

13 February 2018

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Employment Relations (Triangular Employment) Amendment Bill

1. We have considered whether the Employment Relations (Triangular Employment) Amendment Bill ('the Bill'), a member's Bill in the name of Kieran McAnulty MP, is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. The Bill amends the Employment Relations Act 2000 to provide that in situations where an employee is employed by one employer ('primary employer'), but works under the control and direction of another business or organisation ('secondary employer'), the employee has access to the appropriate collective agreement and personal grievance mechanisms.
3. We note the Employment Court has recently considered a type of triangular employment relationship known as a labour-hire arrangement in *Prasad v LSG Sky Chefs Ltd*.¹ The Court described such arrangement as where a labour-hire agency hires out the labour of a worker to another business, which pays a fee to the agency to cover the cost of the worker's services (plus some profit margin for the agency).² The agency in turn remunerates the worker, who agrees to perform work for the other business in accordance with their directions or requirements.³ The Employment Court noted that in such employment models, it can be uncertain who bears responsibility for an employee's working conditions.⁴
4. Clause 5 inserts a new provision into s 56(1) of the Employment Relations Act 2000 regarding the application of a collective agreement. Clause 5 provides that employees of a primary employer may in certain circumstances be bound by a collective agreement to which the secondary employer is a party, and that collective agreement is enforceable by the employee where:
 - a. the work performed for a secondary employer by the employee of a primary employer is within the coverage clause of any collective agreement to which the secondary employer is a party
 - b. the employee is a member of the union party to that collective agreement, and
 - c. the employee is not bound by any other collective agreement to which the primary employer is a party.

¹ *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150.

² At [24].

³ *Ibid.*

⁴ At [91].

5. We understand the purpose of this clause is to ensure that employees who fulfil the above criteria receive the benefit of any applicable collective agreement to which the secondary employer is a party, as if it were a term of the employment agreement between the employee and primary employer. Although this may raise issues regarding the appropriate terms and conditions of employment between a primary employer and employee, we do not consider this provision raises any freedom of association issues.
6. Clause 6 provides that where an employee raises a personal grievance with both a primary and secondary employer, the employee may apply to the Employment Relations Authority or court to join that secondary employer to the grievance. The Authority or court must grant leave if the actions of the secondary employer resulted in or contributed to the grounds of the personal grievance, and the Authority or court considers it just to do so. For the subsequent determination of a personal grievance, the actions of any secondary employer are deemed to be the actions of the primary employer, and the secondary employer is jointly liable with the primary employer for any remedies awarded (unless the Authority or court make an order otherwise). The purpose of the provision is to define the legal effect of the primary and secondary employers' actions, and provide a remedy for the employee. We do not consider this provision engages the right to freedom of association.
7. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel