

Regulatory Impact Statement

Addressing zero hour contracts and other practices in employment relationships

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by the Ministry of Business, Innovation and Employment (the Ministry). It considers options to address employment practices which undermine the mutuality of obligations, focusing on practices that involve:

- employers not guaranteeing employees any hours of work whilst requiring them to be available (so-called 'zero hours contracts')
- employment agreements unreasonably restricting workers from undertaking alternative employment
- rostering practices that include short notice cancellation of shifts
- inappropriate pay deductions (eg service station attendants having their pay docked for customer theft).

Our sense of the size of the problem has relied on anecdotal stakeholder information. While comprehensive data on the nature and extent of the problem is not readily available, a picture of poor practice creeping into mainstream employment arrangements has become apparent. Without comprehensive data, however, the scale of the benefits and costs is hard to quantify. We do know that these types of practices are more likely to be adopted by businesses in the service sectors (namely the retail trade, accommodation and food services sectors which employ collectively around 314,000 employees). This RIS sets out a qualitative assessment of the expected impacts of the options considered.

In addition to banning specific practices, we also propose to introduce a general ban on unconscionable conduct in the legislation to ensure that exploitative practices other than those explicitly banned, will be prohibited. The risk of providing a general ban, as with any broad principle based regulation, is that it may capture practices that are not intended to be banned. The aim of the general ban is to help future proof the policy and guard against unforeseeable instances that may arise. Doing so does run the risk of unforeseen circumstances and will have some cost for employers associated with the inherent uncertainty in principal based regulation.

Stakeholders have raised a number of further issues about the use of various working arrangements and the impacts that such arrangements may have on certainty of income, certainty of hours of work and access to state support. These issues, however, are outside the scope of the current policy work on the imbalance of obligations in certain employment practices. The Ministry is continuously monitoring the changing labour market to keep abreast of developments that may need attention and is undertaking ongoing strategic work across labour market policy areas to ensure that priority issues are identified, understood and addressed.

We have included an additional proposal that "parties must specify agreed contracted hours in the employment agreement where possible". This proposal was developed in the final stages of preparing the cabinet paper and we have not had the opportunity to fully analyse the impacts of this proposal.

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Executive Summary

- 1 This Regulatory Impact Statement considers options to address employment practices which undermine the mutuality of obligations, focusing on practices that involve:
 - employers not guaranteeing employees any hours of work whilst requiring them to be available (so-called 'zero hours contracts')
 - employment agreements unreasonably restricting workers from undertaking alternative employment
 - rostering practices that include short notice cancellation of shifts
 - inappropriate pay deductions (eg service station attendants having their pay docked for customer theft).
- 2 Our sense of the size of the problem has relied on anecdotal stakeholder information. We have found that collective agreements in the Quick Service Restaurant (QSR) industry, as well as some food and beverage businesses, convenience stores and residential care businesses often have provisions enabling the practices under discussion. Similar arrangements were also found in supermarkets (where employees were guaranteed a low number of hours but were expected to be available for more work). It is highly likely that many individual employment agreements in industries where collective agreements contain these clauses would also have these clauses.
- 3 Stakeholders have informed us about the growing prevalence and use of these practices over the last six to seven years, both in New Zealand and internationally. We believe these practices are used to cut the cost of business for employers and may give them a cost advantage over competitors, though there are possible negative impacts on employees. We are aware that some recruitment agencies have had requests for such contracts following the media attention on the matter.
- 4 This regulatory impact statement proposes a package of options to ensure fair mutuality of obligations in employment relationships. The options have been assessed against the following criteria:
 - a) mutuality of obligations in employment relationships
 - b) provide legal certainty
 - c) efficiency of contracting
 - d) minimise incentives to game the system
 - e) minimise costs to all parties.
- 5 Our recommendations are to:
 - a) provide for bans on specific practices; and
 - b) provide for a general ban on unconscionable conduct, with criteria for the Employment Court and the Employment Relations Authority (the Courts).
- 6 We expect the proposed interventions will have the following impacts:
 - Businesses – the proposals will limit certain employment practices and can create additional short term costs for some employers. Initial stakeholder feedback suggests that the direct short term cost of these proposals will not be significant. It is also worth noting that because the precise scope of "unconscionable conduct" will only be developed over time through case law, it creates uncertainty for some businesses.

- Workers – the proposals will reduce the level of risk that workers are required to take in relation to the availability of work. This will allow workers to have improved certainty of income and to better manage work-life balance. Workers will have improved access to redress for detrimental practices. It will also mean people will be better able to ensure they pay the correct amount of tax and child support and received the correct amount of benefit or tax credit.
- Government – the proposals may increase the workload of the regulator. It is likely, however, to have a more significant impact on dispute resolution services. There may be less reliance on the income support system and less cost in administering social welfare and policy payments if employment becomes more certain.
- Broader labour market – the proposals should improve the labour market matching process and help to lift productivity.

7 The recommended options, with our consideration of their outcomes are summarised below. These options will only be effective as a package because of the limitations of each individual option.

Summary of package of recommended options	
Option	Net Outcomes
Specific practices	
Specifically ban: • Parties from agreeing in an employment agreement that an employee must be available for work over the contracted hours unless: - o The agreement retains the right for the employee to refuse such work on a case by case basis without penalty; or - o The agreement provides compensation rates where an employer requires the employee to be available, and those rates are paid in each instance. This would not restrict an employee's ability to undertake additional work with that employer outside their contracted arrangements, so long as there was agreement for such work. • employers cancelling a shift without reasonable notice unless compensation, as agreed in the employment agreement, is paid. • employers from putting any restrictions in the employment agreement on an employee seeking secondary employment unless there is a genuine reason reasons based on reasonable grounds • employers from making unreasonable deductions from employees' wages.	The benefits of the package of options will mean that employees generally will receive more certainty of hours or they will get payment as agreed in their employment agreement, both for being compelled to be available for work and for short-notice cancellation of shifts. The prohibitions encourage employers and employees to consider the value and implications of availability and short notice shift cancellation at the outset of the employment relationship. However, the current imbalance of bargaining power in the sectors where we are seeing these issues means employees may not be able to negotiate reasonable compensation rates. The proposed package also incentivises employers to choose the best employment practice for their business need and to improve rostering practices. The prohibition also protects low income employees from having unreasonable restrictions placed on them in terms of seeking secondary employment. If an employer needs to restrict an employee, they can do so by paying them sufficient compensation, therefore the ability to control the risk is able to be managed by the employer. To ensure that the terms and conditions included in the employment agreements are appropriate, the Act also includes provisions to outline when the bargaining for terms and conditions are considered unfair. The prohibition will also send a clear signal to the labour market that certain kinds of wage deduction are unreasonable and should not be contemplated. This approach would improve employees' ability to challenge wage deductions, without generating undue compliance for costs for businesses.

Summary of package of recommended options	
Option	Net Outcomes
General ban on unconscionable conduct with criteria for the Courts	
A general ban on unconscionable conduct with criteria for the Courts in assessing what constitutes unconscionable conduct. The term “unconscionable” encapsulates behaviours such as unfair, unjust, unscrupulous, unreasonable, against the dictates of conscience. This term sets the threshold for the prohibition at a high level. The criteria include: • whether there is a genuine reason for the practice/agreement that was reasonably necessary (given the nature of the work) • whether the parties to the employment relationship acted in good faith • the relative bargaining strength of the employer and employee • whether there was any undue influence, pressure or unfair tactics used by either party to the employment relationship • whether the employee suffers some disadvantage in the employment context • whether the employer has actual or constructive knowledge of that disadvantage • whether the employer passively or actively takes advantage of the employee’s disadvantage • whether there has been any procedural impropriety • whether there has been any inadequacy of consideration on the part of the employee.	The general ban on unconscionable conduct is to help “future proof” the proposed change. Providing for a ban on unconscionable conduct allows the ban to respond as poor practice evolves and changes over time. The ban allows the Court to decide whether practices are unconscionable on a case by case basis, assessing the conduct against set criteria. The risk with general bans is two-fold, firstly being principle-based and thus broad and not clearly defined the Courts can interpret them to give meaning that was not intended by the legislature. However, we have mitigated this to an extent by providing as much clarity as possible (by providing criteria). Secondly, principle-based legislation can have a chilling effect on employment practices (as employers may become more risk-adverse).

A. Problem Definition

- 8 The labour market is constantly changing as it adjusts to broader societal changes and economic pressures. Businesses and workers need to be able to adapt to changing consumer demands for greater flexibility in terms of hours, location and forms of delivery.
- 9 However, certain practices that some employers are engaging in appear to be exploitative or undermine the appropriate balance of risk in the employment relationship. These practices include:
 - employers not guaranteeing employees any hours of work whilst requiring them to be available (so-called 'zero hours contracts')
 - employment agreements unreasonably restricting workers from undertaking alternative employment
 - rostering practices that include short notice cancellation of shifts
 - inappropriate pay deductions (eg service station attendants having their pay docked for customer theft).
- 10 These issues appear to arise from the fact that employers are able to shift the uncertainties associated with employment to the employee. Employers are engaging in these practices as they perceive them to be a way to manage the risks and costs associated with fluctuating demand and to have flexibility as and when they need it. As employment categories are not defined in primary legislation, some employers are incentivised to create a hybrid practice to suit their particular demands. For example, employers may be using permanent part-timers without guaranteeing any hours of work, relative to using casual employment, in order to secure a stable supply of labour.
- 11 Our view is that while employers and consumers benefit from the reduced short term labour costs, such conduct creates poor outcomes for workers including loss of income. The wider labour market may suffer longer term losses due to poor business practice and lowered labour productivity.
- 12 A root cause of this problem is the inherent power imbalance between parties to the employment agreement. Employees on low incomes tend to be young and inexperienced workers or low qualified and tend to get work where possible. This means these employees have less bargaining power and therefore less ability to negotiate out of this risk being placed upon them.
- 13 This may also mean that these employees are less likely to be aware of their rights and entitlements and therefore are unlikely to enforce them. For example, some of these employees could be enforcing their custom and practice rights where they build up a pattern of work (meaning the employer cannot unilaterally reduce their hours), but this does not seem to be occurring – young, inexperienced or low skilled and low-wage workers tend not to take cases against their employer. However, some of the practices that we are seeing are not currently regulated (ie requiring an employee to be available without providing compensation or work, or short-notice shift cancellation) therefore employee knowledge and awareness of rights is only part of the issue.
- 14 These distort the market because where there are not such power imbalances or information asymmetries, employees are more likely to have the power to negotiate where the risk lies and to know their rights and how to enforce them.
- 15 These practices are explored further below.

Employee availability – where employees are required to be available over any contracted hours

- 16 This is where employees are on standby for work without necessarily being given the opportunity to receive work or payment that is commensurate with their availability. There is a lack of certainty of how many hours an employee will receive from week to week (this may fluctuate up or down over time).
- 17 The law requires an employment agreement to include an indication of the arrangements relating to the times the employee is to work. However, it does not require the employer to give the employee certainty of hours. As such, under current law, employers are able to compel their employees to be available for work without any compensation.
- 18 The impact of this is that while employers can readily access labour allowing them to be responsive, the risk and cost of flexibility are borne by the employee. The results of this can include:
 - a. The labour market is not able to function efficiently because some employees who have extra capacity to work are being unreasonably restricted. This local supply could help fill demand currently being met by migrant labour in low skilled sectors.
 - b. Some employers are reducing the hours of work that employees receive by offering less work each week, instead of using the proper performance management process (where an employee is not performing) or restructuring process (where there is less work available). Some employers are avoiding statutory processes and employees are not afforded a proper process.
 - c. Employees struggle with the interface with WINZ income support, benefits, child support and tax credits. Having uncertain hours may also make it difficult for employees to meet the test of a permanent employee to become eligible for ACC compensation.
 - d. Employees find it difficult to plan, both financially and in their personal lives.

Short-notice cancellation of shifts

- 19 There is currently no regulation specifying how and when shifts can be cancelled. This means employers and employees are free to agree to the work practices that suit their needs. As such, some employees are having their shifts cancelled at short notice (or are being sent home midway through a shift) without being provided compensation. Employers have relatively unbounded flexibility in this model to shift costs onto employees.

Restricting secondary employment or restraining an employee from seeking alternative employment

- 20 At present there is also no legislative provision that deals with employers having the ability to prevent employees from seeking secondary employment. Although it is stated in common law, employment agreements may not unreasonably restrict secondary employment, these types of cases are rarely taken due to lack of awareness and the uncertainty about likelihood of success. Under current legislative settings, employer's ability to restrict an employee from undertaking secondary employment cannot be challenged under the personal grievance process.
- 21 While such practices enable employers to effectively manage their risk (i.e. where there is potential for a conflict of interest), such practices may impede the efficient operation of the labour market because employees who seek secondary employment are restricted in their ability to match that supply to alternative demand. Increasing employee flexibility here would create incentives for employers to invest in their employees to help retain their services.

- 22 We think employers are using these restrictions to manage the risk of fatigue or other factors caused by secondary employment impacting the work of the employee. However, all other externalities that affect the employee's performance have to be dealt with through the proper disciplinary or performance management processes (for example if the employee is fatigued and performing unsafely or poorly because they do not get enough sleep due to being in a band or having a small child). This raises the question as to why a secondary job should be treated differently.

Unreasonable wage deductions

- 23 Some employment agreements allow employers to make deductions from employees' wages to cover business losses. This means employees are working under a constant threat of financial penalty, and may lead to risks in relation to workplace health and safety. Vulnerable and low wage employees lack the bargaining power to negotiate compensation that would account for any financial risks they are expected to bear.
- 24 Wage deductions are directly addressed by the *Wages Protection Act 1983*. This Act generally prohibits employers from making deductions from employees' wages, with limited exceptions to allow for deductions that an employee has consented to, or requested, in writing. Common examples of this would be consenting to have pay deducted for something that is for the benefit of the employee, such as for student loan payments or union fees. An employee can unilaterally withdraw their consent to any deduction. While the existing law does, in theory, provide strong protection of employees' wages, the widespread use of 'consent to deductions' clauses in employment agreements may in some circumstances be undermining that protection. If deductions are consented to in advance, an employee then has limited grounds on which to challenge a deduction, even if it is plainly unreasonable.

Drivers for exploitative behaviour

- 25 Our view is that the zero hour contracts and the specific exploitative behaviours discussed above have been used to drive down cost for employers by shifting it towards their employees. Stakeholder feedback and international evidence suggests that we are more likely to observe these sorts of behaviours in industries with intense price competition, fluctuated customer demand and lower skilled workers (with the fast food industry being the prime example). Given the scale of price competition and narrow margins that firms in some sectors operate within, firms are often not able to pass on costs to their customers and remain competitive. This creates drivers in those industries for firms to find other ways of reducing their cost of production or dealing with uncertainties in fluctuated demand.
- 26 This problem is exacerbated in certain low skilled and labour intensive sectors (for example the fast food sector). In such cases, the alternative for firms is to reduce the per capita cost of labour. While firms could achieve reduced cost by improving workplace productivity, the returns on such investments are uncertain. Factors such as churn and fluctuate market conditions mean that the expected returns on investing in work place productivity may not be guaranteed.
- 27 Given the uncertainty of returns in investing in work force productivity or the limitations on the ability for firms in certain sectors to pass the costs of fluctuated demand onto consumers, firms are likely to be incentivised to pass these costs onto their employees, particularly considering the inherent imbalance of power in employment relationships particularly for lower skilled workers (who tend to have limited employment options).
- 28 While the specific measures proposed will address the presenting issues outlined above (such as restrictions on availability or secondary employment, short notice cancellations of shifts or inappropriate pay deductions), they will not address the drivers to push some of the uncertainty costs towards employees.

- 29 We note, however, that in many industries (for example where there is competition on quality as well as price, or where there is less churn in the workforce or where workers tend to have more bargaining power), these problems are likely to be more muted. However, in a dynamic economy it is difficult to predict with any certainty which industries are likely to be affected by these issues on an ongoing basis.
- 30 There is also potential for some ambiguity about what could be considered as unconscionable conduct while case law develops in this area, but once case law is established it will set the floor for acceptable practices for all employers which will help ensure parties know what is and is not lawful practice.

Size of the problem

- 31 During the course of our review into the employment practices identified above, the Ministry has been sent a number of employment agreements which demonstrate the types of practices we consider undermine the mutuality of obligations. However, it is difficult to quantify how many employment agreements contain clauses that contractually provide for the poor practices being addressed by this RIS because there is no collection of data on all employment agreements.
- 32 Our sense of the size of the problem has relied mainly on stakeholder information. We have found that clauses regarding employee availability (standby with no payment) are used widely in collective agreements in the Quick Service Restaurant (QSR) industry, as well as some food and beverage businesses, hospitality, convenience stores and in the caring sector. Similar arrangements were also found in supermarkets, where employees were guaranteed a low number of hours but were expected to be available for more work. It is likely that individual employment agreements in industries where collective agreements contain these clauses would also have these clauses. There are approximately 314,100¹ employees in the retail services, food and accommodation sectors.
- 33 It is likely that these practices and drivers are most prevalent in relatively low-cost and low-skilled industries where employees have limited choices in finding alternative employment.
- 34 This is supported by data from the Centre for Labour, Employment and Work² on ordinary weekly hours by sector and industry. This showed that 61 per cent of collective agreements in the food retailing sector do not state ordinary weekly hours of work. This compares to a sector such as finance and insurance where only 1 per cent of collective agreements do not state ordinary weekly hours of work.
- 35 Similarly for the other practices identified, our sense of the size of the problem has relied mainly on stakeholder information. Restrictions on secondary employment, including requiring employees to disclose whether they wish to seek additional employment, could be labour market wide; inappropriate pay deductions and short cancellation of shifts are probably more limited. Where these practices have the most impact on employees, and therefore where intervention is most necessary, is in low-wage or low skilled jobs where the power imbalance between parties is most pronounced.

¹ Household Labour Force Survey (December 2013 Quarter), *Number of persons employed by employment status and industry*, http://www.stats.govt.nz/browse_for_stats/income-and-work/employment_and_unemployment/new-labour-market-data.aspx#types

² Employment Agreements: Bargaining Trends & Employment Law Update 2013/14

Status Quo

Legislation

- 36 New Zealand's employment relations framework governs how parties to an employment relationship should interact with each other. The overall objectives of the *Employment Relations Act 2000* (the Act) include building productive employment relationships through the promotion of good faith in all aspects of the employment relationship. The Act aims to acknowledge and address the inherent inequality of power in employment relationships. In its current form, the Act offers high level principles which relate to all employment practices, but are not specific enough to provide clear guidance on the particular issues addressed in this RIS. The Act recognises that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour. The Act also has protections in relation to unfair bargaining which allow the Court to order compensation or vary the agreement.
- 37 Both the requirement of good faith and the prohibition on unfair bargaining import high thresholds that are difficult to meet. Neither standard is likely to enable an agreement to be challenged if it was voluntarily agreed to, irrespective of whether the resulting agreement or behaviour may be exploitative.
- 38 In addition, although the Act gives all employees the right to pursue a personal grievance for a range of complaints, including complaints about unjustified dismissal and an unjustifiable action of the employer which disadvantages the employee. However, this does not enable claims to be made over the interpretation, application or operation of employment agreements.
- 39 Under the current legislative settings, agreements that enable employers to compel an employee to be available, cancel shifts at short notice or restrict that employee's ability to undertake secondary employment cannot be challenged under the personal grievance process. In addition, the groups of employees impacted by the current problems are also unlikely to take personal grievance cases because it is uncertain what outcome the courts would reach.
- 40 Further, although Labour Inspectors can take action on their own accord to agree enforceable undertakings with employers, issue improvement notices or demand notices. They also have the ability to apply to the Authority or the Court for penalties and compliance orders. These powers, however, can only be exercised for breaches of minimum standards provided for in our employment legislation. Under the current enforcement regime there are no minimum standards relating to the problems outlined above.

An international issue

- 41 Zero hours contracts are becoming an international issue of concern. The United Kingdom has recently banned exclusivity (where an employee is restricted from working for another employer) in zero hours contracts (contracts in which the employee is required on an as and when required basis and has no guarantee of hours from week to week, but is able to decline any work offered). They are currently proposing regulations to respond to concerns that employers may seek to avoid the ban on exclusivity clauses by contracting workers for a low number of hours per week. They are proposing to do this by prohibiting restrictions on secondary employment where:

- an employee's income is lower than a certain threshold (the threshold of weekly income will be set in regulations by multiplying a set number of hours by the adult national minimum wage); or
- an employee earns less than a certain hourly rate (proposed as 20 pounds).

- 42 There is also an increasing incidence of global media reports highlighting the prevalence of such employment arrangements in other jurisdictions. Currently in the Netherlands zero hours contracts are restricted to collective agreements only and there must be an objective reason for their inclusion. In Australia there has not been attention given to 'zero-hours' type contracts; this may be because Australia has quite a different approach to casual work. Casual employees are governed by industry awards but generally have a premium (also known as a 'casual loading') put on their wages of approximately 20 per cent and they can develop a pattern of work and not be deemed permanent for up to 12 months. Therefore the flexibility of 'zero-hours' type contracts are provided by casual employees.
- 43 With regards to cancellation of shifts, in Australia this is mainly dealt with through industry awards so each industry has different standards and practices. New Zealand's employment relations framework moved away from an industry awards based system over 25 years ago.
- 44 In Canada there is a provision guaranteeing three hours payment where an employee turns up to work and the shift is cancelled.
- 45 On the wage deductions issue, both the UK and Australia have legislation comparable to New Zealand's *Wages Protection Act*. The UK's *Employment Rights Act 1996* protects employees from "unauthorised deductions" but not "unreasonable deductions". Unlike our *Wages Protection Act*, the UK law explicitly mentions employment contracts, stating that "a relevant provision of the worker's contract" is sufficient to authorise a deduction. By comparison, Australia's *Fair Work Act 2009* provides very strong protection of employees' wages. Apart from deductions authorised by statute or awards, the *Fair Work Act* generally only allows deductions that an employee consents to in writing and that are "principally for the employee's benefit". In addition, a deduction may be deemed to be invalid, even if it was consented to, if it was (i) "directly or indirectly for the benefit of the employer", and (ii) "unreasonable in the circumstances".
- 46 On the issue of general ban, no countries have introduced a general ban on unconscionable conduct in the context of employment law. The nearest comparison is the discussion of unconscionability in the Australian Fair Trading context. The Full Federal Court of Australia has held that conduct alleged to be unconscionable is to be assessed against a normative standard of conscience, permeated with accepted and acceptable community values. This is fully in line with how we intend the Courts to interpret unconscionable conduct.
- 47 Our view is that for the long term benefit of the New Zealand labour market, we should not be allowing these types of exploitative practices.

Further issues

- 48 During discussions with stakeholders about the issues under consideration, a number of specific practices were identified. As mentioned above, some of these practices are outside the scope of the current work and are part of broader economic and social issues that would require a much broader policy response than is possible in the scope of the current work. For example, dealing comprehensively with the related issue of certainty of income through certainty of hours and/or the income support/tax rebate interface. The current work deals with the issue of so-called "zero-hours" where the problem is the combination of employers not guaranteeing employees any hours of work whilst requiring them to be available.

B. Regulatory Impact Analysis

Objectives and criteria

- 49 The labour market is influenced by a range of policy levers. In addition to the employment relations and standards framework, the labour market is affected by the formal skills system, skills utilisation and development, the immigration system, occupational regulation, health and safety settings and the tax and welfare system. The effective and efficient functioning of the labour market contributes directly to a number of key objectives for New Zealand's growth and wellbeing:
- Employment is high, unemployment is low
 - People receive good outcomes from work in workplaces that are safe
 - Real wage growth increases
 - Labour productivity increases
 - Firms have access to the skills and talent they need to grow
- 50 Within this broad outcomes framework, which New Zealand's employment relations settings aim to support, the objectives for the employment relations system and specifically this work are to:
- a) **Support mutuality of obligations in employment relationships.** A relationship of mutual obligation is where there is appropriate balance of risk or benefit between the parties. This would be where the risk is borne by the party best able to mitigate and control for such risk or best able to respond once the risk has manifested. At its most extreme, unbalanced risk becomes exploitation. This is more likely where there is an imbalance of power in an employment relationship.
 - b) **Provide legal certainty.** The impacts of employment law on employment relationships should be clear and predictable; the labour market needs certainty about what is required for good practice.
 - c) **Support efficient contracting.** This is where parties can match supply and demand of labour to business and employee requirements. For example, employees are able to satisfy their capacity to work in the labour market. Similarly, employers are able to fill their labour requirements efficiently, that is not paying for surplus labour or being understaffed. This would balance the needs for flexibility and sufficient certainty for all parties.
 - d) **Minimise incentives to game the system.** This means there are no or low incentives to use a particular practice as a way to avoid employment obligations.
 - e) **Minimise cost to all parties.** For businesses this includes minimising compliance cost and the broader cost of doing business. For employees this includes opportunity costs such as loss of income/income support. For the Government this includes administrative costs.

Analysis of options against criteria

- 51 The detailed analysis of the options that form the recommended package is presented in the annex, with recommendations based on the positive net outcomes of the preferred option. The criteria have equal weighting.

- 52 Options have been assessed against the objectives outlined above. Each option has been assessed against these criteria with either 1-3 crosses '×' or 1-3 ticks '✓' to indicate the degree to which the option meets the relevant criterion as compared to the status quo and a dash '-' to indicate where there is no difference to the status quo. The recommended option is shaded in each case.

C. Conclusion – preferred package and impacts

Summary of preferred package

- 53 The recommended proposal is to provide the following package of options (see annex for full analysis of all feasible options considered).
- a) Prohibit:
- parties agreeing in an employment agreement that an employee must be available for work over the contracted hours, unless:
 - o The agreement retains the right for the employee to refuse such work on a case by case basis; or
 - o The agreement provides compensation rates where an employer requires the employee to be available, and those rates are paid in each instance (*issue 1: option 2*).
 - employers cancelling a shift without reasonable notice unless compensation, as agreed in the employment agreement, is paid (*issue 2: option 2*).
 - employers from putting any restrictions on an employee in the employment agreement seeking secondary employment unless there is genuine reason based on reasonable grounds. Genuine reasons to restrict secondary employment will include where:
 - o the employee has been paid sufficient compensation to warrant the restriction; and
 - o there is an actual, potential or perceived conflict of interest (*issue 3: option 2*).
 - employers from making unreasonable deductions from employees' wages. "Unreasonable" could be partially defined in this context by providing examples, which could include:
 - o deductions relating to third-party behaviour over which the employee has no reasonable control
 - o deductions that are disproportionate to any loss suffered by the employer regardless of whether that loss relates to the behaviour of the employee or of a third party (*issue 4: option 2*).
- b) a general ban on unconscionable conduct, with criteria for the Courts (*General Options – option 3*).
- 54 The benefits of the package of options are that the problems identified are addressed through the specific bans, with the general ban providing a future-proofing mechanism to deal with ongoing drivers for exploitative behaviour. For example, what is likely to happen in regard to the specific prohibitions is that some employers will continue to try to work around the boundaries. These evolving practices can only be captured if there is a general principle that can respond to these changing practices.
- 55 The risk with general bans is two-fold. Firstly, being principle-based and thus broad and not clearly defined, the Courts can interpret them in an unintended way. However, we have mitigated this to an extent by providing as much clarity as possible, through criteria. Secondly, principle-based legislation can have a chilling effect on employment practices as employers may become more risk-averse. However, we do note that some employers may choose to pass the cost of uncertainty and compliance onto consumers

Impacts on businesses

- 56 We are unable to estimate how many employers may be affected because we do not know how many employers are engaging in these practices. However, we consider the proposals will mainly affect the hospitality, food and retail industries, as these are where the practices are prevalent. As noted above, these industries have approximately 314,000 employees. Impacts will be mainly limited to those employers who are engaging in the specifically banned practices or other practices that reach the threshold of unconscionable conduct and are therefore the most egregious. However, employers may need to review their practices and employment agreements to ensure they comply with the prohibitions.
- 57 For those businesses that need to change practices to comply, there may be some short term costs associated with reduced employer flexibility. Large businesses will be better placed to absorb the costs of complying, while smaller businesses will be more affected because they will have to change their practice and have fewer resources to do so and may choose to pass the cost onto their customers. There will also be additional costs associated with the uncertainty of the proposed general ban. This is likely to manifest for employers when cases are taken to the Courts. Such a ban can also have a chilling effect on employment practice. Once case law develops it will provide more clarity to employers about how to avoid these costs by bringing their practices at least up to the minimum standard.
- 58 The package aims to address the concerns of many employers that exploitative practices were occurring, particularly if it was within their industry. Banning poor practice where it is prevalent in an industry can only improve the reputation of the industry and make it more attractive to workers.
- 59 Specific benefits for employers include that flexibility will be maintained where there is a genuine reason to use that practice and the law will clarify what will be banned. This should lead to a more productive workplace because workers will be more engaged.

Impacts on employees

- 60 The package will be of overall benefit to employees. The proposed package bans a set of specific exploitative practices which should improve the quid pro quo in the employment relationship, and provide better outcomes for employees. However, given the power imbalance that these sectors tend to have, the success of these options relies on the signalling power of the package to incentivise employers to change their practices, and on the ability of employees or their representatives to bargain for favourable compensation.
- 61 Given this, the proposals will reduce the level of risk for employees and improved certainty of income and enable employees to better manage their work-life balance. Where exploitative behaviour is occurring employees will now have redress and access to compensation for any disadvantage if they choose to take a case.
- 62 Employees should generally have more certainty while maintaining flexibility where employees have agreed to it or it benefits them. Specifically employees will no longer be:
- a) restricted from seeking secondary employment unless the employer has a genuine reason to restrict them, based on reasonable grounds. This should allow for the increase of income for low wage workers where these restrictions currently exist
 - b) required to be available without the ability to refuse the work, or receiving work or compensation for this availability
 - c) subject to unreasonable pay deductions from their wages.

- 63 While the package is of benefit to all employees, the benefits are most likely to be experienced first-hand by non-standard workers who have been more at risk of unconscionable or unfair practices. This group includes: part-time workers, temporary workers, young people and older workers, Māori, Pasifika, women, those with lower qualifications, and workers in QSR, hospitality, food services and the retail trade.
- 64 Some (most likely low-skilled) employees, who are trying to enter the labour market, may be negatively impacted by the changes if some employers perceive the cost and risk of employing people to have increased.
- 65 The package is expected to result in fairer and more productive employment relationships with improved productivity across the economy. It is unclear whether this will impact wages. While improved productivity can incentivise higher wages, the opposing tension is that if employers have to give more certainty they may look to reduce costs by keeping wages low.

Impacts on Government

- 66 The proposals may increase the workload of the regulator because there may be more cases being taken by the Labour Inspectorate and employees to the Employment Relations Authority and Employment Court. It is likely, however, to have a more significant impact on dispute resolution services as they are the first port of call for individual employees seeking problem resolution. Increases in the number of complaints or cases being considered by the regulatory system is likely to have a proportionate impact on the timeframes for the resolution of those cases.
- 67 There may be less reliance on the income support system if employment becomes more certain.

Wider impacts

- 68 The package promotes fair and productive employment relationships that will lead to improved productivity. It will help enhance New Zealand's international reputation as a place to work and do business. Nevertheless, the degree of productivity gains will depend on whether employers invest more efforts into planning and workforce development as a part of their overall business strategy.

D. Implementation (and risks and mitigation) of preferred package

- 69 The preferred package of options will be progressed along with the changes to parental leave (announced as part of Budget 2014) in an omnibus Employment Standards Bill. This Bill needs to be introduced by mid-2015 to achieve the 1 April 2016 implementation date for the parental leave changes. Subject to Cabinet's agreement, the change to the funding arrangements will be given effect as part of the Budget 2015 process.
- 70 We consider that there is minimal risk to government in implementing the preferred package of options, with the greatest risk being that the changes do not have the desired effect of promoting an appropriate balance of risks in the employment relationship.
- 71 The options need to be introduced as a package. A general ban ensures that emerging behaviours that have not yet been identified, but which reach the threshold of unconscionable conduct, will be captured. The specific bans respond to each identified problem. If any of the options were introduced individually they would not address the group of problems.
- 72 There is also some risk in terms of how the reforms are seen by businesses and a comprehensive information campaign will be developed in time to support the implementation of the changes. This will provide clear messages about the changes, their timing, and in particular what these will require of employers. We do not foresee that the changes will directly affect employers who have good employment practices that already provide mutuality of obligations (most employers) and this will be emphasised in the information campaign.
- 73 The information campaign will directly address the areas for which we anticipate some concern from employers in terms of their understanding of what the changes mean for them. Another focus of the campaign will be to ensure employees are made aware of the changes so they are able to enforce their rights if the prohibitions are breached.

E. Enforcement

- 74 Both the specific and general bans will be enforceable by the employee or their representative as a breach of statutory duty or as a personal grievance. Parties will be able to seek compensation for damages and any loss suffered. In respect of the specific prohibitions, penalties could also be imposed by the Authority for non-compliance. As the practice here is already known and clearly exploitative the penalties are in place to disincentivise any breaches of the specific restrictions.
- 75 To ensure that the terms and conditions included in the employment agreements are appropriate, the act also includes provisions to outline when the bargaining for terms and conditions are considered unfair.

Issues 1-3

- 76 Where a provision in an employment agreement is not compliant with the law (for example the employment agreement compels availability without the employee having the right to refuse or compensating that employee for their availability) then that clause will be deemed void, and therefore unenforceable.
- 77 If an employer relies on the clause then this will be a breach of the law. The employee then has several options, the first is to raise this problem with their employer and seek mediation assistance where necessary.
- 78 For employers who practice shift cancellation, there will now be a requirement to state notice periods and compensation rates. Where there is no provision in an employment agreement for these clauses, the employer will be breaching the law. Also, where an employer does not provide the notice period and compensation stated in the employment agreement, the employer will be breaching the employment agreement.
- 79 Where an employee is restricted from seeking secondary employment but is not paid sufficient compensation to warrant the restriction, or there is no actual, potential or perceived conflict of interest, then the clause will be void.
- 80 For the instances above, then the employee has several options; the first is to raise this problem with their employer and seek mediation assistance where necessary. If the problem is not resolved, they could either take a personal grievance based on disadvantage or go to the Employment Relations Authority seeking a compliance order.

Issue 4

- 81 Under current law, a Labour Inspector is authorised to bring an action to recover a penalty for a breach of the *Wages Protection Act 1983*, but not to recover amounts deducted from wages in breach of section 6 of the *Wages Protection Act 1983*. This is an anomaly, because Labour Inspectors can seek arrears on behalf of employees in other pieces of employment legislation. To address this issue Cabinet recently agreed to permit inspectors to seek monies owed as a result of illegal deductions [CAB Min (15) 8/9]. The proposed change will provide an additional ground on which to challenge a deduction.
- 82 The penalties for a breach of the *Wages Protection Act 1983* are those set out in the *Employment Relations Act 2000*.

Ban on unconscionable conduct

- 83 If an employee believes their employer has undertaken a practice that reaches the threshold for unconscionable conduct, this will be enforced like any other breach of the Act. After raising the issue with their employer, a party can seek mediation assistance or can lodge an application with the Employment Relations Authority to hear the dispute. The employee or their representative will be able to seek a penalty for breach of the Act where their claim is successful.
- 84 We do note that being principle-based and thus broad and not clearly defined the courts can interpret them in an unintended way. However, we have mitigated this to an extent by providing a set of criteria to help define unconscionable conduct. Principle-based legislation may also have a chilling effect on employment practices as employers may become more risk-averse.

F. Consultation

- 85 The Ministry prepared a consultation document that set out the issues that we had identified around zero or low hours contracts, casual employment, short notice cancellation of shifts, restrictions on secondary employment and wage deductions. We completed three weeks of targeted consultation with a broad range of stakeholders including employers specifically in the industries where some of these practices were occurring. We also consulted industry and employer representative groups, unions, and employment lawyers.
- 86 In our consultation document we proposed four options to deal with the identified issues. The feedback on these options is set out below.

General feedback on scope of issues

- 87 It was clear that zero hour contracts were being used widely in the Quick Service Restaurant (QSR) industry, as well as some food and beverage businesses, convenience stores and residential care businesses. Low-hours contracts were also found in supermarkets.
- 88 Several stakeholders were comfortable with the current common law definition of what characterises a casual employee and did not think that it needed to be legislated for. Most of these businesses were large and had the resources and capability to keep up with changes to case law in this area. Small businesses noted that clarity in this area would be beneficial.
- 89 Most stakeholders did not cancel shifts on short notice, unless some unforeseen event occurred, such as a natural disaster. Some stakeholders did report sending employees home when it was quiet, however, they have the options to pick up shifts at other times during the week. Several stakeholders used some form of restriction on secondary employment; mainly this was to protect against any perceived conflict of interest or as a mechanism to deal with health and safety concerns.

Stakeholder feedback on a general ban of exploitative practices

- 90 The first option was to ban 'harsh and oppressive' employment agreements. We proposed three options: banning specific practices, setting out safe harbours, and/or setting out criteria for the courts to assess whether the conduct or agreement was 'harsh and oppressive'.

Specific bans

- 91 Some businesses thought that a specific ban may be too prescriptive and if too broad could capture employment practices that have mutuality of obligations. Most of these stakeholders preferred no legislative intervention, or the employment practices to be assessed against the criteria by the courts.
- 92 On the other hand, some businesses preferred a specific ban to provide clarity about what would and would not be a banned practice. These stakeholders were not in favour of criteria because it would mean the law in this area would be subject to change as the law develops through the courts. Over time this would lead to a lack of clarity as to what employment practices were banned.

Safe Harbours

- 93 Some businesses thought that safe harbours would be a beneficial way of providing clarity about what practices would not be considered unconscionable. However, once the banned practices were developed we realised that it was either clear what was considered 'safe' or prohibited, or that developing safe harbours that did not limit the ban would be complex.

General ban on unconscionable conduct

- 94 Several stakeholders thought that a new term should be used instead of 'harsh and oppressive' because that term was used in the *Employment Contracts Act 1991* and it was extraordinarily difficult to prove. The term 'unconscionable conduct' was considered an appropriate alternative because it takes into account the stronger bargaining power of one party using this to the disadvantage of the other, in a manner that is unfair, unjust or unscrupulous, and against the dictates of conscience.
- 95 It was noted that specifying banned practices should not have the effect of narrowing the scope of what is considered 'unconscionable'. The criteria to be assessed by the courts is a useful way of ensuring practices that are not specified, but are still 'unconscionable', can be captured.
- 96 Most unions and some business groups were in favour of a general ban on unconscionable employment practices as proposed.
- 97 Some unions questioned the enforceability of a general ban, saying that the types of employees who are subject to such practices are unlikely to bring a claim because they are unaware of their rights, are low income and cannot afford to take a case or are afraid that they will be disadvantaged or lose their job if they do. It is proposed that education and awareness about the changes is undertaken, especially in regards to those employees most likely to be subject to unconscionable behaviours. Unions stressed the importance of the role of the Labour Inspectorate in this area.
- 98 Some unions reiterated that the best means of addressing the problem of 'unconscionable conduct' is to strengthen workers' ability to have meaningful input into fixing their own employment conditions through strengthening the statutory provisions around bargaining, and in particular collective bargaining.
- 99 Some stakeholders thought that in addition to the ban, a positive statement of the principle that employment relationships should have mutuality of obligations should be incorporated into the Act.
- 100 Some business organisations acknowledged and agreed there are instances in which the use of a particular form of employment can be inappropriate, and were comfortable with the specific restrictions and the general prohibition on unconscionable conduct.

Stakeholder feedback on defining casual employment

- 101 Several stakeholders did not think that casual employment needed to be legislated for because the well-established definition in case law provides sufficient clarity. Unions were opposed to legislating for casual employment because they thought it could incentivise the use of casuals over permanent employment.
- 102 Those stakeholders that supported defining the characteristics of casual employment in the Act thought some parts of the common law definition would need to be clarified. For example, some stakeholders thought there needed to be clarity around the factors that determine when a casual employee becomes a permanent employee. Small businesses noted that clarity in this area would be beneficial.
- 103 Businesses did not support the use of a casual loading because they thought that it would add an unnecessary cost to doing business and would be unfair to their permanent employees who would then be on a lower rate. Unions supported casual loading to recognise the uncertain nature of casual employment and to recognise that casual employees do not receive the same entitlements as those in permanent employment arrangements.

Stakeholder feedback on compensation for shift cancellation

- 104 The third option addressed shift cancellation and compensation. We asked stakeholders for their views on minimum notice periods for cancelling shifts and appropriate compensation.
- 105 The employers we spoke to told us short-notice shift cancellation was not standard practice and many were in favour of banning short-notice cancellation where there was no compensation. Both employers and unions agreed that once rosters were set, shifts should only be able to be changed by mutual agreement, with unions stating where an employer cancels a shift the cost should be borne by the employer not the employee.
- 106 Some stakeholders noted that requiring compensation for short-notice cancellation is the most robust way of encouraging best practice.
- 107 Employers were concerned that business must be able to operate as it needs to without disadvantaging employees, as far as possible. In cases where business was unexpectedly slow, staff members should be able to go home early by mutual agreement. However, feedback from both sides was also that employees should not be penalised due to poor management practices or forecasting.
- 108 Stakeholders on both sides were concerned that if the norm became that 24 hours' notice for a shift cancellation was all that was required it may lower the floor and some businesses would reduce current good practices.
- 109 On the other hand labour hire companies considered 24 hours' notice to be too long as it may drive labour hire clients to only order workers on the day to avoid the risk of having to pay cancellation compensation. Some industries have very short notice themselves about how many workers will be required.
- 110 "Extreme events" policies were standard for situations out of anyone's control (eg natural disaster, weather, and lockdown when a crime has been committed) and in these circumstances employers felt that no compensation for cancelling a shift should be paid.
- 111 Feedback relating to the treatment of casual workers in this space was mixed with some stakeholders stating that casual workers should not receive compensation for short-notice cancellation but that the notice period should be the same, where reasonable and practicable. Others felt that once there was casual employment based on offer and acceptance, full payment should be made on the cancellation of this.
- 112 Unions and some employers favoured having a specified notice period rather than relying on reasonableness which can be subjective.
- 113 As with all the proposals discussed in this consultation, stakeholders were clear that any intervention must allow for the peculiarities of each industry.

Stakeholder feedback on restrictions on secondary employment

- 114 All employers stated that they did not have exclusivity clauses in their employment agreements but reserved the right to restrict secondary employment where there was potential for harm to the business, real or perceived.

- 115 All the employers we spoke to agreed that consent to undertake secondary employment should not be unreasonably withheld but should be within the employer's power so they are able to protect things such as commercial sensitivity and intellectual property, and to reduce health and safety risks. Therefore, the Act should merely impose a general prohibition on unreasonable restrictions on secondary employment. Employees have redress through the personal grievance system if they feel they have been dealt with unreasonably. Unions recommended large penalties against employers if they were found to have unreasonably restricted secondary employment.
- 116 All employers we spoke to had, at a minimum, a disclosure policy and considered it necessary. However, unions objected to a blanket disclosure policy as it would make vulnerable workers even more vulnerable. Employers stated that transparency can be important to protect the employee, for example where they are young and/or inexperienced and unaware of potential pitfalls with conflicts of interests. Some stakeholders questioned if this disclosure should also extend to other activities such as voluntary work that could impact on the employee's primary employment.
- 117 Unions considered that any prohibition on secondary employment is unreasonable as current mechanisms already offer protection to employers to protect confidentiality, conflicts of interest and health and safety risks due to performance issues.

Stakeholder feedback on unreasonable or inappropriate wage deductions

- 118 Most employers we spoke to felt that, in general, problematic wage deductions stemmed from poor management practices and/or ignorance of the current law, rather than the law itself. These employers felt that additional best practice guidance/education would be an appropriate response.
- 119 Many employers were concerned that tightening the process requirements for obtaining an employee's written consent to a deduction would provide too much power to employees to withhold consent (unreasonably), forcing employers to use more costly and time-consuming channels to recover employee debts. They felt that employers needed the ability to initiate wage deductions for mutually beneficial purposes, or for losses that could reasonably be attributed to the actions of employees. Commonly cited examples were:
- Allowing recovery of "monies owed" at the end of an employment relationship – for example, for leave taken in advance, employee training (if an employee leaves the workplace soon after completing training), failure to return company property, damage to lodgings, failure to work out a notice period, or to recover any outstanding balance on staff accounts
 - Recovery of overpayment (allowed in tightly defined circumstances)
 - Deductions for lodgings and other costs such as fuel and food (this is especially common in on-farm employment arrangements).
- 120 Some employers strongly defended the use of contractual "consent to deductions" clauses as a matter of principle. These respondents argued that discussions/negotiations on the conditions of employment were an appropriate place for expectations around wage deductions to be agreed. They pointed out that employees had an opportunity to seek advice (including legal advice) about the liabilities they were potentially accepting, and to familiarise themselves with their right, under the *Wages Protection Act 1983*, to withdraw consent to any deduction.

- 121 There was, however, some support for banning the use of employment contracts to obtain employees' consent to deductions (other than deductions expressly referred to in legislation). This reflected a view that consent to any wage deduction should – with limited exceptions – only be obtained after the commencement of an employment relationship (ie not as a contractual condition of employment).
- 122 Unions favoured strengthening the law as far as possible, so that employees had to expressly consent to (or request) any wage deduction. However, unions generally felt that the most effective law change would be to ban particular kinds of unreasonable wage deduction (eg by making some classes of wage deduction unlawful). They also suggested encouraging compliance by increasing penalties and Labour Inspectorate resources.
- 123 Many employers stated they would have no major objections to banning particularly unreasonable types of wage deductions. The main condition attached to this support was that care should be taken to avoid inadvertently banning reasonable practices.

Agency consultation

- 124 The following agencies were consulted on the Cabinet paper 'Addressing zero-hour contracts and other exploitative practices in employment relationships' and this RIS: the State Services Commission, the Treasury, the Ministries of Social Development, Education, Pacific Island Affairs, Justice, the Ministry for Women, Te Puni Kōkiri and Inland Revenue. The Department of Prime Minister and Cabinet has been informed about the Cabinet paper. Business NZ and the New Zealand Council of Trade Unions have also been consulted on the development of these proposals.

Treasury's Comment

- 125 Treasury does not support introducing a general ban on unconscionable conduct into the *Employment Relations Act 2000*. The intention of this general ban is to deter employer behaviour that has not yet emerged in the labour market, but may reach a threshold of unconscionable conduct. The Treasury does not think there is sufficient evidence that these new exploitative employment practices will eventuate quickly. This is particularly the case given the social signal that would be sent by banning a specific set of exploitative employment practices.
- 126 In addition, the Treasury believes there is a risk of negative unintended consequences that arise from the implementation of a general ban. Although the intention is for the threshold to be set at a high level, the criteria set out to implement the ban still give considerable scope for the courts to interpret what constitutes behaviour that is "unfair, unjust, unscrupulous, unreasonable, with disregard to the effect on the employee, and against the dictates of conscience". The Treasury believes that a legal standard this broad is likely to create considerable labour market uncertainty, and prevent employers from offering forms of employment that are genuinely mutually beneficial, but may risk being captured by the broad scope of this general ban.
- 127 Treasury would recommend investigating and consulting further on this issue directly to determine whether there is a genuine risk of new exploitative practices evolving which are not captured by the provisions of the *Employment Relations Act 2000*, with the inclusion of the proposed new specific bans.

G. Monitoring, Evaluation and Review

Survey and research data

- 128 Data from Statistics New Zealand's planned 2017 Survey of Working Life (SoWL) will be used to monitor whether there have been any changes in the number of non-standard workers, and the number of employees with no usual working times and no usual number of days. We can also use SoWL 2017 data to monitor changes in the respective proportions of employees whose hours change from week to week to suit their employer's needs, and employees who get minimal advance notice about their working schedules.
- 129 We will also monitor the number of claims made in regards to the prohibitions and the outcomes of these claims.

Annex: Options analysis

Option	Criteria for assessment of options					Net outcomes
	Mutuality of obligations	Legal certainty	Efficient contracting	Minimise incentives to game	Minimise costs to parties	
Issue 1) Employee availability – where employees are required to be available over their guaranteed hours						
1. Status Quo In some employment relationships, employees are being required to be available to work, without necessarily being given the opportunity to receive work or payment that is commensurate with their availability.	While employers can readily access labour allowing them to be responsive, the risk and cost of flexibility are borne by the employees who cannot work elsewhere and are not paid for their availability. This is exacerbated where employees have little or no bargaining power, especially where these employment arrangements are industry practice (as the employee is less able to seek more favourable employment elsewhere).	- The industries where the problems are most prevalent (retail, food and hospitality) employ many new entrants to the labour market (low income, young workers). These workers can be unaware that there are other forms of work arrangements that operate in the market. These employees are also less likely to understand their rights or enforce them. - Employers are aware that there is no law preventing the current practices.	- Employees cannot match their additional capacity of labour when their unutilized availability is being reserved for one employer (who is not providing work or paying compensation for the availability). - Some employers have access to labour without having to pay for reserving that supply of labour. - Employers cannot access this excess labour capacity, as it has been reserved by other employers.	These practices can cut the short term cost of business for employers who use them, and may provide disincentives for employers to invest in their employees. It is highly likely that without intervention these practices will become further entrenched in those industries and will continue to spread to other sectors. We are aware that some recruitment agencies have had requests for such contracts following the media attention on the matter.	- Uncertainty of income for employees means they may find it difficult to plan financially and in their personal lives. This may result in some people receiving or paying incorrect benefit, child support and tax. - Good employers have higher short term costs than those employers avoiding statutory processes - For the wider Labour market there is some level of inefficient matching, and more reliance on the benefit system which is a more certain form of income than working on a zero hours type contract. - Uncertainty of employee work hours and pay means government agencies may have increased administrative costs associated with regularly changing the amounts of clients' social policy and tax-related payments.	While employers have significant flexibility, the current problem becomes further entrenched and may continue to spread, affecting more and more employees and businesses. Despite high profile multinational companies in the QSR (Quick Service Restaurant) industry backing out of these policies it is likely they will continue in smaller hospitality, retail, and caring and cleaning sectors without intervention. This will continue to have negative impacts on the financial wellbeing of employees and will affect the wider labour market, ie businesses needing to move to these types of arrangements in order to remain competitive. This also affects employee engagement and productivity, having a negative financial effect on the economy.
2. Prohibit parties agreeing in an employment agreement that an employee must be available for work over the contracted hours unless: a) The agreement retains the right for the employee to refuse such work on a case by case basis without penalty; or b) The employment agreement specifies compensation where an employer requires the employee to be available, and this is paid where the employee is required to be available. For the purposes of the restriction on availability, parties may also agree that the total remuneration package for salaried employees includes compensation for that availability This option creates a requirement on all employers and employees to agree compensation rates up front in their employment agreement where it is likely that the employee will be required to be available above contractually agreed hours. This would not restrict an employee's ability to undertake additional work with that employer outside their contracted arrangements, so long as there was agreement for such	✓✓ - Encourages employers and employees to negotiate at the outset of an employment relationship where the balance of risk will lie (by negotiating what they are willing to pay/receive for availability, or that employees can refuse any extra work offered above contracted hours). - However, the imbalance of bargaining power in the sectors where we are seeing these issues means employees may not be able to negotiate reasonable compensation rates. - Prohibits availability above contracted hours without compensation. So in the case of "zero-hour" contracts, employees can either decline work (gaining the quid-pro-quo of a casual employee) or will be compensated for their availability. - Incentivises employers to give	✓✓✓ - It provides employers and employees certainty about what practice is banned. - This means employees will know if their employer has breached their obligations, as the employment agreement must state that the employee can refuse extra work, or what the compensation is for their availability. - Nevertheless, there might still be disagreements about the rates.	✓✓ - It will not inhibit flexibility, because it allows employers to continue with flexible practices where they are willing to pay for it or take the risk of employees declining work. - Because it will incentivise some employer to give certainty of hours (due to the cost of paying for availability or risk of not having people available) it will likely increase certainty of hours for some employees which means they can better match their labour capacity (ie: take a second job).	✓ There may be some opportunity to game this provision, for example employers may continue to implicitly require employees to be available for extra shifts. Or employers may still not give contractual hours. However, employees can decline shifts without penalty.	✕ - All businesses will need to review their employment agreements to see if they are compliant, and add in compensation scales if they are requiring availability above contracted hours. - Businesses who are currently requiring availability without compensation will incur costs. For businesses that are already compliant there will be no extra cost. - There may be added cost to the state to process any additional cases and enforce the minimum standard, but this should be minimal.	While the cost to the employer may increase somewhat, this is offset by employees generally getting more certainty of hours or pay. This option will incentivise employers to choose the best employment practice for their business need (ie either genuinely permanent or casual). Encourages employers and employees to negotiate at the outset of an employment relationship where the balance of risk will lie. However, the imbalance of bargaining power in the sectors where we are seeing these issues means employees may not be able to negotiate reasonable compensation rates, and this won't be illegal. Overall this option mostly supports the objectives identified for this work. While there are some compliance costs associated with this option, these could be mitigated by transitioning these provisions in gradually (allowing the provisions to apply only to agreements entered into or renewed after the legislation comes into effect). The costs of compliance are offset by the long term benefits. Net outcome overall positive.

Option	Criteria for assessment of options					Net outcomes
	<i>Mutuality of obligations</i>	<i>Legal certainty</i>	<i>Efficient contracting</i>	<i>Minimise incentives to game</i>	<i>Minimise costs to parties</i>	
work. By preserving flexibility where there is agreement between parties, it would not affect the use of casual working arrangements. We do not propose to set a minimum rate of compensation because there are many different practices across a range of industries that already have set rates. Putting in a floor means that this could actually drops the rate of compensation that employees would usually be entitled to receive. Our view is that the courts will be in a better place to determine this on a case by case basis. Preferred option (as part of package)	permanent employees certain hours, or bear the risk of employees declining work, or pay for their availability. Because this only addresses contractually agreed availability, it won't address non-contractual pressure on employees to be available. However, with education the signalling of this proposal will increase awareness of employees' rights.					
3. <i>Prohibit parties agreeing in an employment agreement that an employee must be available for work over the contracted hours unless:</i> a. <i>The agreement retains the right for the employee to refuse such work on a case by case basis; or</i> b. <i>The employer provides <u>reasonable compensation</u> for the employee being compelled to be available.</i> This option differs from the one above in that the provision means an employment agreement can be silent on what compensation will be paid; that is, there is no requirement to provide for this in the employment agreement. Also, this option differs from the one above in that the provision requires that compensation is reasonable rather than that specific rates must be included. The effect of this difference is that the Courts will be forced to determine what is reasonable. We have added criteria or factors for the Courts to consider in order to assist the Courts in deciding what constitutes "reasonable compensation": - the notice given before the extra work commences - the level of restriction placed on the employee - The quantum of total compensation payable to the employee (both for work actually undertaken and for periods the employee is available for) - the period of availability - how likely it is that the employee will be required to work - the nature of the work - the type of employment arrangement (ie casual, permanent, fixed term) - likely costs incurred by the employee in preparation. - any other relevant factors. This option creates a risk that parties may use the prohibition to litigate issues relating to the sufficiency of compensation for being on call. This raises questions about the appropriateness of the Court having a role in determining such questions.	✓✓ - As with Option 2, employees can refuse to work or get paid for being available. Employers are paying for requiring employees to be available. - As with Option 2, prohibits a specific practice. - As with Option 2, incentivises employers to give permanent employees certain hours, or bear the risk of employees declining work, or pay for their availability. - As with Option 2, because this only addresses 'contractually agreed availability, it won't address non-contractual pressure on employees to be available. - As with Option 2, the imbalance of bargaining power in the sectors where we are seeing these issues means employees may not be able to negotiate reasonable compensation rates; they will need to test this in the Courts which employees with little bargaining power are unlikely to do. - With this option, employers will need to consider if they think the compensation they give for requiring availability from employees would be considered reasonable.	× It is not clear what would be considered "reasonable compensation". Although this is likely to become clearer over time if tested in the Courts.	✓✓ Same as for option 2.	- Same as for option 2. However, as there is likely to be no agreement around this in the employment agreement, employers may be more inclined to ignore the requirement.	× - Businesses who are currently requiring availability without compensation will incur costs. Where businesses are already compliant there will be no extra cost. - The cost of testing what 'reasonable compensation' is may be borne by unions/employees. This cost should reduce over time as standards are set. Employers will also have costs associated with having a claim against them, and having this taken to the Authority/Courts. - There may be added cost to the state to process any additional cases and enforce the minimum standard, but this should be minimal.	Outcomes for this option will be the same as described for option two above except that there will be no requirement for parties to agree compensation scales at the beginning of the relationship. This means that what is "reasonable compensation" will need to be tested in the Courts. Employees with little bargaining power, whom this intervention is mostly aimed towards, are less likely to do this. This also provide an alternative route for parties to litigate the amount of wages (eg sleepovers). However with this option, employers will need to consider if they think the compensation they give for requiring availability from employees would be considered reasonable or risk being challenged. Net outcome overall positive. But more risk than option 2.

Option	Criteria for assessment of options					Net outcomes
	<i>Mutuality of obligations</i>	<i>Legal certainty</i>	<i>Efficient contracting</i>	<i>Minimise incentives to game</i>	<i>Minimise costs to parties</i>	
4. Prohibit parties agreeing in an employment agreement (in certain types of employment arrangements as discussed below ie zero hours contracts) that an employee must be available for work over the contracted hours unless: a. The agreement retains the right for the employee to refuse such work on a case by case basis; or b. The employer provides reasonable compensation for the employee being compelled to be available. The risk noted above (in option 3) is that the Courts will be forced to determine what is reasonable. In the option above this is mitigated by the use of criteria; however this can be further mitigated by limiting the scope of this provision. Ie limiting to one or more of the following: (i) Any employment agreement that does not guarantee any hours of work (ii) Any employment agreement that includes some uncertainty about the hours of work (although, this will include salaried permanent employees who can also have uncertainty in the hours that they work) (iii) Any employment agreement that is not permanent full time employment (iv) An employment agreement that guarantees a weekly wage of less than the minimum hourly wage for a minimum of 40 hours per week (\$14.75 x 40 currently) Limiting the scope of application of the provision could blunt any unintended consequences that arise. For example restricting the availability prohibition to agreements that at least provide \$590 income per week/\$30,680 p.a. would remove the risk of litigation from any agreement that provides for higher wages.	✓✓ - Attempts to narrow the scope to the employees whom we are most concerned about (low income, low skilled, no guarantee of hours), ensuring that they are able to refuse additional work or are compensated when they must be available. This means the risk of needing flexible workers is borne by the employer, who is better placed to manage that risk. - Most of the other points outlined in the above options apply.	✓ It is not clear what would be considered “reasonable compensation”. Although this is likely to become clearer over time if tested in the Courts.	- - An income based threshold is likely to provide some incentive for an employer to choose between paying the employees slightly more to avoid the prohibitions, or absorb the costs associated with the prohibitions to retain flexibility in their systems. - It could have a negative impact on the demand for part time low paid workers (to whom the prohibitions would apply in full under this option). While this risk could be mitigated by carving out casual agreements (to retain the ability to undertake flexible work), this create significant complexity in the market. It might make part-time workers less attractive than full-time or casual.	xx May restrict the scope to the point where it is simple to game (eg.an ‘employment agreement that does not guarantee any hours of work’ could be circumvented by guaranteeing minimal hours (eg 1 hour). Equally, employment agreements that are not permanent full time could be circumvented by providing slightly less hours than 40 hours.	x - Only employers who use the particular type of employment arrangement will be captured, and bear the cost of compliance with the provision. - The cost of testing what ‘reasonable compensation’ is may be borne by unions/employees. This cost should reduce over time as standards are set. Employers will also have costs associated with having a claim against them, and having this taken to the Authority/Courts.	While limiting the scope of the proposal to a narrower set of agreements could theoretically limit the risks identified, there are some challenges: - it is difficult to limit the scope in a principled manner without raising the same risks (ie. the litigation risks with issues such as sleepovers would continue to exist); - being prescriptive about the types of arrangements the prohibitions will apply to could make the prohibition ineffective - providing a boundary is likely to create some distortions around favoured types of employment arrangements, ie leading to less part time workers (even when these arrangements benefit both parties). Overall net outcome is neutral, however, there is likely to be more incentive to game than option 2 or 3, or create distortions in the types of employment arrangements that are favoured.
5. Prohibit parties agreeing in an employment agreement that an employee must be available for work over the contracted hours unless: a. The agreement retains the right for the employee to refuse such work on a case by case basis; or b. The employer provides <u>compensation</u> for the employee being compelled to be available. This option differs from the ones above in that the provision means an employment can be silent on what compensation will be paid, and that the word “reasonable” is removed meaning any level of compensation will meet the requirements (ie \$1 would be sufficient). However, the benefit of this option is that it removes the risks associated with the Courts deciding what ‘reasonable compensation’ is, by allowing the employer to provide any compensation.	- - Depending on the degree of power imbalance, the payment for availability may be extremely small and won’t be illegal or challengeable. - The employees who we are most concerned with have low bargaining power, therefore are unlikely to get reasonable compensation for their availability.	✓✓ Reduces uncertainty and gives clarity to both employees and employers about what is lawful.	✓ - It will not inhibit flexibility, because it allows employers to continue with flexible practices where they are willing to pay for it (as any compensation will do, this could be a very small cost) or take the risk of employees declining work. - Where an employee’s labour is reserved for very little compensation, this may have a negative effect on matching – as an employee could be ready to work, but is waiting for work from their primary employment and being paid little for this availability. - This may incentivise some	xx Incentivises employers to pay very low compensation rates in order to reserve employee’s availability. As a result, the potential for the same issues to persist is high (employees have uncertain hours, and get compensated very little for being available and ready to work).	x - Some businesses will need to change their employment agreements where they are compelling employees to be available above contracted hours without the right to turn down the work. - There will be low compliance costs where the employee doesn’t have the above provision and compensation rates don’t have to be agreed in the employment agreement.	While the compliance costs of this option may be low, these are offset by the increased likelihood of non-compliance and the potentially poorer rates of compensation that are likely to be provided. Given this, there may not be substantial change from the status quo. Net outcome overall neutral.

Option	Criteria for assessment of options					Net outcomes
	<i>Mutuality of obligations</i>	<i>Legal certainty</i>	<i>Efficient contracting</i>	<i>Minimise incentives to game</i>	<i>Minimise costs to parties</i>	
			employers to give certainty of hours (due to the cost of paying for availability or risk of not having people available), and it could increase certainty of hours for some employees which means they can better match their labour capacity (ie take a second job).			

Option	Criteria for assessment of options					Net outcomes
	<i>Mutuality of obligations</i>	<i>Legal certainty</i>	<i>Efficient contracting</i>	<i>Minimise incentives to game</i>	<i>Minimise costs to parties</i>	

Issue 2) Short notice cancellation of shifts without compensation

1. Status Quo Employees are having shifts cancelled at short notice (or are being sent home midway through a shift) without being provided compensation. Employers have flexibility and reduced costs in this model, however the risk and cost of this flexibility are shifted toward the employee.	- Employers are able to respond quickly to dips in business demand by cancelling shifts with little or no notice, without paying employees. The risk and cost of flexibility are borne by the employee who, without reasonable notice of cancellation, cannot work elsewhere and is not paid for being ready and willing to work. - This may be exacerbated where employees have little or no bargaining power, and where these employment arrangements are industry practice (as the employee is less able to seek more favourable employment elsewhere).	- The industries where the problems are most prevalent (retail, food and hospitality) employ many new entrants to the labour market (low income, young workers). These workers can be unaware that there are other forms of work arrangements that operate in the market. - Employers are aware that there is no law preventing the current practices.	- Employees cannot match their additional capacity of labour when their unutilized availability is being reserved for one employer (who then cancels the work without reasonable notice or compensation). - Some employers have access to labour without having to pay for reserving that supply of labour. - Employers cannot access this excess labour capacity, as it has been reserved by other employers.	There is no regulation regarding short notice shift cancellation, other than some case law regarding fixed term employees and casual employees which indicates that they should be entitled to receive full payment when shifts are cancelled without notice.	- Employees have some level of uncertainty of income, which makes it difficult to plan financially and in their personal lives. This may result in some people receiving or paying incorrect benefit, child support and tax. - Good employers have higher costs than those who avoid paying for cancelled shifts without reasonable notice. - There may be inefficient matching in the labour market, and possibly more reliance on the benefit system which is more certain. - Uncertainty of employee work hours and pay means government agencies may have increased administrative costs associated with changing social policy and tax payments amounts regularly.	While employers have significant flexibility, employees bear the cost of this by being ready to work, but not being paid or given work. This will continue to have negative impacts on the financial wellbeing of employees, and their ability to plan in their personal lives. This may also have wider labour market impacts, as businesses using this model get a competitive advantage over others, this may cause other businesses to respond to dips in demand by cancelling shifts. Cancelling shifts may also have an impact on employee engagement and productivity, which could flow through to have a negative financial effect on the economy.
2. Prohibit employers cancelling a shift without reasonable notice unless compensation, as agreed in the employment agreement, is paid. <i>This option creates a requirement on all employers and employees to consider the level of compensation that should be paid in the event of a shift cancellation. This allows parties to consider how much notice is given before the shift is cancelled, and have a scale of compensation to reflect this. (For example if a shift is cancelled within 24 hours, the whole shift may be compensated; within 48 hours, half the shift).</i>	✓✓ - This requires employers and employees to consider the value and implication of short shift cancellation at the outset of the employment relationship. - It means that when a shift is cancelled without reasonable notice employees will be paid the agreed amount. - It relies on the employees or their representatives having	✓✓✓ - It will provide certainty about what practices must be undertaken for cancellation of shifts to be legal. - For employees, they are more certain about what their rights and their entitlements are. For example if an employer neglects to put compensatory	✓✓ - It will promote more efficient contracting by incentivising improved rostering practices. - This would balance both the needs for flexibility and sufficient certainty for all parties.	✓✓✓ Provides a requirement for employers to put in compensation rates in the employment agreement. Would be difficult to game, however, employees that have low bargaining power may not be able to negotiate reasonable compensation.	xx - All businesses that use shift work will need to review their employment agreements to see if they are compliant, and add in compensation scales if they need to cancel shifts without reasonable notice. - Businesses who are currently cancelling shifts with unreasonable notice without compensation will incur costs. Where businesses are already compliant there will be no	While the cost to the employer may increase somewhat, this is offset by employees generally getting more certainty that where a shift is cancelled (at short notice) they will get payment as agreed in their employment agreement. It encourages employers and employees to consider the value and implications of short shift cancellation at the outset of the employment relationship. This option will incentivise employers to improve their rostering practices to avoid having to cancel shifts. Overall this option mostly supports the objectives identified for this work.

Option	Criteria for assessment of options					Net outcomes
	<i>Mutuality of obligations</i>	<i>Legal certainty</i>	<i>Efficient contracting</i>	<i>Minimise incentives to game</i>	<i>Minimise costs to parties</i>	
Preferred option (as part of package)	sufficient bargaining power to negotiate reasonable compensation and reasonable notice of shift cancellation. Where bargaining power is low there is a risk that low compensation rates will be agreed. This gives rights to employees for reasonable notice of shift cancellation or compensation where this isn't given.	measures into the employment agreement, or fails to pay them the agreed amounts, they have a basis to assert their rights. Gives certainty to employers about what their obligations are (ie they pay the rates they agreed to).			extra cost. There may be added cost to the state to process any additional cases but this should be minimal.	Net outcome overall positive.
3. Prohibit an employer from cancelling a shift without reasonable notice unless the employer provides reasonable compensation. The Courts, in deciding what constitutes reasonable compensation, would have to take into account the following factors: - The quantum of total compensation payable to the employee (both for work actually undertaken and for periods the employee is available for or has shifts cancelled) - the length of the shift that was cancelled - the period of notice given before cancellation of the shift - the nature of the work - parties' expectation of work for the relevant shift/period - the type of employment arrangement (ie casual, permanent, fixed term) - likely costs incurred by the employee in preparation for the shift - any other relevant factors. Risks: Creates a risk that parties may use the prohibition to litigate issues relating to the sufficiency of compensation for having a shift cancelled. This raises questions about the appropriateness of the Court having a role in determining such questions.	✓ - Employees will receive some compensation for cancellation of a shift; however, the amount may be low. In order to challenge the amount the employee would have to take a claim that the amount provided isn't reasonable. As the possible compensation is not likely to be substantial it is unlikely that an employee will take a case. - Employers will need to consider what they believe to be 'reasonable compensation' when they have cancelled a shift without providing reasonable notice.	✓ Although, this provides some certainty for employers and employees about what is banned, what is meant by 'reasonable notice' and 'reasonable compensation' will need to be tested to provide more clarity for employers and employees. Further, as this is determined on a case by case basis, this clarity may be limited to those in similar circumstances to the cases that get tried.	✓ Same as for option 2, however, as there is less clarity about what 'reasonable notice' and what 'reasonable compensation' means there could be some employers who cancel shifts within a few hours of the shift who consider this practice to be reasonable. This means that employees may not have sufficient notice to seek alternative employment.	× × - Employers can assess what they think reasonable compensation is on a case by case basis. Employers will be incentivised to provide low compensation until what 'reasonable compensation' means is tested in courts. - Some employers may ignore the requirement and rely on their employees not being aware of their entitlements (as there is no requirement to put anything in the employment agreement).	× - Businesses who are currently cancelling shifts without reasonable notice or compensation will incur costs. Where businesses are already compliant there will be no extra cost. - There may be added cost to the state to process any additional cases and enforce the minimum standard, but this should be minimal. - The cost of testing what 'reasonable compensation' is may be borne by unions/employees. This cost should reduce over time as standards are set. Employers will also have costs associated with having a claim against them, and having this taken to the Authority/Courts.	Although this approach incurs less compliance costs than option 2 above, because 'reasonable compensation' and reasonable notice' are subjective, this could lead to low or no compensation being provided (as an employer may argue that 1 hour is sufficient notice of the shift being cancelled and therefore provide no compensation). Employees do not get a say in the level of compensation or the level of notice that is provided; it would be an amount and period decided by the employer on a case by case basis. Employers and employees do not have much legal certainty about their obligations/rights until cases are tested. Net outcome overall neutral.
4. Prohibit an employer from cancelling a shift without reasonable notice unless the employer provides compensation. This option removes the risks associated with the Courts deciding what 'reasonable compensation' is, by allowing the employer to provide any compensation.	✓ - Employees will receive some compensation for cancellation of a shift; however, the amount is likely to be low and the employee won't be able to challenge the reasonableness of this. - Allows employers to respond to dips in demand by paying the employee some compensation for cancelling the shift. - Depending on the degree of power imbalance, the	✓ - Reduces uncertainty and gives clarity to both employees and employers about what is lawful (though this does not provide as much certainty as providing compensation rates in the employment agreement). - Relies on employees knowing that they are entitled to receive some level of compensation	× There could be some employers who cancel shifts with little notice and pay low compensation, meaning employees do not have the opportunity to seek alternative employment (or the ability to match their capacity of labour to the supply from other employers) and may not receive adequate payment for being ready and willing	× × × - Easy for an employer to game by saying whatever notice they give is 'reasonable'—relies on employee actually taking a case to test this. - Incentivises extremely low compensation rates for shift cancellations as there is no 'reasonableness' requirement.	✓ ✓ Simple to apply with low compliance costs. Some employment agreements that do not comply may need to be amended.	While the compliance costs of this option may be low, these are offset by the increased likelihood of non-compliance and the potentially poorer rates of compensation that are likely to be provided. Given the likelihood of this provision being gamed, it is unlikely that the option would significantly improve the current status quo. Net outcome overall neutral.

Option	Criteria for assessment of options					Net outcomes
	<i>Mutuality of obligations</i>	<i>Legal certainty</i>	<i>Efficient contracting</i>	<i>Minimise incentives to game</i>	<i>Minimise costs to parties</i>	
	payment for short notice cancellation of shifts may be extremely small and won't be illegal or challengeable. There will be limited incentives to negotiate better outcomes.	for short-notice shift cancellations.	to work.			

Option	Criteria for assessment of options					Net outcomes
	<i>Mutuality of obligations</i>	<i>Legal certainty</i>	<i>Efficient contracting</i>	<i>Minimise incentives to game</i>	<i>Minimise costs to parties</i>	
Issue 3) Restrictions on employees seeking secondary employment						
1 Status Quo While employers can effectively manage their risk (ie where there is potential for a conflict of interest) the labour market may not function as efficiently because employees who seek secondary employment are restricted in their ability to match that supply to alternative demand.	Provides protections for employers against potential and actual conflict of interests and reputational risk. However, the employee may be unreasonably restricted from earning extra income even where a conflict of interest does not exist.	There is some case law around restrictions on secondary employment. In some circumstances they may be considered unreasonable; however this is on a case by case basis.	There is anecdotal evidence that these provisions are prevalent; however, it appears they are not relied upon or enforced often. Some provisions require the employee to seek agreement from the employer before engaging in secondary employment. The signalling effect of such clauses may be enough to deter an employee to deter from seeking secondary employment. This means employees may have capacity for labour, but do not feel they are able to seek alternative employment.	Some employers may be trying to reserve their employees' labour in order to have them available for any additional work.	- Employees may be missing out on the opportunity to receive additional income as a result of a restriction on secondary employment. This may mean that they have to rely on benefits or the tax support system when they otherwise might not need to. - Employers may not be able to access the supply of labour due to the restrictions put in place by other employers on employees labour. - There is inefficient matching in the labour market and more reliance on benefit system. - There could be increased administrative costs associated with regularly changing the amounts of clients' social policy and tax-related payments.	While employers are protected from risks associated with their employees engaging in employment where a potential or actual conflict of interest or reputational risk arises, employees may be unfairly restricted from undertaking secondary employment. This may be leading to inefficient matching of labour, where an employee has excess labour to give but is restricted from finding alternative work. There is a lack of clarity around when these provisions are considered unreasonable, as this is decided on a case by case basis by the courts.
2. Prohibit employers from putting any restrictions in the employment agreement on an employee seeking secondary employment, unless there are genuine reasons based on reasonable grounds. An illustration of what may be considered a 'genuine reason' could be where an actual conflict of interest exists. Many employers want to know about employees' secondary employment to deal with health and safety risks in the workplace. Therefore, it is intended that employers are still able to request that employees disclose secondary employment so that employers are able to manage health and safety risks in the workplace.	✓✓ - Protects employees from unreasonable restrictions on seeking secondary employment. - Employers can still protect their interests where a genuine reason for the restriction on secondary employment exists.	✓ Courts will have to decide what 'genuine reasons' include, which means parties won't have immediate clarity until this is tested. However, current case law would be able to guide employers	✓✓ - Employees can better match their labour capacity because they will only be restricted where an employer has genuine reasons based on reasonable grounds. - Employers should have access to more employees who are no longer restricted from seeking alternative employment.	✓✓ Incentivises employers to use restrictions on secondary employment only when they have a genuine reason to do so.	✕ - Businesses who have employment agreements that do not comply will incur costs in varying the employment agreement. Where businesses are already compliant there will be no cost. - There may be added cost to the state to process any additional cases and enforce the minimum standard, but this should be minimal. - The cost of testing what 'genuine reasons' is may be borne by unions/employees.	Overall, this option protects employees from having unreasonable restrictions placed on them. If an employer needs to restrict an employee, they are able to do so where they have genuine reasons based on reasonable grounds to do so. Therefore, the ability to control the risk is able to be managed by the employer. The provision provides clarity about when such restrictions can be used; this will increase over time as 'genuine reasons' is tested by the Courts. Net outcome overall positive.

Option	Criteria for assessment of options					Net outcomes
	<i>Mutuality of obligations</i>	<i>Legal certainty</i>	<i>Efficient contracting</i>	<i>Minimise incentives to game</i>	<i>Minimise costs to parties</i>	
Preferred option (as part of package)		about what are 'genuine reasons' to restrict (ie an actual conflict of interest).			This cost should reduce over time as standards are set. Employers will also have costs associated with having a claim against them, and having this taken to the Authority/Courts.	
3. prohibit restrictions on secondary employment where: a) An employee's income is lower than a certain threshold (the threshold of weekly income will be set in regulations by multiplying a set number of hours by the adult national minimum wage); or b) An employee earns less than a certain hourly rate. This is the current proposal in the United Kingdom to deal with restrictions on secondary employment.	✓ - Employers may have a genuine reason for needing to restrict employment in both of these circumstances (ie there could be a real conflict of interest). However, they are unable to protect their interests through such a clause. - Employees who earn under the threshold are free to seek alternative employment. However, this may be an arbitrary line; employees may not have a conflict of interest and earn above these rates and still be restricted.	• ✓✓ Provides more certainty than the status quo about when a restriction will be prohibited, however does not relate to the reason for restricting being whether a conflict of interest or reputational risk exists.	✓ - Employees, under the threshold, can better match their labour capacity because they won't be unreasonably restricted, and will be sufficiently compensated for that restriction. - Employers should have access to more employees who are no longer restricted from seeking alternative employment.	✗ - Employers may pay just above the threshold so they can restrict employees. This means the threshold becomes very important; knowing where the bar should be would be challenging. - This may result in a push for more full time employees over part time, where a certain number of hours or work must be given to use the prohibition.	✗ Businesses who have employment agreements that do not comply will incur costs of varying the employment agreement. Where businesses are already compliant there will be no cost.	Overall, this option provides protection for those employees who are being paid under the threshold. The risk with this is that it may create distortions in the incentives to use different employment arrangements, ie permanent employment may be seen as more favourable than part time employees. Also, a further difficulty is finding an appropriate threshold. The provision does provide clarity about when restrictions are prohibited. Net outcome overall positive. But more risk than option 2.

Option	Criteria for assessment of options					Net outcomes
	<i>Mutuality of obligations</i>	<i>Legal certainty</i>	<i>Efficient contracting</i>	<i>Minimise incentives to game</i>	<i>Minimise costs to parties</i>	
Issue 4) Inappropriate wage deductions						
1. Status quo (Widespread use of general deductions clauses; validity of any deductions made in favour of the employer depends on the employee's consent)	The Wages Protection Act is intended to give employees control over their wage payments. However, some employment contracts may be (in effect) overriding those protections.	- Although widely used, the legal status of contractual "consent to deductions" clauses is not entirely clear. - There is no legislative guidance on what purposes deductions can be used for.	N/A	Existing laws are generally adhered to across the labour market; but the few employers who work around current employee protections, and pass business losses onto employees, could be said to have an unfair competitive advantage (compared to businesses who insure against such losses).	The current system provides a lot of flexibility for employers and employees to agree to wage deductions for any purpose (either through employment contracts or subsequently). For employers this is a low-cost approach.	The current system is generally understood and supported by employers. However, it is open to abuse, especially where general contractual clauses are relied upon. There is no clear ability to challenge deductions on the grounds of reasonableness. We do not recommend continuing with the status quo, as the current protections place too much reliance on employees withholding their consent. Neither stronger enforcement nor additional education will address this weakness. Enforcement action can be stymied if an employee concedes they consented to a deduction; and additional education about the current law may have the perverse effect of aiding poor practices – for example, by helping employers to be sure they obtain consent to unreasonable deductions in a procedurally valid way.
2. Prohibit employers from making unreasonable deductions from employees' wages. By way of illustration, the behaviours this prohibition could capture (in the event that the existing protections in the Wages Protection Act do not apply) might include: Preferred option (as part of package)	✓✓ This would send a clear signal to employers that some types of business losses should never be borne by employees (regardless of whether the employee's consent to bear that risk can be obtained). Re-affirms the general position that employees should have control over their wage	- - The precise scope of "unreasonable" would develop over time, if tested, through case law. - Would improve clarity to some extent, by making it clear that employee consent cannot be the sole determinant of whether a wage deduction is valid. Over time, this should ensure that practice aligns	N/A	✓✓ This would improve employees' protection (and therefore make it more difficult for a few employers to manipulate current laws) by providing the ability to challenge a problematic deduction even when the employee has (arguably) consented to it. The proposed provision could potentially be used to challenge deductions	- - This option would not impose any additional obligations on employers (other than reviewing practices to ensure they are not "unreasonable"). - The established practice of employment contracts covering (reasonable) deductions could continue.	This would send a clear signal to the labour market that some kinds of wage deduction may be unreasonable and should not be contemplated. This approach would improve employees' ability to challenge wage deductions, without generating undue compliance for costs for businesses. Net outcome overall positive.

Option	Criteria for assessment of options					Net outcomes
	<i>Mutuality of obligations</i>	<i>Legal certainty</i>	<i>Efficient contracting</i>	<i>Minimise incentives to game</i>	<i>Minimise costs to parties</i>	
	payments.	more closely with the original protective intent of the legislation.		for unreasonable purposes, or for unreasonable amounts (eg where an employer deducts a large amount as a punitive measure, even though the loss was small).		
3. Provide that an employee's consent must be express consent to a specific deduction (for a specific purpose and dollar amount). This would mean that in most cases a general clause in an employment contract would not be sufficient to authorise a wage deduction.	✓ • Arguably, ensuring wage deductions are at the employee's (reasonable) discretion is consistent with the original purpose of the Wages Protection Act. This change would increase the likelihood of employees being able to exercise that discretion.	- • It would remain difficult to pin down in legislation how specific an employee's consent would need to be. • There would (still) be no legislative guidance on what purposes deductions can be used for.	N/A	✓ Some additional protection for employees (which limits the ability of employers to exploit potential gaps in current laws), but the lack of valid consent would remain the only clear grounds on which to challenge a deduction.	** • This would impose additional compliance costs, as businesses would need to review processes and employment contracts. • Risk of complicating deductions from final pay, and making it more difficult for employers to recover reasonable costs.	Improved protections for workers. However, this option would require many businesses to make changes to employment contracts and practices. Costs are likely to outweigh benefits. Net outcome overall neutral.
4. Provide that, with the exception of deductions explicitly authorised under legislation, consent to any wage deduction can only be obtained after the commencement of an employment relationship.	✓ As for option 3 above.	✓ • Would improve clarity by definitively ruling out the use of employment contracts to obtain consent to deductions in favour of employers. • No legislative guidance on what purposes deductions can be used for.	N/A	✓ As for option 3 above.	** • This option would limit parties' freedom to contract. This would cause issues for a large number of businesses, even though the problematic use of wage deductions is confined to very few poor employers. • May have unintended consequences, particularly in relation to complicating deductions from final pay.	Improved protections for workers. However, this option would require many businesses to make changes to employment contracts and practices. Costs are likely to outweigh benefits. Net outcome overall neutral.
5. Ban wage deductions for a limited list of specific purposes. At a minimum, the list could include: - Recoveries for customer theft over which the employee had no reasonable control - Fines on the employer's business - Short tills	✓ • This would send a clear signal to employers that some types of business losses should never be borne by employees	✓✓ • Very clear; limited room for argument.	• N/A	✓ • Additional protections for employees, but only in very specific circumstances. • The rigidity of this option would mean there is a high risk of unintended consequences: - There may be some instances where deductions for one of the listed prohibited purposes are in fact reasonable - There may be some plainly unreasonable deductions that a restrictive list could not anticipate.	- Similar to option 2 above (but a greater risk of unintentionally affecting reasonable current practices).	Strong signalling effect and a direct, targeted approach. Risk of unintended consequences. Net outcome overall positive (but not as positive as option 2 above).

Option	Criteria for assessment of options					Net outcomes
	<i>Mutuality of obligations</i>	<i>Legal certainty</i>	<i>Efficient contracting</i>	<i>Minimise incentives to game</i>	<i>Minimise costs to parties</i>	
Other options to consider						
1. Legislate that employment agreements must specify working hours that would normally be expected for the employee to be able to perform the work.	✓ - Greater awareness of obligations as both parties agree at the beginning of the employment relationship, through the employment agreement, to the mutual commitment that they will make – x amount of hours for which the employee is required to work each pay period and the employer is required to pay. - May not protect employees from exploitative behaviour because employers can still work around the proposal (employers could put one hour or one shift to comply but still require employees to be available above and beyond this) and will continue to push risk to the employees.	✓✓ - Both parties are clear that employment agreements must contain a minimum or normal number of hours. - Should mean employees are very clear about their rights and therefore more likely to enforce them.	✓ - Where employees are given certainty of hours they have the ability to seek alternative employment if they have the capacity - Employers can still get around the provision by offering low hours but still require employees to be available (implicitly); there may still be inefficient matching of employee capacity to work and the supply of labour. However, this provision might encourage employers to guarantee normal working hours. - Could undermine flexibility depending on employers' interpretation of the requirement, ie feeling forced to not vary hours at all.	✗ Although this may reduce the risk of gaming, as some employers will comply, it won't eliminate the potential to game the provision because employers could put one hour or one shift to comply but still require employees to be available above and beyond this.	✗ - Businesses who are not currently compliant may incur costs to provide this certainty. Where businesses are already compliant (most businesses) there will be no cost. - Businesses who are not currently compliant yet whose practices are mutually beneficial will unfairly need to comply, thus burdening employers without significantly benefitting their employees.	Even though this may provide certainty it does so at the expense of good flexibility and can still be gamed. Net outcome overall positive, however, can easily be gamed.
2. Building on the specific changes proposed above, our view is that there is a need to amend the Act to provide a general ban on unconscionable conduct. This provision is designed to future proof our response. Especially considering for certain industries there is inherent incentives for some employers to pass on the cost of uncertain customer demand to employees. We will also introduce criteria for the Courts to assess what constitutes unconscionable conduct. The term “unconscionable” is a common law concept that encapsulates behaviours that are unfair, unjust, unscrupulous, unreasonable and against the dictates of conscience. This term sets the threshold for the prohibition at a high level. The criteria could include: - whether there is a genuine reason for the practice/agreement that was reasonably necessary (given the nature of the work) - whether the parties to the employment relationship acted in good faith - the relative bargaining strength of the employer and employee	✓✓ - A ban should deter employers from pushing an inappropriate level of risk onto the employee in the future who is not equipped to manage it. - It helps employees who would otherwise lack the ability to ensure employers are behaving appropriately - It creates a counterbalance for employers to better regulate their behaviour in a manner that is more consistent with the wider public interest. - Where employers	✗ - There is potential for some ambiguity about what could be covered inside the criteria while case law develops in this area, but once case law is established it will set the floor for acceptable practices for all employers which will help ensure parties know what is and is not lawful practice. - As the criteria are broad, there may still be some uncertainty until cases are brought to the Court and those practices are determined to be unconscionable. This should then have a	✓✓ - Shouldn't restrict employee's availability unreasonably which means employees can better match their labour capacity - Shouldn't limit competition and innovation in employment arrangements, and accordingly, good flexibility in such arrangements, as it only affects unconscionable conduct. - As circumstances across the regulated activity vary greatly	✓ This provision builds on the proposed changes outlined above, and helps to future proof the policy to ensure we achieve the desired labour market outcomes.	✗ - Businesses will need to check their employment agreements and policies to ensure they are compliant. - Businesses who are not currently compliant may incur costs. Where businesses are already compliant (most businesses) there will be limited costs. - There may be added cost to the state to process any additional cases and enforce the minimum standard, but this should be minimal. - There is a reasonable litigation risk. The cost of testing what 'unconscionable conduct' is may be borne by unions/employees. This cost should reduce over time as	This ban should deter employers from using employment practices that are exploitative, and should minimise gaming of the system. It will promote efficient contracting because it shouldn't restrict flexibility. Providing for criteria allows the ban to develop over time as practice changes, therefore it will adapt as work practices change and will allow the Courts to make the judgement on a case by case basis. As an addition to the specific bans above the most important aspect of this option is that it gives the ability to respond to changes in practice as employers seek to get around specific bans – essentially future proofing the legislation. The risk with general bans is two-fold. Firstly, being principle-based and thus broad and not clearly defined the Courts can interpret them in an unintended way. However, we have mitigated this to an extent by providing as much clarity through the criteria as possible. Secondly, principle-based legislation can have a chilling effect on employment practices (as some employers may become more risk-adverse); however, in this case we think that where an employer is uncertain if their conduct breaches the provision, the process of considering this

Option	Criteria for assessment of options					Net outcomes
	<i>Mutuality of obligations</i>	<i>Legal certainty</i>	<i>Efficient contracting</i>	<i>Minimise incentives to game</i>	<i>Minimise costs to parties</i>	
- whether there was any undue influence, pressure or unfair tactics used by either party to the employment relationship - whether the employee suffers some disadvantage in the employment context - whether the employer has actual or constructive knowledge of that disadvantage - whether the employer passively or actively takes advantage of the employee's disadvantage - whether there has been any procedural impropriety - whether there has been any inadequacy of consideration on the part of the employee Unconscionable conduct is a relatively well established common law concept and sets the threshold for the prohibition at a high level. This is appropriate and as such a prohibition would be aimed solely at addressing behaviour which is wholly detrimental for our labour market. An employee or employee representative may take a case to the Courts claiming that their employment agreement or the employer's conduct is unconscionable. We did consider using the term 'harsh and oppressive' however, this was considered too high a threshold and there was very little guidance from the case law as to the interpretation of the meaning, except that it involved 'tyranny' on part of the employer. Preferred option (as part of package)	engage in practices that undermine the mutuality of a contract, or are otherwise exploitative, action can be taken against such employers which will deter employers from using these poor practices. - A ban will only address the most egregious conduct in the market; it will not promote the objective of providing for appropriately balanced mutuality of obligations, above and beyond unconscionable behaviour. - Supports a devolved employment based regulatory framework, which gives primacy to bargains struck by the parties.	deterrent effect on these behaviours.	(both across industries and over time), a principle based intervention helps address the variety of drivers across the regulated activity.		standards are set. Employers will also have costs associated with having a claim against them, and having this taken to the Authority/Courts.	and potentially erring on the side of caution is a good thing that will improve employment practice and therefore labour market outcomes. We consider it is appropriate that the criteria for unconscionable conduct should sit in primary legislation because in regulation the criteria would be able to be amended without the full parliamentary process. Although there is a strong signalling effect for employers, this option relies on employees knowing what an unconscionable practice could be. Therefore bolstering this option with education and awareness will be important. Net outcome overall positive.
3. Expanding the duty of good faith to include an obligation on both parties to act in a way that provides fair and balanced mutual obligations in the employment arrangement. The duty of good faith exists in every aspect of the employment relationship. The risk of extending the duty of good faith to encompass this obligation is that there may be significant unintended consequences, as this new obligation permeates through every aspect of the employment relationship.	✓ All parties captured by the duty of good faith would be required to act in a way that provides fair and balanced mutual obligations. It is difficult to determine what this would look like in all aspects of the employment relationship and may have unintended consequences (ie the duty of good faith covers the relationship between two unions, and two employers where both are bargaining for the same collective agreement).	xx - Good faith is a broad sweeping tool for what are very specific problems that this piece of work is trying to address, and expanding it may have unintended consequences (by covering situations that it was unintended to cover, eg this would also cover the relationship between two unions, and two employers where both are bargaining for the same collective agreement). - Enforcement of good faith provisions may be difficult. There needs to be a deliberate, serious and sustained breach of specific aspects of good faith in order for a penalty to be awarded. - There may be ambiguity about what could now be required by the duty of	- Unlikely to have a significant effect on efficient contracting, though it could encourage positive employment practices.	- May lift good practice; unlikely to make it more difficult for employers to work around the system as a breach of good faith has a very high threshold (including that it must be deliberate, serious and sustained).	xxx - Employers and employee would need to ensure that all provisions in the employment agreement have fair, balanced mutual obligations. - This would likely increase litigation costs for parties, and to the state.	Though this would promote mutuality of obligations in the employment relationship, it is likely that putting such an obligation into a broad duty could have unintended and unforeseen consequences. It is also a very broad tool to attempt to address a very specific set of issues. This could significantly increase costs for employers and the State. Net outcome overall negative.

Option	Criteria for assessment of options					Net outcomes
	<i>Mutuality of obligations</i>	<i>Legal certainty</i>	<i>Efficient contracting</i>	<i>Minimise incentives to game</i>	<i>Minimise costs to parties</i>	
		good faith.				
4. Increase education and awareness around current entitlements without any other legislative changes. The risk here is that though employees may be aware of their rights, some of the problems identified are not regulated for and can continue (such as requiring employees to be available with no payment, and short-notice shift cancellations).	✓ Though the obligations themselves won't change, employees may be more empowered to negotiate for mutual obligations because they know what their entitlements are.	✓ With an information and awareness campaign employees and employers will be more aware of their rights/obligations, therefore there will be more clarity.	✓ Employees who know their custom and practice rights may be more likely to enforce them. This will mean that they will get the hours they are entitled to (ie if an employee has worked 40 hours for six months, even though they have no guarantee in their contract, custom and practice rights are that they are entitled to these hours going forward).	- Unlikely to have any impact on the incentives for employers to gain. It is theoretically possible that more employees will enforce their rights which could incentivise employers to improve practice; however we think this impact will be negligible.	✗ - Indirect cost from increased enforcement, however this is likely to be marginal. - There will be some increased costs to the state in order to provide information/education in this space.	Although this option will increase employees' awareness about their entitlements, it will not fully address the issues identified in this RIS around employees being required to be available to work without being provided work or being paid for such availability, or short-notice shift cancellations. This option also won't address the incentives on employers to game. Net outcome overall positive, but would require further intervention in order to deal with problems identified. We have included “enhanced information provision” as a part of our implementation plan.
5. Lift and shift the characteristics of casual employment from case law into the Act, and fix the perceived issues around the 'pattern of work' characteristic. One of the factors that may be contributing to the use of zero hours contracts is that the settings for casual employment are too rigid and causing employers to believe there is risk in using this type of arrangement. This is because when a 'pattern of work' develops the casual employee can be deemed permanent by the Courts (and then they get the rights/entitlements associated with this which can be costly for the employer). Therefore employers are looking to other employment arrangements to find flexibility. Some employers perceive casual employment as risky because when a pattern of work develops the employee can be deemed permanent by the Courts (and then get the rights/entitlements associated with this). Lifting and shifting, without clarifying what constitutes a 'pattern of work' would mean that this perceived risk will persist.	✗✗ - This does not address the mutuality of obligations or protect employees from exploitative behaviour. - The removal of any requirements for there to be no pattern could result in increased numbers of workers put on casual arrangements. This would have the effect of reducing some of the protections available to such employees.	✗ - This option would provide certainty for employers and employees about what the characteristics of casual employment are. Especially for those businesses who are unable to access the relevant case law. However, the characteristic that causes uncertainty for employers, being the 'pattern of work', would be too difficult to clarify. Therefore, the risks associated with casual employees becoming permanent when a pattern of work forms, still persists. - The certainty provided by defining the characteristics of casual employment is limited, in that it is ultimately determined by the courts on a case-by-case basis.	✓ Employers would be more certain about which employment category they need to use, and would be able to match the demand/supply of labour to this.	✗ If the design is not carefully crafted it could result in perverse outcomes. For example, employers may be incentivised to misuse casual employment to test an employee for suitability within the specified period, instead of using the trial period. Alternatively, an employer could continuously employ someone on a series of discrete casual arrangements (without providing the entitlements of permanent employment).	- The burden imposed on the regulated community should be minimal, as this option essentially legislates for the current common law characteristics of casual employment.	This option would not provide a solution for the current risks associated with casual employment, as defining a 'pattern of work' or removing this requirement would be too difficult and could cause unintended consequences. Lifting and shifting the current definition of the characteristics of casual employment, without dealing with the pattern of work issue, may improve visibility of the requirements for employers and employees. However, it would entrench the 'pattern of work' characteristic without dealing with the core issue. This needs to be a part of a larger work program to understand the interface between all the different types of employment arrangements. Net outcome overall negative.