MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

Minister	Hon Brooke van Velden	**Portfolio**	Workplace Relations and Safety
Title of Cabinet paper	Providing greater certainty for contracting parties	**Date to be published**	14 October 2024

List of documents that have been proactively released		
Date	**Title**	**Author**
September 2024	Providing greater certainty for contracting parties	Office of the Minister for Workplace Relations and Safety
28 August 2024	Providing Greater Certainty for Contracting Parties ECO-24-MIN-0179 Minute	Cabinet Office
15 August 2024	Regulatory Impact Statement: Contractors – Providing greater certainty for contracting parties	MBIE
11 July 2024	Briefing: Contractors – Options for an exclusion that gives more weight to intent	MBIE
7 June 2024	Briefing: Initial analysis of Proposal to put more weight on 'intention' when assessing employment status	MBIE
13 May 2024	Aide Memoire: Meeting with Freightways on 16 May 2024	MBIE
29 April 2024	Aide Memoire: Meeting with Uber on 1 May 2024	MBIE
19 April 2024	Briefing: Scope of policy work on the contractor/employee boundary	MBIE
27 March 2024	Aide Memoire: Meeting with NZ Post on 28 March 2024	MBIE
19 December 2023	Briefing: Issues related to the definition of employee	MBIE

Information redacted **YES**

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reasons of privacy of natural persons, confidential advice to Government, international relations, information subject to an obligation of confidence, free and frank expression of opinion and legal professional privilege.

Regulatory Impact Statement: Contractors – Providing greater certainty for contracting parties

Coversheet

Purpose of Document	
Decision sought:	Analysis produced for the purpose of informing Cabinet decisions
Advising agencies:	Ministry of Business, Innovation and Employment
Proposing Ministers:	Minister for Workplace Relations and Safety
Date finalised:	15 August 2024

Problem Definition

If a worker has been hired on a contract for services (as a contractor) but considers the real nature of their relationship with the hiring business is one of employment, they can seek a decision on their status through the employment system's dispute resolution system; the Employment Relations Authority (the Authority) and the Employment Court (the Court).

The ability for a worker to challenge their status enables workers who are misclassified to seek a determination of their correct employment status but also create uncertainty for all hiring businesses using contracts for services. Even if a business has a genuine reason for hiring a worker on a contract for services and the worker agrees to the terms offered, the worker can challenge their status at any time.

Employment status challenges are costly to both workers and businesses. To avoid the uncertainty of a potential challenge, businesses could be disincentivised from offering contract work, offering terms and conditions to contractors (in case they are seen as an indication of employment status), or from utilising particular business models in case of the risk of challenge.

Executive Summary

Workers can be hired on contracts of service (employment) or contracts for services (contracting). Businesses may choose to use a contract for service, where there is a temporary need (eg for a specific project), or to obtain specialist skills. An employment model may be used where a business needs a greater degree of flexibility in the tasks the worker can undertake in the organisation, as well as control over their work.

In most situations it will be clear whether a worker is a contractor or an employee but in some circumstances it will not. Workers can challenge their employment status through the Authority and the Court who assess the 'real nature of the relationship' guided by a series of tests that have developed under the common law (section 6 of the Employment Relations Act 2000 (ER Act)).

The aim of allowing a worker to challenge their employment status is to prevent a hiring business from either deliberately or inadvertently misclassifying employees as

contractors, as this could result in the worker not receiving the rewards or protections due if they were properly classified. This can create uncertainty for hiring businesses using contracts for services.

It is difficult to gauge the size of the problem. There were an average of 17 Authority and Court employment status cases per year in the eight years from 2016 to 2023. This may not reflect the true number of status disputes, as we do not have data on how many other cases are settled outside dispute resolution services, or where resolution is not pursued.

This is a very small number of cases given the number of contractors operating in New Zealand (165,500). However, there may also be suppressed demand for contracting arrangements if hiring businesses are not pursuing business models or hiring opportunities. We have no information about the size of this potential supressed demand. Judgement about its size and the associated potential benefits of enabling it to occur will be influential in option evaluation.

The costs from actual or potential challenges could be reduced through a mechanism to increase certainty by giving greater weight to intention in the case of genuine contracting arrangements, while still enabling misclassified employees to challenge their employment status (the objective).

We were asked to consider an option (option 2 in this RIS) that creates an exclusion from employee status and to test the option against the objective. Option 2 includes the following criteria. If these are met, a worker would be determined to be a contractor and unable to challenge their status under the existing test under section 6 of the ER Act:

- Criterion one (intent criterion): A written agreement with the worker that specifies they are an independent contractor rather than an employee.
- Criterion two (restriction criterion): The hiring business does not restrict the worker from working for another business (including competitors), except while they are completing paid work for the hiring business.
- Criterion three (availability criterion): The hiring business does not require the worker to be available to work on specific times of day or days, or for a minimum number of hours.
- Criterion four (termination criterion): The hiring business does not terminate the contract if the worker declines an additional specific task or engagement offered (beyond what they have already agreed to do under the existing contract).

We were also asked to suggest any variations to option 2 that might increase the effectiveness of meeting the objective. We investigated five further options (options 3 to 7) that vary the criteria of the exclusion under option 2. The variations result in exclusions that vary by the type and breadth of business models that would be able to access the exclusion. Where businesses do not meet the exclusion criteria, workers would continue have their employment status assessed under the full test in section 6 of the ER Act. The Cabinet paper recommends Cabinet consider two of these variations:

- Option 5 (Option One in the Cabinet paper): Amend the availability criterion so that it could be met if the worker is not required to be available to work OR the worker is able to sub-contract the work.
- Confidential Advice

We also considered add-ons to the options relating to the provision of information, and opportunity to seek advice, in the written agreement (criterion one). These options can be

combined with any of the exclusion options. These would strengthen the options but are not expected to have a major impact on their overall effectiveness.

The benefits and costs of options 2 to 7 compared with the status quo are uncertain and difficult to quantify. It is not possible to predict in advance how many businesses would shift their hiring behaviour to access the exclusion, and what this would involve. This makes a definitive judgement difficult.

We consider that the risks of broadening the situations where a worker is unable to use the full test under section 6 of the ER Act to challenge their employee status outweighs the potential benefits of increased certainty for businesses who are able to meet the exclusion criteria. In particular, we are concerned that the exclusion could result in some hiring businesses restructuring their existing business models to offer future workers contracts for services in order to reduce the rewards and protections offered to those workers.

While we consider the exclusion options will enable intent to be given greater weight in situations that meet the exclusion criteria, and that this will increase certainty for those parties, the size of the potential benefits resulting from more expansionary behaviour of hiring businesses into contracting is unclear.

We consider there is a more tangible risk that some businesses change their hiring activity to use contracts rather than employment that results in workers receiving lower rewards and fewer protections than they would if they were properly classified, particularly for work currently undertaken by casual employees.

Given the uncertainties regarding the costs and benefits of options 2 to 5, we prefer the status quo. Confidential Advice

Limitations and Constraints on Analysis

The commitment to give greater weight to the intention of contracting parties is part of the ACT – National Coalition Agreement.

As mentioned above, we were asked to consider a particular option (and variations of that option) and test it against the objective '*to ensure parties to a contract for services have their original intentions upheld, while minimising risks of exploitation*'.

The timeframe to undertake the analysis has limited our ability to assess a broader range of options. This includes for example, potential changes to the statutory definition of 'employee', or 'carve outs' for particular sectors or industries from the section 6 ER Act definition of employee.

There is also limited data available about contractors in New Zealand, including limited demographic data and information on which industries and sectors they work in.

As mentioned above, the benefits and costs of the options are uncertain, difficult to quantify, and rely on understanding a shift in hiring behaviour which is not possible to predict in advance.

Stakeholder consultation was targeted and limited by the time available. Consultation focused on stakeholders' views of option 2 and potential ideas for variations, rather than other options or their view of the problem that was trying to be addressed. We have not

had the opportunity to consult stakeholders on the Treaty of Waitangi implications of implementing an exclusion.

Responsible Manager(s) (completed by relevant manager)

Alison Marris
Manager, Employment Standards Policy
Ministry for Business, Innovation and Employment

15 August 2024

Quality Assurance (completed by QA panel)

Reviewing Agency:	Ministry of Business, Innovation and Employment (MBIE)
Panel Assessment & Comment:	MBIE's Regulatory Impact Assessment review panel has reviewed the Regulatory Impact Statement (RIS) prepared by MBIE's Employment Standards policy team on options for an exclusion that gives more weight to intent for contracting parties. We assessed the RIS as 'partially meets' against the quality assurance criteria. It is not possible for this RIS to achieve a rating of 'meets' because of data limitations, constraints around consultation and the ability to present a wider scope of options to address the perceived problem. However, the team have stated these constraints and limitations clearly and indicated their impact on the information presented. We consider this clarity is sufficient to enable decisions on the options presented in this proposal.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

Contractors make up about 5 percent of the workforce

1. Most workers in New Zealand are employees. Most entities that hire workers will do so as employment. Based on the December 2023 Household Labour Force Survey, about 82 percent (2.4 million) of workers are employees and 4.4 percent (105,000) of these are casual employees.[1] A further 12 percent (355,000) of workers are self-employed with no employees. The remainder are employers (5.6 percent) (166,000) or other (0.9 percent).[2] Contractors are a sub-set of the 'self-employed with no employees' category.

2. In the 2018 Survey of Working Life, just over 5 percent of working New Zealanders reported working as self-employed contractors. At that time this equated to nearly 144,000 workers.[3] Assuming the proportion has not changed, this is equivalent to around 165,500 people as at the December 2023 quarter. The majority of contractors are aged 35-64 (about 70 percent) and 10 percent of contractors are aged 65 or over.[4]

3. In the 2018 December quarter, nine out of ten contractors said they were satisfied or very satisfied with their jobs. Additionally, nine out of ten contractors said they would prefer to continue being self-employed rather than have a paid job working for someone else.[5] This aligns with an MBIE survey in June 2022, in which 66 percent of respondents said they enjoy their independence as a contractor.[6]

There are benefits to both employment and contracting

4. There are benefits to both employees and employers from an employment relationship. Employers benefit from an employment relationship by being able to hire workers who become familiar with their processes. There is also often a greater degree of flexibility in terms of the tasks that the worker can undertake within the organisation than separately contracting with someone each time a new task is undertaken. Employees also benefit from an employment relationship including entitlement to minimum standards, protection from unjustified dismissal and a structured regulatory framework.

5. Entities sometimes hire workers as contractors for a variety of reasons. They may need specialist skills on an infrequent basis such as a plumber or electrician. A business may be hiring the services of both the worker and the equipment that they use/own such as agricultural equipment, or truck deliveries. Workers may prefer to operate as contractors because of the flexibility and variety of work that contracting can provide.

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[1] The following industries employed more than 10 percent of casual employees: Accommodation and Food Services 16,000 (15.2 percent); Retail Trade 14,500 (13.8 percent); Health Care and Social Assistance 12,900 (12.3 percent); Education and Training 11,300 (10.7 percent) - StatsNZ Household Labour Force Survey, 2023. Approximately 30 percent of all causal employees work in Retail Trade and Accommodation and Food Services. These industries had lower average median hourly earnings in 2023 ($25/hour) for all employees (ie not only casual employees) compared to the median hourly earnings for all employees across all industry groups ($31.66/hour).

[2] Figures taken from StatsNZ Household Labour Force Survey, 2023 Q4.

[3] One in 20 employed New Zealanders are contractors; Survey of working life StatsNZ, 1 July 2019, conducted between October and December 2018.

[4] Survey of Working Life, 2018 – self reported data.

[5] One in 20 employed New Zealanders are contractors; StatsNZ, 1 July 2019.

[6] https://www.mbie.govt.nz/assets/better-protection-for-contractors-summary-of-public-consultation.pdf, page 7.

The regulatory systems within which employment and contracts for service operate are different

6. Employment relationships (contracts of service) are governed by employment law. Employment protections are largely based on the assumption of an imbalance of bargaining power between the parties, where employers are considered to have a high degree of control over their employees. Parties to an employment relationship have a broad range of obligations to deal with each other in good faith.

7. Employees' rights include the right to: a written employment agreement; be paid at least the minimum wage; rest and meal breaks; various types of leave, including annual and public holidays, sick and bereavement leave; the right to join a union that can bargain collectively for wages and other terms and conditions of work; be treated fairly; and a specialised dispute resolution system (personal grievances).

8. Contractual relationships (contracts for services) between the hiring business and workers are governed by contract, commercial and competition laws. These laws include the Fair Trading Act 1986, Commerce Act 1986 and Contract and Commercial Law Act 2017. A 'contract for services' is an arm's length contract between two independent entities. Contractors accept the risks and benefits of being in business on their own account. In accepting these risks, contractors may be able to profit in a way employees cannot, for example by profiting from cost savings and efficiencies in their business.

Identifying which regulatory regime applies in a given situation

9. Most of the time it is clear whether a worker is an employee or a contractor. They will have a written agreement that specifies the rights, responsibilities and obligations of the parties which will make it clear whether they are an employee or a contractor. However, there will be some situations in which it is not clear. The lack of clarity itself is not necessarily an issue but there is an issue if that lack of clarity or the incorrect classification is used to alter the rewards or protections that a worker would receive if they were properly classified. Some examples of situations that may arise include:

    a. **A grey area** – It could be genuinely unclear which category the worker is in. The arrangement may have some characteristics of employment and some characteristics of contracting.

    b. **Misclassification by the hiring business** – It may be that the nature of the relationship is one of employment but it is stated to be a contract to avoid paying some of the minimum employment entitlements in an attempt to lower labour costs or reduce the requirements to follow processes, eg termination. For example, in a 2023 case, a 16-year-old completing a transition to work programme at school had been hired on a contract for services by a scaffolding company, without a written agreement.[7]

    c. **Genuine contractors who nevertheless challenge their status** – The worker may be engaged on a contract for services but as a result of a dispute may realise that the dispute resolution mechanisms for contractual disputes in the civil jurisdiction are limited and costly to initiate. They may try to represent their relationship as one of employment to make use of the greater protection and more accessible dispute resolution system available to employees.

    d. **Relationship could shift over time** – A working relationship could begin as a contract for services but could shift over time to having more characteristics of

[7] [2023] NZERA 655, https://determinations.era.govt.nz/assets/elawpdf/2023/2023-NZERA-655.pdf

employment. This could arise because often parties do not review the arrangements as the work evolves.

e. **Contractors seek to increase their bargaining power** – even where workers are involved in genuine contracting arrangements, they may be faced with unfair contract terms or face inequality of bargaining power. These workers have sought to have the regulatory regime altered to enable them to access some of the benefits of employment such as the ability to collectively bargain while remaining contractors. This was enabled for screen industry workers through the Screen Industry Workers Act.

The regulatory framework for determining employment status has evolved through common law

10. The legislative employment protections are only available to workers who meet the definition of an employee in section 6 of the ER Act – which is a person who is "*employed by an employer to* do any work for hire or reward under a contract of service." Some workers are specified as always being employees such as homeworkers.[8] In contrast, workers in the screen industry have a default position that they are only employees if their written agreement specifies they are employees.[9]

11. The ER Act provides for the ability for a person to challenge their employment status which effectively means to ask the Authority or the Court to determine whether they meet the definition of 'employee' under the Act.

12. Over time, a series of tests have been developed under common law which guide how the Authority and Court determine whether a worker is an employee or a contractor:[10]

    a. **The intention test**: the type of relationship that the parties intended is relevant but does not determine the true nature of the relationship on its own. Intention can normally be worked out from the wording in parties' written agreement (if there is one).

    b. **The control vs independence test**: the greater the control exercised over the worker's work content, hours and methods, the more likely it is that a person is an employee. A worker with greater freedom to choose who to work for, where to work, when to work, the tools used and so on, is more likely to be a contractor.

    c. **The integration test**: this looks at whether the work performed by a person is fundamental to the employer's business. The work performed by a contractor is normally only a supplementary part of the business.

    d. **The fundamental/economic reality test**: this looks at the total situation of the work relationship to determine its economic reality. A contractor is a person in business on their own account.

13. In determining the intention of the parties, the Authority or the Court will have regard to the written agreement, if there is one. Depending on the circumstances of a case, intention may also be assessed through evidence such as texts and emails sent by the parties and by interviewing witnesses.

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[8] Section 6(1)(b)(i) of the Employment Relations Act.

[9] Section 4 of the Screen Industry Workers Act 2022.

[10] The Supreme Court's decision in Bryson is the leading authority on s 6 and confirmed the four tests as the appropriate measures by which to determine the existence or not of an employment relationship (SC CIV 24-2004 [2005] NZSC 34).

14. However, the Authority and the Court must look past a written agreement to consider other evidence that indicates the real nature of the relationship between the parties, as the ER Act requires the court to "*consider all relevant matters, including any matters that indicate the intention of the persons; and is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*" The effect of this can be that considerable weight is given to the other three tests above and these can override the intention of the parties.

15. There have been some judicial comments that suggest the Authority and the Court may give greater weight to intention where the worker has high bargaining power and may take a more protective approach (ie give weight to the other tests) where bargaining power is less even.[11]

16. The resulting finding is restricted to the individual(s) concerned, even if there are other workers in a similar situation.

What is the policy problem or opportunity?

17. The aim of allowing a worker to challenge their employment status is to prevent a hiring business from either deliberately or inadvertently misclassifying employees as contractors if this results in the worker not receiving the rewards or protections due if they were properly classified. This misclassification can occur either from the outset (problem b in paragraph 9) or if the relationship changes over time (problem d in paragraph 9).

18. However, the ability for a worker to challenge their status can create uncertainty for hiring businesses using contracts for services. Even if a business has a genuine reason for hiring a worker on a contract for services and the worker agrees to the terms offered, the worker can challenge their status at any time (problem c in paragraph 9).

19. Employment status cases can be costly for both the worker and the hiring business as the Authority and the Court have to look at the relationship as a whole which involves collation and presentation of a large amount of contextual information.

20. There are also situations where a hiring business may be genuinely unsure what the appropriate approach is for the proposed work situation (problem a in paragraph 9). To avoid this uncertainty, the hiring business may not go ahead with the work or may take a conservative and potentially more costly approach by engaging workers as employees.

21. We have also heard anecdotally from employer representatives that concern about potential challenges can reduce willingness to provide additional terms and conditions to contractors if they might be seen by a court as an indication of employment status. So contracted workers may be missing out on additional benefits as a result of the uncertainty arising from the potential to challenge employment status.

22. The policy opportunity is to provide greater certainty to hiring businesses who hire workers as contractors (reduce the risk of problems a, c and d in paragraph 9) while not increasing the risk that workers are misclassified (problem b).

What is the size of the problem?

23. There were an average of 17 Authority and Court employment status cases per year in the eight years from 2016 to 2023. In 46 percent of the Authority decisions, the worker was found to be a contractor and in 2 percent they were found to be both (ie the status changed

[11] For example [2010] NZEMPC 22 ARC 5/09 at https://www.employmentcourt.govt.nz/assets/2010-NZEmpC-22-The-Chief-of-Defence-Force-v-Ross-Taylor.pdf.

overtime). In 38 percent of the Court decisions, the worker was found to be a contractor.[12] There were 46 awards finalised in the timeframe, at an average of $21,400 each. In each of the four years from 2019/20 to 2022/23, Employment Services provided mediation services in relation to between 143 and 156 employment status disputes per annum.

24. Some of the uncertainty comes from poor hiring practices. Out of 146 Authority and Court cases from 1 January 2016 to 31 May 2024, there were 93 cases (64 percent) where the worker did not have a written agreement. Of the 41 employment status cases where there was a written agreement, the worker was found to be a contractor 61 percent of the time. Of the 93 cases where there was no written agreement, the worker was found to be a contractor 43 percent of the time.

25. Available data on numbers of court and mediation cases may not reflect the true number of status disputes, as we do not have data on how many other cases are settled outside dispute resolution services, or where resolution is not pursued.

26. Overall, it is likely that the number of employment status cases is very small compared with the number of workers hired under contracts for services. While these are expensive cases for those involved, the overall costs in the system are low.

27. The other potential costs such as firms choosing not to hire workers as contractors are unclear. We have not identified a way of calculating these potential costs as they are not observable. If you think that these potential costs are high, you may consider that action to give greater weight to intent will be worthwhile. If you do not consider those potential costs to be high, the drivers for change appear to be more limited.

What objectives are sought in relation to the policy problem?

28. The objective for the policy problem is "*to ensure parties to a contract for services have their original intentions upheld, while minimising risks of exploitation.*"

29. The current ability for any contracted worker to challenge their employment status has two impacts:

    a. It allows a worker to rectify situations where they have been misclassified and they have not received the rewards due if they were properly classified.

    b. It creates uncertainty for hiring businesses that use a contract for services.

30. The objective is to shift the balance so that hiring businesses, in situations which have characteristics of genuine contracting arrangements, can rely on the intent specified in their written contract, while still enabling misclassified employees the ability to challenge their employment status.

[12] There were eight Employment Court cases over this time period.

Section 2: Deciding an option to increase the weight given to intention in employment status challenges

What decision criteria will be used to compare options to the status quo?

31. We assessed the options against the following decision criteria:

    a. effectiveness of ensuring parties to a contract for services have their original intentions upheld by placing greater weight on intention;

    b. effectiveness of minimising risks of exploitation;

    c. workability, implementation, cost or other considerations; and

    d. consistency with international obligations.

What scope will options be considered within?

32. The commitment to give greater weight to the intention of contracting parties is part of the National – ACT Coalition Agreement.

33. We have assessed the status quo alongside an option that gives greater weight to the intention of the contracting parties by creating an exclusion from the section 6 test in the ER Act to assess whether a worker is an employee. We have also assessed five variations of the exclusion option.

34. There are also two 'add-on' options relating to the provision of information and advice that we have assessed. These can be combined with any of the exclusion options.

35. The constraints set out in the 'Limitation and Constraints on Analysis' section of the RIS have limited our ability to assess a broader range of options, for example:

    a. Potential changes to the statutory definition of 'employee', for example to alter the weight given to intention among the various common law tests when the Authority and Court assess employment status.

    b. 'Carve outs' for particular sectors or industries from the definition of employment in section 6 of the ER Act, such as are currently in place for screen production workers, real estate agents and sharemilkers.

    c. Non-regulatory options to improve clarity and understanding among the parties about when the different types of hiring arrangements should be used and the importance of a suitable written agreement.

Stakeholder views of options

36. We consulted with a targeted set of stakeholders on their view of option 2, including potential impacts. Feedback was mixed. Stakeholders including BusinessNZ, Uber and the Employers and Manufacturers Association supported option 2. The New Zealand Council of Trade Unions (CTU), CTU affiliates and Prodrive did not support option 2.

37. The CTU supported the recommendations of the Tripartite Working Group on Better Protections for Vulnerable Contractors. They saw a clear risk that casual employment relationships could be captured by the exclusion.

38. CTU and its affiliates that we met with considered that other criteria could better capture genuine contracting relationships, such as whether the contractor had the ability to add

value to their business, whether the work could be sub-contracted or whether the work was being conducted independently.

39. **Appendix Two** provides a high-level summary of the stakeholder views and we have provided information in the options analysis where relevant.

What options are being considered?

40. We consider the following options in the RIS. Options 3 to 7 vary the criteria of the exclusion under option 2 (these are set out in full under the description of option 2).

- Option 1: Status Quo - No change to the section 6 test to determine employment status under the Employment Relations Act.
- Option 2: Establish an exclusion with four criteria that must be met, that gives more weight to intent.
- Option 3: Include a fifth criterion that the worker is able to sub-contract the work.
- Option 4: Replace the availability criterion with a criterion requiring that the worker is able to sub-contract the work.
- Option 5 (*Option One in the Cabinet paper*): Amend the availability criterion so that it could be met if the worker is not required to be available to work OR the worker is able to sub-contract the work.
- Option 6: Amend the availability criterion so that it could be met if the worker is not required to be available to work OR the worker can set their own rate.
- Confidential Advice

41. We also consider options relating to the provision of information and advice. These options can be combined with any of the above exclusion options.

- Option A: Specify a minimum set of provisions that the written agreement must include (eg that the worker will not have access to full employee entitlements and are responsible for paying their own tax and Accident Compensation Corporation (ACC) levies)
- Option B: Provide reasonable time to seek advice.

Options being assessed

Option 1 – Status quo: No change to the test under section 6 of the Employment Relations Act

42. Description: The status quo option involves no change to the 'real nature of the relationship' test under section 6 of the ER Act to determine whether a worker is an employee or a contractor. The test will continue to evolve under the common law.

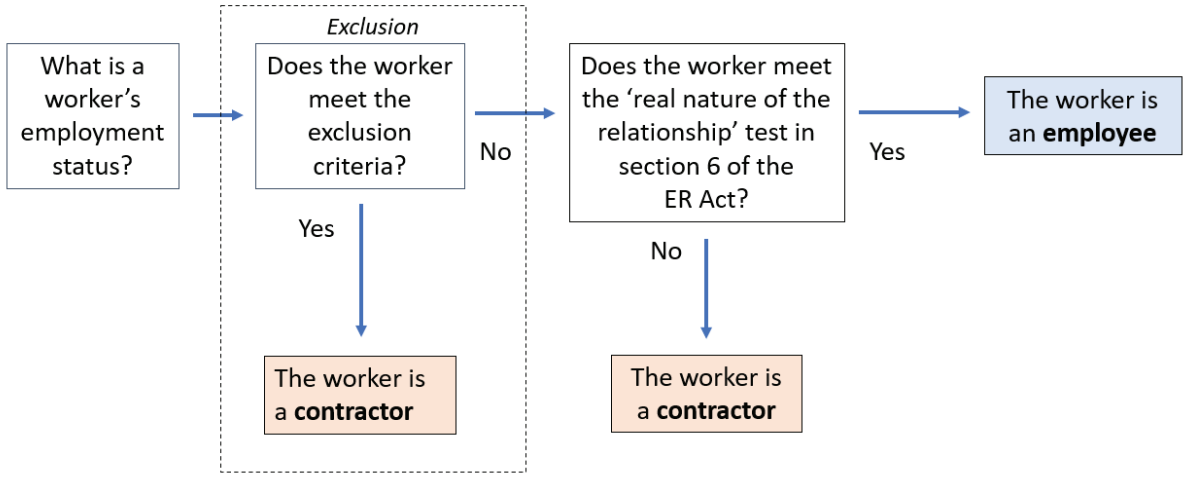
43. The 'intention of the parties' is one of the four tests that has been developed under section 6 of the ER Act. Under this test, the wording of a written agreement is not determinative of intention. The four tests are considered as a whole to determine the 'real nature of the relationship' of the parties. As described in the 'Problem Definition' section, this can create uncertainty for businesses about the nature of the relationship they have used for their business model.

44. The status quo gives less weight to intent compared with the situations that are captured by the exclusion criteria in the options assessed below. For situations that do not meet the exclusion criteria, the status quo will apply. The status quo enables workers who consider that they have been misclassified to challenge their employment status.

Option 2 – Establish an exclusion that gives more weight to intent

45. Description: Option 2 would establish an 'exclusion' from the statutory test of employee in section 6 of the ER Act for contractual relationships that met the specified exclusion criteria. For contractual relationships that do not meet those criteria, the Authority or Court would apply the existing 'real nature of the relationship test' in section 6 to determine whether the worker was an employee.

Figure one - How the exclusion would work with the current test



46. Option 2 includes the following criteria. If these are met, a worker would not be able to have the real nature of the relationship assessed under section 6 of the ER Act:

- Criterion one (intent criterion): A written agreement with the worker that specifies they are an independent contractor rather than an employee.
- Criterion two (restriction criterion): The hiring business does not restrict the worker from working for another business (including competitors), except while they are completing paid work for the hiring business.
- Criterion three (availability criterion): The hiring business does not require the worker to be available to work on specific times of day or days, or for a minimum number of hours.
- Criterion four (termination criterion): The hiring business does not terminate the contract if the worker declines an additional specific task or engagement offered (beyond what they have already agreed to do under the existing contract).

47. Further information on the intended effect of the criteria is set out at **Appendix One**.

48. Option 2 would increase the weight given to intention, compared to the status quo, for businesses whose working relationships met the criteria as there is a smaller set of factors that can be considered, one of which (the intent criterion) is clearly linked to intent.

49. The exclusion is likely to have relatively a narrow application, as it would not be accessible to contracting models where the business requires the worker to be available (the availability criterion). The exclusion criteria under option 2 are more likely to be met by task-

based platform work and product focused contracts (ie where the worker is contracted to provide a product or deliverable by a specified date).

50. In consultation, Retail NZ and NZ Post considered that it would be difficult for their business models to meet the availability criterion. Employment lawyers we spoke to also considered that businesses would want to change their model to meet the exclusion but many could struggle to meet the availability criterion.

51. For all options, businesses in the exclusion would be able to provide additional benefits with less risk that it would impact the status of the worker (if challenged).

52. Option 2 is likely to increase the risk of misclassification compared with the status quo as businesses may be able to offer some roles that are currently considered to be employment relationships as a contracting arrangement. In particular, roles that are currently considered casual employment relationships would be likely to meet the three substantive exclusion criteria (criteria two to four), as flexibility is the key defining characteristic of casual employment relationships. The potential unintended consequence is that some employers of casual employees could change their hiring practices to fit within the exclusion and therefore move outside of the employment system.

53. There are benefits to employment relationships for employers so many hiring businesses will continue to use casual employees. If some casual jobs are switched to a contract model, there may be little difference for some workers. For example, if the pay rate compensates them for the employment-related entitlements they had received and for the administrative costs of dealing with their own tax, ACC levies and potential liabilities. However, some may struggle with the requirements of running their own business, particularly if the contract does not adequately compensate or provide reward for the costs and benefits associated with contracting. This risk is more likely in situations where there is unequal bargaining power. The size and significance of this issue depends largely on how the labour market responds. The CTU saw a clear risk that casual employment relationships could be captured by the exclusion.

54. Confidential Advice

Option 3 – Include a fifth criterion that the worker is able to sub-contract the work

55. Description: Option 3 adds a fifth criterion to the test set out under option 2, which requires the worker to be able to sub-contract the work (sub-contracting criterion).

56. Freightways and NZ Post considered that the availability criterion should be amended to include an alternative where a business could still meet the exclusion if the worker was able to sub-contract the work. While option 3 adds sub-contracting as a criterion, option 4 replaces the availability criterion with a sub-contracting one and option 5 provides sub-contracting as an alternative to the availability criterion.

57. Option 3 is the narrowest exclusion as businesses need to meet all five criteria. It could only be used when there is no control over when the worker is available or who is delivering the product.

58. The addition of this criterion would better target the exclusion to clear-cut contracting arrangements, compared to other options (eg where a product is being delivered without any controls over when and who is delivering it) which would minimise the risk of exploitation. The option would limit the ability for businesses to change their hiring practices to fit the exclusion for roles that would be considered an employee relationship under the current test.

59. It is unclear whether a sub-contracting criterion would be effective (in the absence of the availability criterion) in limiting the exclusion to genuine contracting arrangements. Confidential Advice This also applies in relation to options 4 and 5.

60. In particular, casual employment arrangements are less likely to be expected to meet the sub-contracting criterion (under this option or option 4) reducing the risk of misclassification for these types of working relationships.

Option 4 – Replace the availability criterion with a criterion requiring that the worker is able to sub-contract the work

61. Description: Option 4 replaces the availability criterion under option 2 with a sub-contracting criterion.

62. Option 4 would change the types of business models that could meet the criteria. Business models that require the worker to be available at specified times but allow to the work to be sub-contracted would meet the exclusion criteria (eg potentially some courier models, as long as they met the other criteria).

63. Business models that do not require control around when someone is available, and do not allow the worker to sub-contract the work, would not meet the exclusion criteria (eg platform models such as Uber, which do not allow sub-contracting).

64. The overall impact of whether this would mean more business models could potentially utilise the exclusion compared to option 2 is unclear.

65. In the absence of the availability criterion, it is unclear whether the sub-contracting criterion would be effective in distinguishing between employee and contracting relationships.

Option 5 (Option One in the Cabinet paper) – Amend the availability criterion so that it could be met if the worker is not required to be available to work OR the worker is able to sub-contract the work

66. The availability criterion (ie the business does not require the worker to be available to work specific times, days or minimum hours) has the biggest impact on the breadth of business models that could use an exclusion. Confidential Advice

67. Description: Option 5 amends the availability criterion under option 2 so that it could be met if the worker is not required to be available to work OR the worker is able to sub-contract the work.

68. A broader range of contracting arrangements could access the exclusion under option 5, as it would include the types of business models that could utilise the exclusion in both options 2 and 4.

69. As mentioned under option 2, roles that are currently considered casual employment relationships would be likely to meet the three substantive exclusion criteria (criteria two to four), as flexibility is the key defining characteristic of casual employment relationships. In

addition, as mentioned under option 4, it is unclear whether the sub-contracting criterion would be effective in distinguishing between employee and contracting relationships.

70. It is difficult to quantity these impacts as it depends on how the labour market responds.

Option 6 – Amend the availability criterion so that it could be met if the worker is not required to be available to work OR the worker is able to set their own rate

71. Description: Option 6 amends the availability criterion under option 2 so that it could be met if the hiring business does not require the worker to be available to work OR the worker is able to set their own rate (this is intended to be used as a proxy for higher bargaining power).

72. This option would increase the types of business models that would be able to utilise the exclusion compared to option 2 (and the status quo), as it could be utilised in situations where the business needs to have services provided at certain times or on certain days, but the arrangement is with someone who is able to set their own rate.

73. There have been some judicial comments that suggest the Authority and the Court may give greater weight to intention where the worker has high bargaining power and may take a more protective approach (ie give weight to the other tests) where bargaining power is less even.[13] This may mean it does not have much (if any) impact on the weight given to intention for the additional businesses able to access the exclusion.

74. The proxy of being able to 'set your own rate' for higher bargaining power may help ensure that any increase in the types of arrangements that the exclusion could be applied to is limited to situations both intend for the arrangement to be a contracting one.

75. It would be difficult to define what would be required for the worker to be considered to have 'set their own rate'. Even if the criterion specified that the compensation needed to be based on the rate the contractor offered, or following a certain amount of negotiation, it would still likely be subject to gaming, ie where negotiation was not genuine and did not impact the compensation offered. This lack of clarity, and potential for gaming, could result in misclassification of an employment relationship as a contracting arrangement.

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[redacted]

[13] For example [2010] NZEMPC 22 ARC 5/09 at https://www.employmentcourt.govt.nz/assets/2010-NZEmpC-22-The-Chief-of-Defence-Force-v-Ross-Taylor.pdf.

Confidential Advice

Consistency with international obligations

80. Options 2, 5 (Option One in the Cabinet paper) and Confidential Advice) have been assessed for compliance with New Zealand's international obligations.

81 International relations.

82. International relations.

83. International relations.

84. International relations.

85. International relations.

86. International Relations

87 Legal privilege and International relations

Legal privilege and International relations

Treaty of Waitangi implications

89. We have not had the opportunity to consult stakeholders on the Te Tiriti implications of the options. We have set out our view below based on the limited information available.

90. The latest available data on contractors shows that 5.2 percent of employed Māori workers are self-employed contractors, slightly below the 5.8 percent of Pākehā workers who are contractors.[14] We do not have a further breakdown of contractors who are Māori.

91. If any of the options led to contracting arrangements being used more frequently than at present, and in relationships with unequal bargaining power, some workers may not be able to negotiate terms that account for the costs and benefits of contracting. The models that could access the exclusion in options 4, 5, and 7 could include where labour is substitutable, which may be more common in lower paid work. The risk of gaming in option 6 is likely to be worse where there is unequal bargaining power (which low pay may be a signal of). This could disproportionally impact Māori, due to their greater representation in lower paid work.

92. The policy change could have a positive impact on some Māori businesses (11 percent of New Zealand businesses[15]). When entering a contracting relationship, the options (other than the status quo) will increase the weight on the intention of the parties at the time that the contract was entered into, providing more flexibility for businesses.

Potential additional requirements that can be combined with any of the options

93. A number of stakeholders considered that the proposed option increased the risk of exploitation and could exacerbate any power imbalance in the relationship. BusinessNZ, employment lawyers, Prodrive, the CTU, Unite union and the Chief of the Employment Relations Authority considered that process and information provisions should be included

[14] Survey of Working Life, Statistics New Zealand, 2018. In MBIE's November 2019 – 2020 consultation on contractors, 6 percent of respondents identified as Māori.

[15] 20,499 (11 percent of all) businesses where any ownership income was paid to individuals of Māori ethnicity or descent. Te Matapaeroa 2021, Data on the Māori Economy, Te Puni Korkiri.

to help mitigate this (eg a requirement for the worker to obtain independent legal advice and providing information on the implications of being an independent contractor).

94. The effectiveness of any of the options could be strengthened by including additional information provision or advice requirements relating to the written agreement. The options could be combined or stand alone. The impact of including these requirements on the objective is not expected to be as large as changes to the criteria (covered in the options above). Some stakeholders also mentioned that they may have little impact if the worker had English as a second language.

95. The business would need to meet the additional requirement/s if they were to rely on the exclusion.

Option A: Specify a minimum set of provisions that the written agreement must include (recommended)

96. The criterion requiring a written agreement could be further strengthened by a requirement to include specified terms to help ensure the worker has a clear understanding of what they are agreeing to. The required provisions could include ones focused on the implications of being an independent contractor (eg that they will not have access to full employee entitlements and are responsible for paying their own tax and ACC levies) or that relate to the arrangements being agreed to (eg any liabilities for damage or failure to meet targets or the payment and payment method and timing).

97. The requirements would impact whether the exclusion criteria are met, not the validity of the contract. Any requirements would need to be consistent with contracting law.

98. A business could be determined to not be within the exclusion because they did not adequately include one or more of these provisions in the agreement, even if the arrangement itself meets the substantive criteria of the exclusion. The more provisions required, the more likely it would be that businesses would need to update existing contracts to meet the criteria. We consider the benefits to both contracting parties of having a written contract that includes key provisions outweigh this risk.

Option B: Provide reasonable opportunity to seek advice

99. This option would require the business to give the worker a reasonable opportunity to seek advice on the written agreement. Again, a business would need to meet this requirement (alongside the other exclusion criteria) if they wished to rely on the exclusion.

100. This requirement could increase the potential for disputes regarding whether the exclusion criteria were met, ie the facts of the case would be important in determining what is a ‘reasonable opportunity’. A number of stakeholders considered that this option was not likely to be effective as many workers were unlikely to seek advice in practice.

How do the options compare to the status quo?

Decision criteria	**Option 1: Status quo**	**Option 2: Exclusion that gives more weight to intent**	**Option 3: The worker must <u>also</u> be able to sub-contract the work**	**Option 4: Replace availability criterion with the worker can sub-contract**	**Option 5: Availability <u>or</u> worker can sub-contract**	**Option 6: Availability <u>or</u> worker can set own rate**	Confidential Advice
Effectiveness of ensuring parties to a contract for services have their original intentions upheld by placing greater weight on intention	0 Intention is one of the four tests under section 6 of the ER Act to determine employment status.	+ Increased weight on intention for arrangements that meet the criteria. Expected to apply to task-based platform work and product-focused arrangements.	0/+ Exclusion is likely to apply to a narrow set of arrangements.	+ Changes the type of arrangements that would meet the criteria compared with option 2. Could apply to some courier models but not likely to apply to platform-based models.	+½ A broader range of arrangements likely to meet exclusion. Captures arrangements under options 2 and 4.	+½ A broader range of arrangements likely to meet the exclusion. Captures arrangements under option 2 and where worker can set their own rate.	
Effectiveness of minimising risks of exploitation *(due to risk of workers currently considered employees being shifted to contracts without adequate compensation for associated costs/risks)*[16]	0 Casual employees 0 Other employees (not casual) 0 Workers with unequal bargaining power which being in lower paid work could signal[17]	- Casual employees (as have most of the characteristics covered by criteria) 0 Other employees 0 Workers with unequal bargaining power which low paid work could signal	0 Casual employees 0 Other employees 0 Workers with unequal bargaining power which low paid work could signal	0 Casual employees - Other employees (due concerns re. effectiveness of sub-contracting criterion) - Workers with unequal bargaining power which low paid work could signal (arrangements able to access exclusion would include where labour is substitutable, which may be more common in lower paid work)	- Casual employees (as have most of the characteristics covered by criteria) - Other employees (due concerns re. effectiveness of sub-contracting criterion) - Workers with unequal bargaining power which low paid work could signal (additional arrangements able to access exclusion would include where labour is substitutable, which may be more common in lower paid work)	- Casual employees (as have most of the characteristics covered by criteria) - Other employees (due to risk of gaming criterion that can set own rate) - Workers with unequal bargaining power which low paid work could signal (risk of gaming likely to be higher where unequal bargaining power, which low pay may be a signal of)	
Workability, implementation, cost, or other considerations	0 Workability of criteria	- Workability of criteria *For options 2 to 7*, businesses will need to change hiring practices, documentation to meet the exclusion, potential initial increase in litigation	- Workability of criteria	- Workability of criteria	- Workability of criteria	- - Workability of criteria Difficult to define requirements for criterion to 'set own rates'	
Consistency with international obligations	0	Legal professional privilege					
Overall assessment	**0**	**-1/2**	**0/-1/2**	**-1 1/2**	**-1 1/2**	**-2 1/2**	Confidential Advice

Key for qualitative judgements					
½ / - / -½ - - / - -½ / - - -	worse than doing nothing/the status quo/counterfactual much worse than doing nothing/the status quo/counterfactual	0	about the same as doing nothing/the status quo/counterfactual	½ / + / +½ ++ / ++½ / +++	better than doing nothing/the status quo/counterfactual much better than doing nothing/the status quo/counterfactual

[16] Note that the ratings in this row have been averaged before combining with the ratings in the other rows for a particular option.

[17] For example, Māori, Pacific peoples, women and people with disabilities are overrepresented in lower paid work in New Zealand.

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

99. In paragraph 29, we outlined two impacts relating to the ability of contracted workers to challenge their employment status:

    a. It allows a worker to rectify situations where they have been misclassified and they have not received the rewards due if they were properly classified.

    b. It creates uncertainty for hiring businesses that use a contract for services.

100. The objective is to shift the balance so that hiring businesses, in situations which have characteristics of genuine contracting arrangements, have greater weight put on the intent specified in their written contract.

101. The options differ in the breadth and type of arrangements that would be able to be captured by an exclusion from the section 6 test in the ER Act. The options that provide access to an exclusion that gives greater weight to intention to a broader range of working relationships, conversely limits the situations where a worker is able to rectify a situation where they have been misclassified (and not received the appropriate rewards).

102. The benefits and costs of options 2 to 7 compared with the status quo are uncertain and difficult to quantify. There is limited data and information available. The key change from the availability of the exclusion is a potential shift in hiring behaviour. This is not possible to predict in advance. It may be that:

    a. hiring businesses have the confidence to hire additional workers on contracts given the certainty that the exclusion provides about the employment status of those workers

    b. hiring businesses offer their contractors who meet the exclusion criteria better terms and conditions because these additional benefits cannot be represented as characteristics of an employment relationship.

103. However, it may also be that hiring businesses restructure their existing business models to offer future workers contracts for services in order to reduce the rewards offered to those workers. There is a particular concern about situations in which casual employees are currently employed (options 2, and 5), where it is unclear how effective a criterion would be (options 4 and 5), where there is a risk of gaming (option 6), [redacted] Confidential Advice

104. The inability to predict the extent of behaviour change makes a definitive judgement difficult. Consultation with stakeholders did not identify strong evidence of supressed business models, though some hiring businesses did talk about incentives to not offer better terms and conditions to contractors. We would not expect to hear from businesses that have an incentive to misclassify workers. But there were strong concerns by both unions and employment lawyers about the increased risks of misclassification, particularly for casual employees.

105. We therefore do not have sufficient certainty to be able to recommend an alternative option to the status quo that would better address the problem while still meeting the objective.

106. We give greater weight to the possibility that an exclusion could increase risks of exploitation for workers compared with the potential benefits of increased certainty for

businesses. Given the uncertainties regarding the costs and benefits of options 2 to 5, we prefer the status quo.

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108. It is possible that there are other options, outside of those assessed in this RIS, that may have been able to better address the problem and meet the objectives, including those mentioned in paragraph 35 above. The timeframe for the analysis, means that we have not been able to investigate these other options.

What are the marginal costs and benefits of the option?

109. As mentioned above, the Cabinet paper seeks agreement to either option 5 (Option One in the Cabinet paper) Confidential Advice. If Cabinet agrees to option 5, the Minister can proceed to requesting the Parliamentary Counsel Office to begin drafting. Confidential Advice. We have therefore compared the marginal costs and benefits of option 5 with the status quo in the table below.

Affected groups	**Comment**	**Impact** *High, medium or low*	**Evidence Certainty** *High, medium or low, and reasoning*
Additional costs of option 5 compared to the status quo			
Regulated groups – Businesses that hire workers as contractors	Businesses hiring contractors will need to meet the costs of providing a written agreement that meets the exclusion criteria, and change hiring practices if they currently operate an employment model. Disputes may increase in the short-term.	Low	Low We don't know what proportion of businesses might want to access the exclusion.
Regulated groups – Workers on contracts for services	Workers hired by businesses that meet the exclusion criteria will only be able to challenge those criteria. Terms and conditions could decline over time where there is unequal bargaining power.	Low	Low It is not possible to accurately predict how businesses and workers will respond to the creation of the exclusion.
Workers currently hired as employees	Some current employment models may be captured by the exclusion, with some workers losing access to the full section 6 test. Where a business moves to a contracting model, and there is unequal bargaining power, this may be associated with a reduction in terms and conditions. Casual employment relationships could be captured by the exclusion.	Medium	Low It is not possible to accurately predict how businesses and workers will respond to the creation of the exclusion.
Businesses that hire workers as employees	If competitors lower their costs through changing to a contracting model, it may pressure other businesses to do the same.	Low- Medium	Low It is not possible to accurately predict how businesses and workers will respond to the creation of the exclusion.

Regulators – Employment Services	MBIE's employment disputes resolution services may come under increased pressure in the short-term during the transition to the exclusion.	Low	Low It is not possible to accurately predict how businesses and workers will respond to the creation of the exclusion.
IRD	If this change results in some employees moving from PAYE to contractor status they will be able to make tax deductions, reducing tax revenue.	Low Discussion with IRD indicates this effect is likely to be minor or negligible.	Low It is not possible to accurately predict how businesses and workers will respond to the creation of the exclusion.
Consumers	No additional costs expected	Low	Low
Others (eg, wider govt, etc.)	No additional costs expected	Low	Low
Total monetised costs	N/A	N/A	N/A
Non-monetised costs	Uncertain	Low	Low
Additional benefits of option 5 compared to the status quo			
Regulated groups – Businesses that hire workers as contractors	Certainty would be increased for the business models that meet the exclusion criteria. The exclusion would enable some businesses to have more confidence of reduced challenges to their business model. Employment status challenges under the full section 6 test could reduce over time.	Medium (compared to status quo)	Medium The number of businesses that might meet the exclusion criteria, or change their models to do so, is not known.
Regulated groups – Workers on contracts for services	No substantive benefits arising from additional certainty. Some workers in the exclusion may be deterred from taking a status challenge if they considered there would be a reduced chance of success.	Low	Low It is not possible to accurately predict how businesses and workers will respond to the creation of the exclusion.
Workers hired as employees	No substantive benefits expected.	Low	Low It is not possible to accurately predict how businesses and workers will respond to the creation of the exclusion.

Businesses that that hire workers as employees	No substantive benefits expected.	Low	Low It is not possible to accurately predict how businesses and workers will respond to the creation of the exclusion.
Regulators – Employment Services	MBIE's employment disputes resolution services may benefit in the medium to longer term if the exclusion reduces challenges to employment status for some workers.	Low	Low It is not possible to accurately predict how businesses and workers will respond to the creation of the exclusion.
IRD	No substantive benefits expected.	Low Discussion with IRD indicates any effect is likely to be minor or negligible.	Low It is not possible to accurately predict how businesses and workers will respond to the creation of the exclusion.
Consumers	No additional benefits expected	Low	Low
Others (eg, wider govt, etc.)	No additional benefits expected	Low	Low
Total monetised benefits	N/A	N/A	N/A
Non-monetised benefits	Uncertain	Low	Low

Section 3: Delivering an option

How will the new arrangements be implemented?

110. The legislative proposals need to be implemented through amendments to the ER Act. MBIE is responsible for administering the ER Act and provides information for businesses, unions and employees through its website, contact centre and other customer services on an ongoing basis. Information provision and updates to website content would be undertaken within MBIE's existing baseline funding.

111. As part of implementing legislative change to increase certainty for contracting parties, MBIE's Employment Services will update guidance on the Employment New Zealand website, undertake internal training updates, and inform stakeholders. MBIE will

complete the necessary updates and information provision by commencement of the amendment.

How will the new arrangements be monitored, evaluated, and reviewed?

112. As regulatory steward of the Employment Relations and Employment Standards system, MBIE has several ways to monitor and evaluate the effectiveness of a regulatory change to establish an exclusion.

113. MBIE will monitor implementation of the policy through media reports, research, statistics published periodically by StatisticsNZ and others. MBIE will explore whether new or existing sources of information, such as surveys, could include questions on contractors to contribute to monitoring, evaluation and review but without additional funding, options will be limited.

114. MBIE will analyse information from its call centre and dispute resolution services to gauge how businesses and workers respond to the establishment of an exclusion.

115. MBIE will also monitor determinations of the Authority and the Court in this area to gather information about the types of business models and workers that meet the exclusion that Cabinet agrees to, and those that do not. It is possible that litigation increases in the shorter-term as the new legislative provisions are tested, but may taper off in the longer-term if the exclusion itself, and legal precedent, have resulted in increased certainty about the types of situations that would be covered by the exclusion.

List of Appendices

Appendix One: Intended effect of the exclusion criteria in option 2

Appendix Two: Summary of stakeholder comment on option 2

Appendix One: Intended effect of the exclusion criteria in option 2

116. The costs from actual or potential employment status challenges could be reduced through a mechanism which would 'exclude' certain relationships from the full test in section 6 of the ER Act, by giving greater weight to intention in genuine contracting relationships. The intended effect of option 2 is to provide a straightforward test for a subset of contracting arrangements with characteristics indicative of a genuine contracting relationship.

117. Table one sets out the intended effect of each of the four criteria in option 2.

Table one: Intended effect of the exclusion criteria in option 2

Criteria	Intended effect
One: Has a written agreement with the worker that specifies they are a contractor rather than an employee	Requiring a written agreement that specifies the intended nature of the relationship and that it is not one of employment would help to ensure that both parties understand the nature of the arrangement they are agreeing to and provide a signal of agreed intent.
Two: Does not restrict the worker from working for another business (including competitors), except while they are completing paid work for the business	This criterion supports freedom of contracting by ensuring the worker is free to decide who to perform tasks or provide services for, including being able to work for competitors (noting, there can still be requirements in relation to the confidentially of information). This does not mean, however, that the business must restrict the worker from performing tasks for another business when they are performing tasks for them, but that they can restrict this (where appropriate) and still comply with this criterion. If the worker chooses to accept several tasks from one business, resulting in them working full-time for that business, that may still meet this criterion. However, if the requirements of the contract mean it is not practical for them to work for anyone else (eg the contract requires full time work) that may result in the Courts determining this criterion has not been met.
Three: Does not require the worker to be available to work on specific times of day or days, or for a minimum number of hours	This criterion protects the worker's freedom to decide when they perform the work. This is an important distinguishing control element between employees and independent contractors. If the contract requires the worker to perform the task on a specified day, even if they have some flexibility on what time of day they do it, it would not meet this criterion. For gig-based contracts involving short-term tasks, this means the worker can choose when they accept these tasks. For other types of contracts, the contract could still include an agreed date for the project to be delivered. However, to meet the criterion, it must be up to the worker to determine when they work to produce the product or deliverable by the agreed date. If the due date, or other contracting requirements, mean the worker must be available (and the worker cannot determine this) to work specific times to deliver the project, that would not meet this criterion.
Four: Does not terminate the contract	This criterion supports freedom of contracting by ensuring the worker is free to decide whether a particular task would be

for not accepting an additional specific task or engagement offered (beyond what has been agreed under the existing contract).	profitable for them to perform. The practical impact of this criterion may be low, however, as the worker would need to prove the termination was as the result of them not accepting an additional task, as opposed to another reason. If an employer does not terminate a contract but stops offering work that was usually offered under that contract because the worker did not accept an additional task, it would be possible for the Court to consider whether this means the contract has been terminated for all effective purposes (subject to proof of the reason for the termination being established to the satisfaction of the Court).

Appendix Two: Summary of stakeholder comment on option 2

Table two: Summary of stakeholder comments on option 2

Stakeholder group	Views
Business stakeholders	Retail NZ and NZ Post considered that it would be difficult for their business models to meet the availability criterion. Freightways and NZ Post considered that the availability criterion should be amended to include an alternative where a business could still meet the exclusion if the worker was able to sub-contract the work. Some stakeholders queried the operation of the criteria in practice. For example, while a business may not be able to terminate a contract if a worker did not take on a task, would the exclusion still apply if they were subject to other disadvantageous consequences? Uber wanted to ensure that, where a business met the availability criterion, they could continue to offer incentives.
The CTU, CTU Affiliates and Prodrive	The CTU supported the recommendations of the Tripartite Working Group on Better Protections for Vulnerable Contractors. They saw a clear risk that casual employment relationships could be captured by the exclusion. CTU and its affiliates that we met with considered that other criteria could better capture genuine contracting relationships, such as whether the contractor had the ability to add value to their business, whether the work could be sub-contracted or whether the work was being conducted independently. Unite union also considered that situations where a contractor would effectively earn below the minimum wage (after expenses) should always be considered under the full test to help prevent exploitation. Prodrive did not support legislative change that increased the weight of intention without providing measures that would result in more equity in the relationship between the business and the worker.
Employment lawyers and the [redacted] Prejudice supply of information	Litigation could be increased by having two tests that could be challenged in relation to an employment status decision. Businesses would want to change their model to meet the exclusion but many could struggle to meet the availability criterion. It would be difficult for a worker to prove it if they thought that a 'no-fault termination' contract had been terminated because the worker did not agree to take on a task.