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Enhancing the effectiveness of minimum employment standards in New Zealand

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Abstract

Employer breaches of New Zealand's minimum employer standards and other forms of worker exploitation have been increasingly recognised as a significant problem. This affects migrant workers in particular, and among them those working without documentation or on various types of non-resident visas. Exploitation has become particularly embedded in a number of industries: fishing, hospitality and tourism, and in some sectors of agriculture, particularly those dependent on seasonal labour. Initially, government action to mitigate these problems was slow and reluctant but over the last decade, culminating in the reforms of 2016, there has been a more focussed effort to provide a strong legislative framework to support minimum employment standards. This article describes the background to those reforms, analyses the reforms themselves and goes on to consider whether they are adequate to ensure access to justice by disadvantaged workers.

JEL Codes: J81, J83, J88

Keywords

Legal protection and enforcement, migrant workers, minimum employment standards, New Zealand, worker exploitation

Seismically active countries such as New Zealand experience two forms of earthquake: the familiar sudden and devastating type causing obvious damage and the slow-slip earthquake, which may continue over a long period of time, largely unfelt but

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occasionally triggering localised earthquake activity. The immediate impact of the Employment Contracts Act 1991 was of the first type. It devastated the national award system that had long delivered acceptable and enforceable terms of employment to the great majority of New Zealand workers and it collapsed the union movement, particularly in the private sector. Prior to 1991 workers generally, but particularly vulnerable workers, had been protected through the national award system, the patchwork of awards that, in combination, set the terms and conditions of virtually all workers. In the last decades of this system, improvements to wages and conditions were set through national negotiations led by the more powerful unions creating benchmarks which then flowed on to the many smaller awards. Enforcement of awards was relatively straightforward and most disputes were settled by union delegates/organisers. After 1991, the collective determination of terms and conditions collapsed as the great majority of workers became employed on individual contracts. This, of course, left many workers vulnerable to exploitation. Not only did conditions rapidly deteriorate, but so also did traditional enforcement mechanisms, a collapse that impacted most heavily on vulnerable workers (Anderson, 1999; Oxenbridge, 1999).

The longer term, slow-slip, impact of the 1991 reforms, however, only became fully apparent over the following decades, as their effects in both labour markets and the economy more broadly opened numerous gaps in employment protection over the following decades. These gaps were rapidly exploited by employers who, in the absence of unions and increasingly constrained enforcement by governments, had few incentives to deter such conduct. As with Australia, problems of exploitation became increasingly widespread and tend to be found in similar industries, typically those characterised by short-term or seasonal employment. Changes to immigration policy, and especially the increasing liberalisation of the working restrictions on short-term, non-resident visas, resulted in such workers becoming increasingly common, and indeed encouraged, for seasonal agricultural work and many sectors of the hospitality and restaurant sectors (Anderson, 2011; Anderson et al., 2017; Anderson and Naidu, 2010; Rasmussen, 2010).

Examples of such exploitation include the high profile and widely reported instances of people trafficking and modern slavery, abuses of migrant labour in a variety of industries, the abuse of corporate structures to avoid or evade liabilities through ‘phoenixing’ or the use of labour-supply chains, and the use of less well-known practices where the loss to the individual worker may be relatively small but the cumulative benefit to the employer significant.

This article consists of three parts. First is a discussion of attempts over several decades up to 2016 to limit exploitation on fishing vessels operating in New Zealand’s Exclusive Economic Zone (EEZ). This issue is treated separately, partly because of the jurisdictional challenges faced in regulating foreign-flagged vessels in the EEZ and also because, from 2016, all vessels fishing in the EEZ were required to be New Zealand flagged with the consequence that New Zealand employment standards became directly applicable. The second part looks at worker exploitation within New Zealand itself and the political and legal responses to the increasing levels and awareness of that exploitation. This discussion considers both the particular problems of migrant workers and workers generally. The article concludes by dealing with the enforcement of minimum standards and issues of access to justice.

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Identifying worker exploitation in New Zealand

Clibborn and Wright (2018) have addressed the issue of wage theft of temporary migrant workers in Australia. Given the similarities between the Australian and New Zealand labour markets, it can be expected that the issues addressed by the authors (such as the weakening of unions leading to increased worker vulnerability) also apply in the New Zealand context. As the international literature has been well canvassed by Clibborn and Wright, this article focusses on literature dealing specifically with worker exploitation in New Zealand.

In a keynote speech to the New Zealand Women Judges Association, Justice Glazebrook (2010) highlighted the problem of trafficking in New Zealand, particularly in the sex trade and other susceptible industries such as the agricultural sector. Heesterman (2015) has also commented that while many women may come to work in the New Zealand sex industry willingly, they are often subsequently forced into exploitative situations. In 2013, the Ministry of Business, Innovation and Employment (MBIE) began a research programme focussed on temporary migrant workers. The first piece of work associated with the programme was a literature review by on the vulnerability of temporary migrant workers in New Zealand and internationally (Yuan et al., 2014). The literature review noted that while the flow of temporary migrant workers to New Zealand had increased, the number of skilled migrant workers had declined. Based on international and domestic evidence, the authors stated that this influx of unskilled or low-skilled workers were particularly vulnerable to exploitation. In a subsequent report by Searle et al. (2015a), MBIE addressed migrant worker exploitation in the context of the Canterbury rebuild. The authors' findings were that some Filipino workers in the construction centre had experienced exploitation, including excessive fees paid to recruitment agencies. Shortly afterwards and as part of the same programme, MBIE released a report (Searle et al., 2015b) on temporary migrant workers in the hospitality industry. While the report did not quantify the extent of migrant worker exploitation in the hospitality industry, it identified that there were a large number of migrant workers in this industry who were vulnerable to exploitation by employers.

The perceived problems of human trafficking in New Zealand has also led to the formation of a Human Trafficking Research Coalition in 2013, which commissioned the University of Auckland to investigate the extent of worker exploitation in New Zealand. This culminated in a report by Christina Stringer (2016), *Worker Exploitation in New Zealand: A Troubling Landscape*. As well as providing a detailed analysis of the extent of the problem in New Zealand, the report identified six key industries prone to exploitative practices. As might be expected – these industries were those with high levels of migrant labour. The key industries identified, excluding fishing, which is discussed below, were the following:[1]

- Construction, especially in Christchurch as a consequence of the high demand for labour for the post-2011 Christchurch rebuild.
- Dairy where the rapid expansion of the industry, including a move away from small–medium family units to more corporate farming, had led to significant labour shortages.

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- Horticulture and viticulture.
- Hospitality.
- International education, especially in the Private Training Establishment (PTE) sector, which provided a feeder channel for exploited labour especially in hospitality and horticulture and viticulture.
- Prostitution. While exploitation in this industry affected some New Zealanders who could lawfully provide sex services, the main problems related to the exploitation of illegal workers – usually persons on student or visitors visas.[2]
- Problems were also identified in a number of other areas such as aged care.

Stringer documented that the exploitation of workers occurred both at the recruitment phase and during employment. Exploitative recruitment practices included excessive recruitment fees (as high as NZD60,000), in some cases amounting to debt bondage, deceptive information and visa practices including misleading information or false promises of employment as a pathway to residence. Employment practices included the usual gamut of practices: withholding documents, confinement of workers, excessive hours of work, underpayment of wages, excessive deductions from wages and similar behaviour.

A report prepared by Caritas Aotearoa New Zealand (2016) also addressed the issue of worker exploitation, based on 14 interviews with migrant workers. It found that among the participants, there was a common theme of issues related to wages, being denied sick or holiday pay, bullying or being threatened at work and being treated unfairly due to race or ethnicity. Participants also explained that vulnerabilities, including poor English, lack of knowledge of domestic laws, visa conditions and a lack of support networks led to vulnerabilities placing them at risk of exploitation.

While the above reports do identify significant problems, it appears that these are largely confined to specific sectors of an industry and often particular employers. For example, in several industries (including horticulture/viticulture), problems are particularly apparent when labour is employed through labour hire companies, and the exploitation of workers on essential skills visas in the hospitality industry seems to be more apparent with chefs in ethic restaurants. In the dairy industry, problems tend to occur with particular employers and do not appear to reflect an industry culture of exploitation.

Stories of serious migrant worker exploitation and trafficking have also emerged. While there has only been one successful prosecution for human trafficking in New Zealand, Carville (2016) for the *New Zealand Herald* has suggested that instances of trafficking are more prevalent but have simply not been labelled as such. For example, in 2014, migrants expecting to work in offices or at restaurants were forced to work on kiwifruit orchards run by forced labour gangs where they were threatened with physical punishment for noncompliance. More recently, in 2018, the telecommunications company, Chorus, came under fire for its use of subcontractors who flouted minimum employment standards during the roll out of ultrafast broadband. Breaches included failing to maintain employment records and pay the minimum wage, as well as unlawful deductions from pay and a lack of written employment agreements (Fuatai, 2018). Recent cases have also illustrated significant problems in the tourism and backpacking

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sector where there is seemingly a culture of accommodation for work varying from the minor to the highly exploitative (Cropp, 2018).

As of 2018, MBIE has been tasked with researching migrant exploitation with a view to identifying and reducing exploitative practices. Accordingly, we can expect to see further research and recommendations from the Government, making worker exploitation an important issue to watch for the foreseeable future.

New Zealand's minimum employment standards

Before moving to the substantive discussion, it may be useful to briefly note the content of New Zealand's recently defined, but long-existing, 'minimum entitlement provisions'. The Employment Relations Act 2000 Section 5 defines these as

(a) the minimum entitlements and payment for those under the Holidays Act 2003, currently 4-weeks annual holiday and 11 statutory holidays;
(b) the minimum entitlements under the Minimum Wage Act 1983, currently NZD17.70/hour and
(c) the provisions of the Wages Protection Act 1983 which is primarily an anti-truck act and requires payment in money and limits the ability to make deductions, agreed or otherwise, from wages.

Section 5 of the Employment Relations Act also defines 'employment standards' which includes not only the minimum entitlements but also the provisions of the Equal Pay Act 1972 and specific sections of the Employment Relations Act and Holidays Acts – primarily the provisions which relate to record keeping obligations.

Exploitation in the fishing industry[3]

Until 2016, when all vessels were required to become New Zealand–flagged, a substantial proportion of the fleet fishing in New Zealand's EEZ consisted of Foreign Chartered Vessels (FCVs). Although the widespread exploitation of FCV crew had been apparent from the 1990s, both the judicial and political response in New Zealand had been unhelpful. For both economic and political reasons, it was not difficult to shut one's eyes to worker exploitation and to regard the problem as isolated and not systemic. This section looks at some of the explanations for this 'blind-eye' approach and the reasons why the failure to reform became increasingly untenable.

FCVs are foreign-flagged vessels owned and operated by the foreign partners in joint ventures with the New Zealand owners of fishing quota. These joint venture arrangements were intended to be an interim measure to be gradually phased out as domestic fishing capacity developed. However, in 2010/2011, three decades after the establishment of the EEZ, 27 of the 56 vessels operating in the EEZ were foreign-flagged. The FCVs were time or demise chartered and fully crewed – typically with officers from the country of the foreign joint venture partner and crew from Southeast Asian countries. South Korean officers and Indonesian crew seemed particularly common (Stringer et al., 2011, 2016). FCVs were not required to register in New Zealand and fishing crew did not

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require work visas to work in the EEZ. While the Fisheries Act 1996 contained provisions applying the Minimum Wage Act and the Wages Protection Act to vessels in 'New Zealand fisheries water', which included the EEZ (Fisheries Act, Section 103(4)), these measures were not only ineffective but also of uncertain legality (Dawson and Hunt, 2011; Devlin, 2009). Attempts in 2000 to enact legislation to provide some protection for minimum wages and repatriation costs were unsuccessful, with a preference for voluntary measures being expressed by the select committee (Devlin, 2009).

However, from this point onwards, pressure for reform began to build. A Labour Department investigation in 2004 identified both widespread abuse and the ineffectiveness of Section 103 of the Fisheries Act (Department of Labour, 2004). The political response was the introduction of a Code of Practice on Foreign Fishing Crew (Department of Labour, 2006). The Code set out detailed requirements around employment conditions and remuneration including the requirement for a guarantee of the financial obligations by the New Zealand joint venture party.

This Code was opposed by many in the industry and attempts were made to have it weakened. While this campaign was unsuccessful, Devlin (2009) commented that

> a New Zealand party is unlikely ever to be held accountable under the Deed. The Deed of Guarantee is likely to prove to be more show than substance. (p. 100)

Devlin also pointed to a significant political problem: the strong opposition of Maori interests to the introduction of the Code. Some appreciation of the tone of the debate, which was to continue until 2014, can be gained from the following quote by the Tariana Turia Maori Party co-leader:

> Would the Minister [of Immigration] agree that the real concern for the minimum wages being paid to foreign fishing crews has more to do with undermining the Maori fisheries industry and assisting the Talleys family to achieve cheap quotas and control of Maori fisheries because of that family's relationship with politicians? (cited at Devlin, 2009: 92)

To understand this tension, it is first necessary to appreciate that as the result of Treaty of Waitangi Settlements agreed between various Maori iwi and the Crown, Maori interests control a substantial proportion – approximately 30% – of the total fishing quota either directly or indirectly through ownership of fishing companies. This includes a major stake in Sealords, one of the two major fishing companies. This grouping, together with smaller quota holders, have been the major proponents of a low-cost, exploitative approach to fishing, as they saw improved conditions for FCV crew as damaging their economic interests. Talleys, the other major player, favour a more focussed high value approach to the industry. Its vessels were New Zealand–flagged and, therefore, pay and conditions were consistent with New Zealand minimum conditions (Stringer et al., 2016).

Pressure for change increased significantly in 2010 following the sinking of the *Oyang 70*, where several lives were lost. This event, and importantly the descriptions of working conditions given by survivors, gained wide publicity. The release of *Not in New Zealand's Waters, Surely?* (Stringer et al., 2011) documented the nature of working conditions in considerable detail and again generated wide publicity in New Zealand and

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overseas. Earlier reports, including that by Devlin, were mainly concerned with the failure to pay minimum wages and other costs such as crew repatriation, and the examples cited by Devlin related primarily to Russian crewed vessels. *Not in New Zealand Waters* focussed on South Korean vessels and identified systemic abuse – physical and financial – of workers on FCVs. The report concluded,

> Interviews undertaken with foreign crew working aboard FCVs reveal serious abuse, work periods of up to 20 hours per day with extreme shifts of 53 hours, workers not receiving their minimum wage entitlement, inhumane and cruel living conditions including food rationing, and obscured but real Indonesian employment contracts which existence is denied by New Zealand institutions. (Stringer et al., 2011:17)

A subsequent, and comprehensive, Ministerial Inquiry (Ministry of Agriculture and Fisheries (MAF), 2012) into the use of FCVs clearly identified the breakdown and ineffectiveness of the voluntary regulatory regime intended to ensure that FCVs complied with New Zealand's minimum employment standards. However, the Ministerial Inquiry did not recommend the obvious solution to this problem – a requirement that all vessels fishing the EEZ be New Zealand-flagged. Nevertheless, in May 2012, the Government legislated to require reflagging from May 2016 (Fisheries (Foreign Charter Vessels and other Matters) Amendment Act 2014).[4] The reasons for that decision are somewhat opaque but one major reason was that that the increasing publicity given to exploitation was increasingly posing a threat to international markets (Stringer et al., 2016: 1920).

While reflagging did not necessarily end the use of overseas crew on fishing vessels or their exploitation,[5] it did mean that New Zealand maritime and labour officials were in a much stronger position to enforce both the seaworthiness of vessels and directly apply New Zealand minimum employment standards. For example, once vessels are New Zealand–flagged, employers are obliged to provide workers with an approved statement, in their own language, of their rights under New Zealand law, and a breach of sponsorship obligations may lead to future requests to recruit foreign crew being refused.

Responding to domestic exploitation of workers

The publicity and regulatory activity relating to the fishing industry appears to have acted as something of a catalyst for a wider review of both the extent of worker exploitation within New Zealand, and the effectiveness of the country's minimum employment standards. By the time MBIE (2014) released its discussion document *Playing by the Rules*, it had become increasingly apparent that significant problems of exploitation existed within New Zealand.

Playing by the Rules documented and sought feedback on the enforcement of minimum standards legislation. Using data from the periodic *Survey of Working Life* (Statistics New Zealand, 2012),[6] *Playing by the Rules* identified a wider problem of breaches of employment standards. The survey indicated that 17% of employees were not receiving at least one minimum entitlement, with this being most prevalent among the precarious and lower skilled workforce, migrant workers, and younger and older workers. The two key conclusions of the report were that the available sanctions and penalties did not provide a sufficient deterrent, particularly for serious breaches, and that Labour Inspectors

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could not easily obtain the information needed to successfully identify and investigate breaches. The report did not focus on another factor, the then seriously under-resourced Labour Inspectorate (Sissons, 2014).

Both *Playing by the Rules* and *A Troubling Landscape* particularly identified the problems faced by non-resident workers, typically those who are in New Zealand on some form of non-resident visa, such as visitors, working holiday, student, essential skills or recognised seasonal work visas.[7] It also identified and focussed on the particular problem of recalcitrant employers who persistently violate minimum conditions, including record keeping requirements, often by abusing corporate structures.

The political response

Playing by the Rules was issued over the signature of the Minister of Labour. Given that a conservative, National-led Government had been in place since 2008, the positive response to both the use of FCVs in fishing and *Playing by the Rules* was perhaps a little surprising. However, on reflection, the politics of the response was understandable. Stringer et al. (2016: 1920) comment, '[o]n the face of things, there were no major internal or business drivers for regulatory intervention by the New Zealand Government into labour standards in the charter vessel sector'. The decision to require only New Zealand–flagged vessels in the EEZ was perhaps partly the politics of exasperation, as other measures to provide minimum standards had not only failed but had also been deliberately evaded by the industry. More influential was that the widespread publicity being given to the egregious conduct of the industry was having an increasingly negative political impact domestically and internationally, and the failure to act was threatening to impact international markets. It might also be assumed that the influence of Talleys and equally its ability to compete with New Zealand–flagged vessels was not unimportant (Stringer et al., 2016).

The politics may have been slightly different in the case of exploitative behaviour domestically. The incidents receiving publicity largely concerned migrant workers employed by migrant employers. Public opinion would almost certainly have been sympathetic to the former and hostile to the latter. Furthermore, while some New Zealand businesses may have benefitted from cheap labour, for example, in horticulture, it is likely that many others would have been opposed to the evasion of minimum standards by less scrupulous businesses and may have perceived a longer term threat to the successful seasonal employment programme. News reports of exploitation normally feature complaints from other small employers about being undercut. The example of negative publicity in the fishing industry also remained in the background for export-oriented industries.

From National's perspective, active and positive reforms were a win–win situation. Not only did it make National look better politically, especially given some of its anti-worker legislation, such as removing the legal right to work, breaks and legislating for trial periods of employment, it also undercut Labour by putting National's footprint clearly on one of the Labour's key political battlegrounds. It should also be noted that National's reform enthusiasm did have limits. Controls on zero-hour contracts were initially not supported by National, and passed only because its coalition partners, the Maori

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Party and United Future, indicated that they would support Labour's amendments to the Employment Standards Legislation Bill 2016.

Legislating against migrant exploitation

Until 2014, the primary focus of 21st century legislative reform had been on people smuggling and trafficking, primarily in response to various international developments. For example, the Crimes Amendment Act 2002, which in Sections 98C and 98D introduced detailed provisions on smuggling and trafficking in people, preceded New Zealand's ratification of the United Nations Trafficking Protocol.[8]

The most significant reforms, however, have been the 2015 amendments to the Immigration Act 2009, which strengthened provisions relating to the employment of migrants working in New Zealand. Section 351 'Exploitation of unlawful employees and temporary workers' (defined in Subsection (8) as persons holding a temporary entry class visas or who are unlawfully working in New Zealand) provided that it is an offence for an employer, while allowing an unlawful employee or temporary worker to work in the employer's service, to either:

(a) be responsible for a serious failure to pay money payable under the Holidays Act 2003; to be in serious default under the Minimum Wage Act 1983 or to be responsible for a serious contravention of the Wages Protection Act 1983 in respect of the employee or worker and
(b) to take an action with the intention of preventing or hindering the employee or worker from leaving the employer's service; or leaving New Zealand; or ascertaining or seeking his/her entitlements under the law of New Zealand; or disclosing to any person the circumstances of their work for the employer.

In respect of (b), the Act specifically gives as examples: taking or retaining possession or control of a person's passport, any other travel or identity document or travel tickets, preventing or hindering a person from having access to a telephone, using a telephone, using a telephone privately and preventing or hindering a person from leaving premises or leaving premises unaccompanied.

Penalties for breaches of Section 351 are significant: a maximum of a NZD100,000 fine or 7 years imprisonment or both. The seriousness with which the judiciary treats both people smuggling and exploitation was apparent in the first prosecution under Section 98D of the Crimes Act, *R v Ali and Kurisi* (2016), involving the relevant sections. The principal defendant, Ali, received a sentence of 9 years and 6 months, following convictions under Section 98D of the Crimes Act and 3 years imprisonment on the immigration charges. His co-defendant, Kurisi, received a sentence of 12 months home detention for several charges under Section 351 of the Immigration Act, avoiding imprisonment largely because of a serious medical condition (*R v Kurisi*, 2017). In sentencing Ali, Heath J – noting that the maximum sentence of 20 years is the highest finite sentence available in New Zealand – stated that he regarded the offending as mid-range with a starting point for sentencing of 10 years. In other cases involving Section 351 of the Immigration Act, sentences of 11 months of home detention (*R v Jain*, 2015), 26 months

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imprisonment (*Balajadia v R*, 2018) and imprisonment of 4 years and 5 months and 2 years and 6 months (*R v Islam and Ahmed*, 2019) were imposed.[9] In all cases, reparations were directed to be paid, and in several instances, enforcement actions were also taken by Labour Inspectors under the Employment Relations Act. The increasing use of multi-agency enforcement is discussed below.

Reinforcing and enforcing employment standards

Effective employment standards depend on three things: a strong legislative standards framework, effective enforcement mechanisms and powers, and the willingness of both governments and courts to investigate and enforce the standards. As noted above, while the substance of the minimum employment standards is not problematic, there is always a need for a degree of vigilance in ensuring that new means of exploiting employees are regulated. The principal problem, as was made clear in *Playing by the Rules*, relates to enforcement. More specifically, the key issue lies around how to make enforcement more effective, particularly in the case of persistent offenders and those targeting vulnerable groups of workers.

The Employment Standards Bill 2015 was introduced primarily to expand and strengthen the enforcement mechanisms in the Employment Relations Act, particularly through the addition of Part 9A. However, contrary to the Government's plan, the Bill was also used as a vehicle to deal with the increasing problem of zero-hour contracting. As noted above, National only accepted these changes when it became clear that its coalition partners indicated that they would support Labour's amendments.

In addition to zero-hour contracting, some other practices were prohibited. In particular, the Wages Protection Act was amended to prohibit 'unreasonable' deductions from wages and prohibitions on seeking employment premiums were extended to non-employers.

Zero-hour contracts

While short-term and casual employment agreements have long been common in New Zealand, the more pernicious zero-hour contract has been a relatively recent development. Such contracts are typified by a significant disparity in obligation and by the complex range of formalised secondary terms included in the contracts. Terms typically require an employee to be available for work – whether generally or for specific periods, impose no reciprocal obligation on the employer to provide work or to guarantee payment for a minimum number of hours, and place severe restrictions on secondary work through (probably unenforceable) restraint of trade clauses or general or specified prohibitions on secondary employment. The commercial justification for such contracts is difficult to see. The major users of such contracts, such as fast-food chains, are almost certainly able to predict their labour requirements in considerable detail. It seems more likely that the attractiveness of such contracts related as much to their ability to control and discipline workers as it did to the cumulative effect of marginal savings in individual labour costs.

Sections 67C–67H partly ameliorate these disparities of obligation by requiring, among other matters, that an 'availability' clause may only be used if there are agreed and specified guaranteed hours, there are genuine reasons based on reasonable grounds for including such a clause, and compensation is provided for the employee being

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available. In addition, if shifts are cancelled without reasonable notice, compensation must be provided. Secondary employment restrictions are also subject to detailed reasonableness provisions. How effective these provisions will be is unclear. Elucidating the meaning of terms such as 'reasonable' is likely to be expensive, uncertain and, for most affected employees, unaffordable.

Strengthening enforcement mechanisms

The object of Part 9A of the Employment Relations Act is 'to provide additional enforcement measures to promote the more effective enforcement of employment standards' (Section 142A(1)). The provisions are additional to the standard enforcement and penalty provisions in Part 9 of the Act and to the powers of Labour Inspectors in Sections 223–228, which include the ability to seek remedies through enforceable undertakings, improvement notices and demand notices, as well as through an action in the Authority or Court. Part 9A consists of four core components. In all cases, the standard of proof is the standard that applies in civil proceedings. These measures may be sought only by a Labour Inspector, not by other interested parties such as unions.

Declarations of breach

Section 142B allows a Labour Inspector to apply to the Court for a declaration of breach of a minimum entitlement provision, either by a person in breach or by a person who has been 'involved' in the breach where the breach is serious. Indications of a serious breach include the amount involved, the number and period of the breaches, whether the breach was intentional or reckless and whether record keeping requirements were complied with. The purpose of a declaration of breach is to enable the applicant for an order under Part 9A to rely on the declaration as conclusive evidence of the matters stated in the declaration.

Pecuniary penalties

Section 142E enables the Court to make a pecuniary penalty order against a person in respect of whom a declaration of breach has been made. The maximum penalty for an individual is NZD50,000, and for a body corporate, it is NZD100,000 or three times the amount of the financial gain made from the breach, whichever is greater. The criteria for ordering pecuniary penalties are similar to those for a declaration, but in addition include the nature of the loss/gains involved, steps already taken to mitigate loss caused by a breach, and the vulnerability of the employee.

An insurance policy may not indemnify a person for liability to pay a pecuniary penalty. A pecuniary penalty is a civil penalty, and as noted, liability is established on the civil standard of proof.

Compensation orders

Section 142J allows the Employment Court to make a compensation order if the Court is satisfied that the employee concerned has suffered or is likely to suffer damage because of a breach.

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Banning orders

Banning orders are an important new remedy. Section 142M enables the Court to make an order prohibiting a person from entering into an employment agreement as an employer, being an officer of an employer, or being involved in the hiring or employment of employees. Such an application must be made by a Labour Inspector or an immigration officer. It requires that the person has persistently breached, or has persistently been involved in the breach of, one or more employment standards, or has been convicted of an offence under Section 351 of the Immigration Act. The penalties for breaching a banning order are significant – a maximum fine of NZD200,000 or a term of imprisonment not exceeding 3 years, or both.

Accessorial liability

A second important component of the reforms is the ability to make a declaration in respect of a person 'involved'. This introduces a range of accessorial liability by extending the liability for breaches beyond the legal employer to persons aiding or abetting the breach, inducing the breach whether by threats or promises or otherwise, being in any way, directly or indirectly, knowingly concerned in, or party to, the breach or conspiring with others to effect the breach.

Combatting wage theft and avoidance strategies

While the reforms above are a commendable attempt to deal with the more egregious forms of exploitation and wage theft, they do not impact on a number of other dubious practices designed to either evade minimum standards or to obtain economic benefits without payment of wages. A handful of such cases have come before the courts in recent years with the courts showing a willingness to contain a number of such practices. The three main forms of conduct to arise and the approach of the courts in each can be briefly summarised.

Classifying workers as contractors

The tactic of attempting to classify workers as something other than employees to avoid protective legislation is a long-existing and well-tried tactic. It need not be discussed here other than to note that the tactic has become increasingly constrained following the requirement, introduced in 2000, that the courts consider the 'real nature' of a relationship. This test focusses on the economic character of the relationship and reflects developments in the case law of the United Kingdom in particular (Anderson et al., 2017). The willingness of the courts to be proactive was demonstrated in *Prasad v LSG Sky Chefs Ltd* (2017), where the Employment Court, in a decision upheld by the Court of Appeal, held that 'contractors' to a labour hire company were in fact employees of the host company. The exploitative character of the relationship was a significant factor in the decision.

When is a worker working?

It is not uncommon for employers to make demands of workers that involve them taking part in required, but unpaid, work activities. Over recent years, the courts have held that a

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number of such activities are work and must be paid. These cases were decided under the Minimum Wage Act and depend on an approach that prohibits 'averaging' and requires that for every hour worked the worker must be paid at least the rate of the minimum wage. The following cases provide examples of unpaid or underpaid work where the courts have held the minimum payment is required: 'sleepovers' at a home for the intellectually handicapped (*Idea Services Ltd v Dickson*, 2011); anaesthetic technicians required to remain on hospital premises and be available on short notice but only paid when actually called back (*South Canterbury District Health Board v Sanderson*, 2017); informal unpaid staff meetings for sales discussions (*Labour Inspector v Smiths City Group Ltd*, 2018); 'donning and doffing' protective work clothing at the end of shifts and at breaks (*Ovation New Zealand Ltd v New Zealand Meat Workers Union Inc*, 2018) and work trials that provide the employer with some economic benefit (*The Salad Bowl Ltd v Howe-Thornley*, 2013).

Holidays

The most dramatic case of underpayment to New Zealand employees, estimated as being as much as NZD2.5 billion, relates to the underpayment of holiday pay. The problem affects employers in both the state and private sectors and primarily impacts part-time, casual or seasonal employees, or where there are variable amounts of overtime. While this particular problem seems to be largely one of systems failure rather than deliberate employer attempts to evade/avoid their liabilities, the various investigations have shown that once these breaches became known many employers did little to remedy them (Teen, 2018). Investigations have also shown attempts by some employers to rort the system, the most common being to minimise various penal payments for statutory holidays, particularly those to employees who would otherwise have worked on the day in question. These payments are higher if a person working the holiday would normally worked on that day compared with a person who is rostered only for the holiday but does not normally work that day. A common practice of fast-food chains was to adopt the interpretation that a worker would only be eligible for a holiday if they had worked the same day over the three preceding weeks. This interpretation has now been held to be incorrect (*Wendco v Labour Inspector*, 2017). More generally, MBIE has initiated a major remediation programme working with payroll providers and employers to attempt to quantify amounts owed.

The problems arose due to a combination of factors – the failure of some payroll staff to properly understand the requirements of the (admittedly complex) Holidays Act, and the inability of electronic payroll systems to deal adequately with the provisions of the Act and particularly the calculations required for quantifying holiday pay. However, it is possibly symptomatic of an issue that may become of much wider importance. A recent article, 'The Hacking of Employment Law' (Alexander and Tippett, 2018), points out ways in which payroll and other software systems can be manipulated to disadvantage employees, including using the way in which time worked is recorded to allow employers to benefit from a considerable amount of unpaid work.

Enforcement

Enforcement of minimum employment entitlements and employment rights in general can often be fraught and difficult. The ability of inspectors is constrained by departmental

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budgets and enforcement priorities. For example, the Holidays Act remediation work discussed above obviously constrains the ability to enforce anti-exploitation legislation. In New Zealand, enforcement by Labour Inspectors is confined to the enforcement of statutory rights and the statutory penal provisions, meaning that actions for contractual breaches above the minimum standards is dependent on the individual – or their union if they are a member – initiating action. Such a course is usually likely to be uneconomic and risks costs awards against the employee if unsuccessful.

Individual enforcement, including the willingness to even approach the Labour Inspectorate, can also be problematical. Access to justice has become an increasingly recognised and complex problem generally, but specifically in the case of vulnerable workers such as migrant workers. As discussed below, the problem is even more acute in the case of at least some groups of migrant workers.

In this article, we will not seek to deal with the specific problem of being able to enforce a judgement against a defendant. The difficulties that are faced in New Zealand, including the abuse of corporate structures, including 'phoenixing', leveraging insolvency laws through prevarication that makes pursing a judgement uneconomical and potential blacklisting are far from unique to it.

MBIE enforcement

Clearly, effective enforcement will be dependent on resourcing. Both the former National Government and the current Labour Government have responded positively to this requirement. The number of Inspectors increased from 41 to 60 between 2014 and 2017 and is intended to reach 110 by 2020. The number of publicly reported enforcement actions over the last 2 years suggests that this increase is resulting in much more effective investigations. The Inspectorate has made a deliberate decision to 'adopt a clear regulatory stance' and to hold 'employers accountable for their breaches' rather than taking a consultative role (Mason, 2017: 54). The removal of employment standards cases from the mediation settlement-based approach to employment disputes that characterise the Employment Relations Act reinforces this approach.

Changes to the rules relating to temporary work visa categories are also under consideration. As this article was being finalised submissions on a consultation paper on such visas had just closed. The proposed changes are not only intended to simplify the visa system but also aim to increase required minimum remuneration levels (MBIE, 2018).

This more aggressive approach has been supported by the courts with considerable emphasis being placed on the need for deterrent sentences or penalties. In *Borsboom (Labour Inspector) v Preet Pvt Ltd* (2016), a full Employment Court considered the approach to penalties in cases involving breaches of employment standards. In its decision, the Court took particular note of recent increases in maximum penalties and Parliament's intention to deter noncompliance. The Court essentially held that each breach of a minimum standard is to be considered separately in assessing a penalty. In one subsequent case, *Labour Inspector v Binde Enterprises Ltd* (2016), this approach resulted in penalties amounting to NZD220,000. In the first case under Part 9A, *A Labour Inspector v Victoria 88 Limited T/A Watershed Bar And Restaurant* (2018), following an agreed Declaration of Breach a banning order of 3 years was imposed as well as a NZD20,000 pecuniary penalty, much of which was paid to affected employees.

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Mason (2017) also notes that current enforcement is increasingly a multi-agency effort involving not only the Inspectorate, but also, for example, Immigration, Inland Revenue and the Companies Office. He gives the example of the Masala group case where an employment investigation expanded to include immigration fraud and tax evasion. In that case, which involved criminal convictions, the provisions of the Criminal Proceeds (Recovery) Act 2009 were activated with NZD8 million being forfeited to the Crown. Similarly, some steps have also been taken at an administrative level to restrict employers in breach of employment standards from obtaining visas to sponsor new workers.[10] Immigration New Zealand is provided with a list of such employers by the Labour Inspectorate and, depending on the seriousness of the breach, listed employers will be stood down from being able to recruit migrant labour for 6 months to 2 years (see Note 10).

Access to justice for migrant workers

While the amendments to the Immigration Act and the Employment Relations Act have improved the legal framework to deal with exploitation, migrant workers still face significant barriers to enforcing their rights in practice (Anderson and Naidu, 2010; Anderson and Tipples, 2014). One of the most significant issues faced by migrant workers in exploitative situations is the dependency on employers for visas and the fear of deportation. As noted by Sissons (2014), where a worker's visa is tied to a particular employer this has the effect of exacerbating existing power imbalances and making the worker unlikely to report exploitative practices to the Labour Inspectorate. Migrant workers themselves have also identified fears of deportation related to their visa conditions as the main barrier to reporting exploitation by employers (Shaw, 2018). Here, it is important to differentiate between the different types of visas available for migrant workers in New Zealand. Those on essential skills work visa are particularly at risk, given that the validity of their visa is dependent on maintaining a job with their current employer. In contrast, those on working holiday visas are not bound to their employers in the same way, and do not share the issue of visa dependency (Stringer, 2016). One issue MBIE could address in its current review is whether visa categories such as the essential skills visa should be tied to a specific employer. However, doing away with this requirement would also have its complications, as restricting a worker's visa conditions to one employer supports the Government's aim of controlling migration flows and employing migrant labour only to alleviate domestic labour shortages.

A second issue for migrant workers is economic dependency on their employers. This creates an access to justice issue, as this dependency acts as a deterrent to reporting exploitation in the workplace. In the Australian context, Berg and Farbenblum (2018) have noted that migrant workers are often both financially dependent on their employer and dubious about finding alternative employment. This would be particularly so where workers have poor levels of English and are therefore limited in their ability to search for and perform alternative employment. This financial dependency is even more accentuated for migrants who are indebted as a result of high recruitment fees for obtaining employment in the first place.

In its report, Caritas Aotearoa New Zealand (2016) identified that a lack of knowledge over New Zealand's employment laws puts migrant workers at a disadvantage,

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making them vulnerable targets for exploitation. This was also noted by Stringer (2016), who found that some migrant workers were not aware of fundamental employment laws, such as the requirement for a written employment contract. As migrant workers cannot be expected to enforce their rights if they do not know what they are, lack of information presents an access to justice issue for these individuals. In this regard, steps that the Government has taken to increase the information available to migrant workers deserves some credit. In particular, the minimum rights of workers are available on the MBIE website in 11 different languages (including English). Nevertheless, it appears that informational barriers still present a significant practical hurdle for some migrant workers being able to enforce their minimum employment standards.

Finally, the pressures acting on migrant workers are obviously complex. While many migrant workers will recognise the exploitative practices of their employer as wrong, some will also feel bound by personal or family loyalties. Berg and Farbenblum (2018) have noted that in Australia, often the employer will be a friend or relative, thus making the reporting of that person (which may result in hefty fines or criminal sanctions) a difficult decision for migrant workers from a personal perspective. The same factors are also applicable domestically. In a case involving migrant worker exploitation at a restaurant in New Zealand, the Employment Relations Authority commented that complex family and personal loyalties resulted in the employees in question feeling bound to their employer thus being reluctant to report her behaviour, despite her exploitative practices (*Nguyen v Hue Kim Thai Ta t/a Little Saigon Restaurant*, 2014). While it is important to be aware of this difficulty, it is hard to see what solutions the Government could propose to address such an interpersonal issue.

Conclusion

With the exception of EEZ fishing worker exploitation, wage theft in New Zealand does not appear to be systemic although in at least some industries a relatively deep culture of exploitation has developed, either in direct employment or by turning a blind eye to the exploitative practices of labour supply companies. Labour-hire employment in particular allows the beneficiary of the labour to engage in exploitative behaviour with minimal risk. Decided cases and media reports suggest that exploitation is most prevalent in the lower end of the tourism sector, the hospitality industry and in some sectors of agriculture, especially viticulture/horticulture. The most serious cases appear to involve migrant workers and workers on short-term visas. In the restaurant sector, exploitation often involves employers of the same ethnicity.

While reforms in the fishing industry solution were slow in coming – and the eventual resolution had more to do with industry reputation, market damage and industry politics than a concern for labour conditions – the situation changed in the period leading up to and following *Playing by the Rules.* There was a clear political consensus for reform. The National Government, while conservative and preferring a low-wage economy, was prepared to actively reinforce minimum standards both legislatively and by funding increased enforcement. In doing so, it was generally supported by the industry lobby groups – most of the industries facing problems tended to be small employers who resented being undercut and saw such exploitation as potentially threatening their use of migrant labour. While the zero-hour reforms hinted at a limit to National's willingness to

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protect conditions, these reforms did not undermine existing minimum standards, although neither did they advance them. Given the reforms of 2016 seem reasonably robust and enabling of both successful prosecutions and enforcement actions, it is unlikely that the Labour Government will initiate further reform; it has already committed to substantially increase the number of Labour Inspectors.[11]

Currently, the most serious barrier to preventing exploitation is not the lack of legal remedies but the difficulties faced in accessing and effecting those remedies. While the Labour Inspectorate have successfully dealt with a number of claims, their resources are necessarily limited and must be prioritised. If exploitation is to be successfully fought, or at least significantly constrained, at least two linked reforms are required: victims of exploitation must be provided with safe avenues of complaint and enforcement options must be expanded. Both reforms will be difficult and to be effective there must be a smooth path from complaint to enforcement.

The difficulties preventing access to justice have been noted above and the problem of access to justice is clearly recognised as an issue (New Zealand Work Research Institute, 2018). It is also clear that enhancing and ensuring access poses considerable practical difficulties, in particular developing avenues for access that can gain the confidence of migrant communities and ensure the protection of complainants. While steps are being taken to involve organisations such as Community Law Centres and Citizens Advice Bureaus, as well as some union initiatives, progress is slow (Greenwood and Rasmussen, 2018). However, even if complainants do come forward, the costs of individual enforcement actions are likely to be prohibitive, and even if successful any award is likely to be difficult, if not impossible, to enforce.

It is unfortunate that the more effective remedies in Part 9A of the Employment Relations Act and those in Section 352 of the Immigration Act may only be pursued by Labour Inspectors. A case could clearly be made to allow private enforcement where the Inspectorate fails to act. Private prosecutions are permitted under the Health and Safety at Work Act if the Regulator does not take, or does not intend to take, action under that Act.

In conclusion, the 2016 reforms have laid a firm legal foundation for dealing with the problems of wage theft and worker exploitation. That foundation is, however, of limited use unless it is capable of effective enforcement and poses a realistic threat to offending employers and individuals. Effective implementation remains the Achilles heel of the law.

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Notes

1. For a summary of practices by industry, see Stringer (2016), Table 3.2 at p. 21.
2. While the Prostitution Reform Act 2003 decriminalised sex work in New Zealand the Immigration Act makes it unlawful for persons with a non-resident visa to provide such services.

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3. For a repository of resources on this issue, see the website of Dawson & Associates (2015): https://www.maritimelaw.co.nz/blog-item/281/ (accessed 11 March 2019)
4. On 1 May 2016, it was reported that 12 vessels had either reflagged or were in the process of so-doing and nine had elected not to do so (Kirk, 2016).
5. See statement of New Zealand First Fisheries Spokesperson Richard Prosser (2017), MP and statement of obligations at Immigration New Zealand (2019b). Employers are obliged to provide workers an approved statement of their rights under New Zealand law.
6. Statistics New Zealand, 2012. The figures from this survey varied little from the 2008 Survey. This survey is somewhat irregular and was last carried out in late 2018. The results are expected to be released in late June 2019.
7. The essential skills visa ties workers to a named employer and location. See Immigration New Zealand (2019a) for a list of possible visas.
8. United Nations Human Rights, Office of the High Commissioner (2000). New Zealand policy is not to ratify international agreements until such time as the law accords with the instrument in question.
9. Unlike the situation in the High Court, District Court sentencing notes are not normally published. Reports of District Court convictions are, therefore, based on news reports.
10. *Employers who have breached minimum employment standards* (Employment New Zealand, 2019) sets out the criteria used and has a list of noncompliant employers.
11. The Labour-led coalition's proposed reforms focus on two issues: pay equity and the introduction of industry standard agreements, which will effectively build on the somewhat more solid floor of minimum standards than they inherited.

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