the work they did for LSG via Solutions.

28. The Court considered the categorisation of these relationships more generally and noted that the inquiry into the nature of these relationships and who, if anyone, bears what responsibility for working conditions, is intensely factual.[40] The Court will examine the way in which arrangements between the parties are structured, particularly where there is a deficit of bargaining power, and how such arrangements have operated in practice, to determine the real nature of the relationship.[41]

29. The Court stated that "it is less likely that a host organisation will be found to be in an employment relationship with a labour hire worker where [...] the arrangement and the obligations, rights and roles of each party is well documented, understood and agreed at the outset, and the work is provided on a supplementary and temporary basis".[42]

30. However, it is more likely that an employment relationship will be found to exist if:[43]

    A. there is unclear or no documentation between the parties;
    B. the work is of indefinite duration;
    C. the individual expects the work to be provided;
    D. the individual is expected to perform the work;
    E. the host organisation exercises a significant degree of supervision, control and direction over the individual's work; and
    F. the host organisation deals with any performance issues.

31. *McDonald v Ontrack Infrastructure Ltd Construction*[44] was the first case to deal with triangular employment relationships, which shows how relatively recent the triangular employment relationship concept is. It also took place in a construction context. In this case, the plaintiff, who was a temporary worker, had a written agreement with a labour hire agency, Allied Work Force Ltd (**AWF**), who was the second defendant in these proceedings. The first defendant, Ontrack Infrastructure Ltd (**Ontrack**), used AWF to source casual labour as and when required. Ontrack and AWF had a formal contractual relationship between them for the supply of such temporary workers and there was no suggestion that this contractual arrangement was a sham. AWF paid the plaintiff's wages and

[39] *Prasad v LSG Sky Chefs New Zealand Ltd*, above n 35, at [97].

[40] At [96].

[41] At [91-93].

[42] At [92].

[43] *Prasad v LSG Sky Chefs New Zealand Ltd*, above n 35, at [92].

[44] *McDonald v Ontrack Infrastructure Ltd* [2010] NZEmpC 132.

deducted his PAYE. Ontrack provided the plaintiff with training, gave him instructions, supplied him with equipment and paid him an overnight tax-free allowance to enable him to pay for accommodation, food and incidentals.

32. Applying the "real nature" test in section 6 of the ER Act (as was done in *Prasad v LSG Sky Chefs*) the Authority found that the plaintiff was employed by AWF. On appeal, the full Employment Court found that the starting point for cases like this is the contractual documents that existed at the commencement of the placement.[45] It then considered any communications or documentation from which the intention of the parties could be derived, which may show that the real nature of the relationship was something different to that disclosed in the contractual documents.[46] The Court found that it was for someone such as the plaintiff to argue that he was employed by an entity "at the third point of the triangle, that is by a person who was not originally his employer but with whom his employer had a commercial relationship which included the exclusive provision of the employee's services to that third party".[47] The Court held that the merits of the case should be referred to a single Judge for determination in separate proceedings.

33. The case law context that the Act emerged from shows that, even now, third parties are not immune from being brought within the scope of employment law and having related responsibilities towards their workers. In *Prasad v LSG Sky Chefs*, the Court determined that the "real nature" test in section 6 of the ER Act was "sufficiently flexible" to deal with the difficulties of determining the real nature between a person is employed by another person under a contract of service.[48] However, the Act can be distinguished from the case law as it does not require a temporary worker to establish that a host organisation is an employer in order to raise a grievance against them. Under the Act, the temporary worker would only have to establish that the host organisation was a controlling third party when applying to join the host organisation to his or her personal grievance claim.

Impact of the Act on the construction industry

34. When the Education and Workforce Select Committee invited submissions for the Bill, numerous construction industry participants were opposed to it.

35. The Canterbury Employers' Chamber of Commerce (**CELL**) identified the potential for increased costs for labour hire agencies and the host organisations that use them in its submission opposing the Bill. CELL stated that these increased costs will make the use of triangular employment relationships significantly less attractive and result in "client employers reconsidering the efficiencies of their present arrangements and opting instead to increase the use of casual and fixed term employment arrangements".[49]

36. The Registered Master Builders' Association (**RMBA**) of New Zealand stated that the building and construction sector would likely be "disproportionately affected" by the Bill "given the common use of labour hire companies at a

[45] At [41].

[46] At [41].

[47] At [52].

[48] *Prasad v LSG Sky Chefs New Zealand Ltd*, above n 35, at [91].

[49] Canterbury Employers' Chamber of Commerce "Submission on the Employment Relations (Triangular Relationships) Amendment Bill", at [7].

time when many companies are struggling under the weight of additional compliance that has unnecessarily been imposed on them."[50] The RMBA stated that as the "sector is operating at full capacity which is why policy settings, for instance, on immigration, training and employment that affect the construction and building workforce need to remain responsive to this demand for skills".[51] It also felt that the Bill and its explanatory material did not provide sufficient rationale for why new rules and requirements were needed for triangular employment relationships.[52]

37. As the RMBA identified in its submission, the construction industry is a large contributor to employment growth and is predicted to become an even larger contributor over the next few years in New Zealand. At the same time, employment relationships are becoming more complicated and, correspondingly, more scrutinised. Therefore, it is incumbent on the many industry participants who use temporary workers, such as employers, head contractors and subcontractors, to understand the responsibilities they have towards their employees and how the Act will add layers of responsibilities (and risks) in these relationships.

38. Personal grievance claims can result in compensatory awards, as well as legal costs, which employers, head contractors and subcontractors may not have considered before in relation to the temporary workers on their sites. The compensation ranges for personal grievance claims under section 123(1)(c)(i) of the ER Act are increasing too. In the 1 January 2018/30 June 2018 period, $20,000 to $20,999 was the most common award range in the Authority for compensation for personal grievance claims (10 of the 73 awards were made in this range).[53] In the 1 January 2017/30 June 2017 period, the most common award ranges were $5,000 to $5,999 and $8,000 to $8,999.[54] Lost wages, penalties and costs can also be awarded under the ER Act. This kind of expenditure can be significant for the 97% of enterprises in New Zealand with fewer than twenty employees.[55]

39. As the RMBA also identified, the extended definition of personal grievance under the Act is especially stressful given the rising demand for workers in the construction industry. More temporary workers on sites mean enterprises may need to invest more into conducting due diligence checks to ascertain the real nature of the employment relationships at play. If enterprises are unable or unwilling to invest more into due diligence checks, they will be taking on more risk that may involve greater expenditure defending personal grievance claims lodged by temporary workers. This could also result in reputational damage through negative media attention, as the media is paying close attention to incidents of exploitation in the construction industry, especially incidents involving the exploitation of temporary migrant workers.

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[50] Registered Master Builders' Association of New Zealand Incorporated "Submission on the Employment Relations (Triangular Employment) Amendment Bill", at 3.

[51] At 1.

[52] At 2.

[53] "Compensation for personal grievance claims Jan – Jun 2018" (14 November 2018) Ministry of Business, Innovation and Employment <www.employment.govt.nz/about/employment-law/compensation-and-cost-award-tables/compensation-personal-grievance-jan-jun-2018/>.

[54] "Compensation for personal grievance claims Jan – Jun 2018", above n 51.

[55] "Small Businesses in New Zealand" (June 2017) Ministry of Business, Innovation and Employment <https://www.mbie.govt.nz/assets/30e852cf56/small-business-factsheet-2017.pdf>.

40. Manpower Services (New Zealand) Ltd, which is one of nineteen accredited labour hire companies that can support work visa applications to undertake construction work in Canterbury, also opposed the Bill in its submission. It argued that making both the primary employer and controlling third party liable "gives rise to potential injustice on both sides," as a personal grievance may arise from one party's actions, potentially leaving both parties to jointly share liability.[56]

41. However, this should be less of a concern for the relevant industry participants. Despite this shift of risk from temporary workers towards host organisations, the Act may still protect labour hire agencies who genuinely had no knowledge of or ability to control the controlling third party's actions that led to a grievance claim. This is because the Act gives the Authority or Court power to determine whether or not the controlling third party is wholly responsible and liable for remedies. For the same reason, the Act also allows an employer or both an employee and employer to apply to the Authority or Court join the controlling third party to a proceeding.

42. While this may seem difficult to swallow, the Act may not change much in practice, especially for temporary migrant workers. Despite the resources spent drafting the Act and considering submissions on it, the Act is similar to the case law it emerges from. Some may argue that there was also a missed opportunity here to provide many more protections for temporary workers, especially temporary migrant workers. For example, the Act could have required controlling third parties to conduct more stringent due diligence checks on the labour hire agencies and temporary workers they used. Furthermore, the Act will still not address incidents where temporary migrant workers feel that they are unable to complain to authorities about their treatment, as they depend on their employers for their work visas, particularly those seeking permanent residency in New Zealand.[57] It also does not address the issue generally of the costs and resources needed to make an application to the Authority or Court in the first place.

Tangential risks that the Act could give rise to

43. There may be related, tangential risks for employers, head contractors and subcontractors if temporary migrant workers are successful in personal grievance claims against controlling third party as the Authority and Court are able to alert Immigration New Zealand (**INZ**) to concerns they may have about exploitation in any cases before it. This could attract additional scrutiny from both MBIE and INZ.

44. An employer who is convicted of an offence under section 351 of the Immigration Act 2009, which addresses the exploitation of unlawful employees and temporary workers, is liable to a term of imprisonment not exceeding seven years, a fine not exceeding $100,000, or both.[58] An employer who is also a residence class visa holder and who is convicted of an offence under this section can be liable for deportation.[59]

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[56] Manpower Services (New Zealand) Ltd "Manpower Services (New Zealand) Ltd submission to the Education and Workforce Select Committee", at 3-4.

[57] Stringer, above n 12, at x.

[58] Immigration Act, s 357(3) and (4).

[59] Immigration Act, s 161(1)(d).

45. Under section 351 of the Immigration Act 2009, exploitation also includes breaches of the minimum entitlements under the Minimum Wage Act 1983 and the provisions of the Wages Protection Act 1983.[60] These minimum entitlements are examples of employment standards. Breaches of employment standards can result in compensatory and penalty awards in the Authority and the Court.[61] If a penalty is awarded for a breach of an employment standard and the employer employs migrant workers, this will be a breach of the immigration instructions in INZ's Operational Manual.

46. In these cases, INZ will view the employer as non-compliant with the law. The employer may face a six month stand-down period (or longer depending on the total of the penalty) from the ability to support a visa application. This applies to all who support visa applications, which includes employers who are supporting work visa applications, seeking accredited employer status, or supporting residence class visa applications based on employment. This also applies to existing employees on work visas applying to secure an extension of their work visa if the visa expires during stand-down period. If an employer largely relies on migrant workers, as many do in the construction industry, the inability to support visa applications for new and existing employees could significantly impact its operations. This can also be very problematic for the migrant workers who may not be able to continue working for the employer as a result of the stand-down.

Conclusion

47. As recent INZ investigations into, and prosecutions of, organisations in the construction industry show, the Government has a close eye on the work arrangements in this industry, particularly where temporary migrant workers are involved.

48. While the Act does not add much to the case law that already exists around triangular employment relationships, it is indicative of potential legislative mechanisms to come that could address exploitation, especially of temporary migrant workers.

49. The Act may also give rise to tangential risks if temporary migrant workers' personal grievance claims alert MBIE and INZ to potential exploitation issues. As the construction industry grows, it should be preparing for more stringent checks on its employment arrangements, especially where temporary migrant workers are used.

[60] Employment Relations Act 2000, s 5.

[61] *Antares Restaurant Group Ltd v Unite Union Inc* [2012] NZERA Auckland 290.