



BRIEFING

Temporary Migrant Worker Exploitation Review: Business models and practices

Date:	12 July 2019	Priority:	High
Security classification:	In Confidence	Tracking number:	3821 18-19

Action sought		
	Action sought	Deadline
Hon Iain Lees-Galloway Minister for Workplace Relations and Safety Minister of Immigration	Provide feedback and give direction on the proposals to extend liability for breaches of employment standards, and mitigate risks associated with contracting layers and company structures	17 July 2019
Hon Poto Williams Associate Minister of Immigration	Note for your information	

Contact for telephone discussion (if required)			
Name	Position	Telephone	1st contact
Nita Zodgekar	Manager, International Labour Policy	Privacy of natural persons	✓
Paramita Turner	Senior Policy Advisor	Privacy of natural persons	

The following departments/agencies have been consulted
Department of Prime Minister and Cabinet; Ministry of Education; Treasury; WorkSafe

Minister's office to complete:

- | | |
|---|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Declined |
| <input type="checkbox"/> Noted | <input type="checkbox"/> Needs change |
| <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn |

Comments



BRIEFING

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Purpose

This briefing seeks your feedback and direction on proposals for reducing risks around business models and practices that can facilitate or hide temporary migrant worker exploitation.

Executive summary

Business models can be used to facilitate or hide temporary migrant worker exploitation. We have heard particular concerns with subcontracting, franchising and labour hire business models and their association with exploitation. These business models are often used for legitimate business purposes; however, they have features which can directly or indirectly facilitate or hide exploitation.

While current and proposed policy settings relating to business models and practices reduce migrant exploitation risks, they could go further in some areas by ensuring accountabilities are appropriately placed. Areas of focus in this briefing include liability for breaches of employment standards, contracting and employment layers, and risks associated with company structures and liquidation.

We have considered five options and propose testing three through public consultation, with further policy work to be developed based on the outcome of the consultation. These options are intended to promote good business practices, building upon a strong base of existing policy and new policy currently under development. The two we do not recommend progressing at this time would be expensive for all businesses subject to them, regardless of the practices they have, and would be complex to implement.

We envisage public consultation would help to: test demand for the proposals generally; shape and refine the options; and fill knowledge gaps in some areas. We have considered the options in Table One below (further detail is provided in **Annex One**), noting that assessments are provided indicatively given the high-level stage of development and lack of comprehensive data. Additional information on the criteria used to assess the options is provided in the Overview briefing (0080 19-20 refers).

Table One: Options considered for public consultation (further detail provided in Annex One)

Options	Efficiency	Effectiveness	Confidential advice	Simplicity
We propose to extend liability for breaches of employment standards (paragraphs 10 – 24)				
1. Introduce liability for parties with significant control or influence over another [recommend testing in public consultation]	✓	✓	Confidential advice to GC	✓
We propose to consult on mitigating risks associated with contracting layers (paragraphs 25 – 42)				
2. Require certain subcontractors and franchisees to meet additional criteria under the employer-assisted visa gateway system [recommend testing in public consultation]	?	?	Confidential advice to GC	?
3. Introduce supply chain reporting requirements (not recommended for consultation at this time)	x	?	Confidential advice to GC	✓
4. Introduce a labour hire licensing scheme providing certain protections for workers (not recommended for consultation at this time)	?	?	Confidential advice to GC	?
We propose to consult on an option to further mitigate risk associated with company structures (paragraphs 43 – 50)				
5. Prevent persons convicted of serious employment offences under the Immigration Act from managing or directing a company [recommend testing in public consultation]	✓	✓	Confidential advice to GC	✓

You have previously discussed the temporary migrant worker exploitation review and potential portfolio overlaps with the Minister of Commerce and Consumer Affairs (briefing 3367 18-19 refers). Options 3 and 5 above have particular connections to the commerce and consumer affairs portfolio. While we do not recommend progressing Option 3 at this time, we consider public consultation would provide a useful opportunity to hear stakeholder views and perspectives on Option 5.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Note** that this briefing provides options at an early stage of development for public consultation, which would be intended to help test and shape options as well as build our knowledge and understanding of business models in practice

Noted

b **Agree** to publicly consult on options relating to:

i. Extending liability for breaches of employment standards to include persons with significant control or influence over entities which commit the breach

Agree / Disagree / Discuss

ii. Requiring certain subcontractors and franchisees to meet additional criteria under the employer-assisted visa gateway system

And labour-hire licensing

Agree / Disagree / Discuss

c **Agree** to publicly consult on the option of preventing a person convicted of serious employment-related offences under the *Immigration Act 2009* from managing or directing a company, subject to a discussion with the Minister of Commerce and Consumer Affairs.

Agree / Disagree / Discuss

Nita Zodgekar
Manager, International Labour Policy
Labour, Science and Enterprise, MBIE

12/07/19

Hon. Iain Lees-Galloway
Minister for Workplace Relations and
Safety
Minister of Immigration

17/07/19

Background

1. In April 2019, as the Minister of Immigration and for Workplace Relations and Safety, you agreed to a multi-year work programme to reduce the exploitation of temporary migrant workers (including international students) and mitigate their vulnerability. We have grouped the work under the three themes of prevention, protection and deterrence [briefing 2874 18-19 refers].
2. This briefing advises you on reducing risks around business models and practices that facilitate exploitation, and seeks your feedback and direction on which proposals to publicly consult on. It is accompanied by two other detailed briefings:
 - a. Improved pathway for reporting and referral of migrant worker exploitation [briefing 3490 18-19 refers]
 - b. Enhanced toolkit for deterrence and penalising employer non-compliance [briefing 3573 18-19 refers].

The problem: business models and practices can facilitate or hide exploitation

3. Officials have previously noted the following problems observed in a business models and practices context [aide memoire 3367 18-19 refers]:
 - a. Power imbalances (at a business-to-business and business-to-worker level) may drive a 'race to the bottom' with consequential impacts on worker conditions.
 - b. Legal liability for breaches of employment standards may not reflect the real nature of control or influence between the relevant parties.
 - c. There is no legal obligation in relation to employment standards for workers in a business' supply chain.
 - d. Contracting and employment layers may facilitate or hide exploitation (including by driving cost pressures, and making any monitoring or auditing more complex).
 - e. Directors may liquidate their business to avoid liability and penalties associated with exploitation (while noting that 2016 legislation enabling officers to be held personally liable for breaches of employment standards appears to be working well).
4. This briefing groups proposed options to mitigate risks associated with the problems above into the following sections:
 - a. Legal liability for breaches of employment standards
 - b. Contracting and employment layers
 - c. Mitigating risks associated with company structures.
5. Stakeholders, including members of the Consultation Group, have expressed concerns about subcontracting, franchising and labour hire models and their particular association with migrant exploitation. However, we note that these models are often used for legitimate purposes by employers who comply, and promote compliance, with minimum standards. We note that particular models are not necessarily problematic in themselves; rather, they have features which can directly or indirectly facilitate or hide exploitation. These features are discussed in further detail in the sections below.

Options to address exploitation are generally complementary but have some interdependencies

6. As there are various drivers of migrant exploitation, responding to the issues requires a multifaceted approach. In particular, the themes of prevention and deterrence set out in paragraph 1 above are interdependent, to the extent that more effective deterrence measures may mean less intensive interventions relating to business models and practices will be needed.

Migrant worker exploitation will therefore be addressed through a combination of options across the work streams of this review

7. Exploitation is often observed in small businesses (such as owner-operated restaurants) that act broadly independently of others, where problems associated with power imbalances, liability and contracting layers may be less relevant. For example, the independent research report has noted cases of employers deliberately seeking out migrant workers, potentially leveraging their cultural and linguistic familiarity, and exploiting them. We consider that such cases are likely best mitigated and addressed through mechanisms that support workers to report exploitation, and effective enforcement approaches, rather than for example through addressing the business models themselves. These mechanisms are discussed in the two other briefings provided in this package.

We have generated the options in this paper through research and discussion with stakeholders

8. Following our previous advice to you (in aide memoire 3367 18-19) we have considered five broad options to address the problems set out in paragraph 3. These options have been generated based on research, including of settings and initiatives in comparable countries, and discussion with stakeholders internally and, at an earlier stage, consultation group members. We consider three options would particularly benefit from broader and more substantive public consultation.
9. We established a set of criteria for evaluating the changes proposed to reduce migrant exploitation and mitigate vulnerability. The analysis of each of our proposals against the criteria is summarised in the tables provided in the executive summary and each section of this briefing, with more information provided in **Annex One**. Additional information on the criteria used to assess the options is provided in the Overview briefing (0080 19-20 refers).

We propose consulting on extending liability for breaches of employment standards to a wider range of parties

10. It is generally the direct employer that is liable for ensuring minimum employment standards are met for each of their employees. However, in some cases this may not accurately reflect the real nature of control or influence exercised between all relevant parties.
11. Accessory liability provisions introduced to the *Employment Relations Act 2000* in 2016 enable persons “involved in a breach” of certain minimum employment standards to be held liable for the breach, in addition to the employer. To date, these provisions have been used to hold individuals (primarily company directors) involved in exploitation to account. Businesses could potentially also be held to account under these provisions if it can be proven that they had knowledge of the breach and participated in it. This is an avenue that needs to be tested in New Zealand courts (which would include testing the thresholds for determining whether a separate entity was “involved in” exploitation).
12. Existing accessory liability provisions require direct involvement in a breach and so do not reflect circumstances where a party pressures another more broadly to adopt practices reliant on, or otherwise resulting in, exploitation. That party may profit from exploitation,

whether directly or indirectly, while there is no disincentive (other than reputational harm) for the party to remain blind to the problem or to take no action, including if it is made aware of exploitation. These settings can encourage aggressive business practices that come at the expense of workers, particularly migrant workers.

13. Australian legislation introduced in 2017 allows franchisors and holding companies to be held liable for breaches of employment standards by their franchisees and subsidiaries respectively.¹ Australia’s 2019 Migrant Workers’ Taskforce recommended extending these provisions to include all situations where businesses contract out services to persons. The Australian Government has accepted this recommendation in principle, and is undertaking work to consider how this could work in practice.
14. New Zealand is not immune from these problems. We have observed cases of exploitation associated with large organisations across a range of sectors, and there are opportunities to promote a wider culture of compliance with employment standards. A summary of the option against our criteria for analysis is provided in Table Two below:

Table Two: Breaches of employment standards – option recommended for consultation

Options	Efficiency	Effectiveness	Confide	Simplicity
<i>We propose to extend liability for breaches of employment standards</i>				
1. Introduce liability for parties with significant control or influence over another	✓	✓	Confidential advice	✓

Extending liability for breaches of employment standards to certain parties would encourage a culture of compliance and mitigate the risk of exploitation

15. Adopting the current Australian legislation would create liability for franchisors and holding companies that have a significant level of control or influence over a franchisee or subsidiary (respectively) that breaches employment standards. This would also require that the franchisor or holding company (or an officer) knew or could reasonably be expected to have known that the breach would occur, or that a breach of the same or a similar character was likely to occur.
16. Under the Australian model it is a defence if the person took reasonable steps to prevent the breach. In determining this, a court may have regard to factors including: the size and resources of the entity; the extent to which the person had the ability to influence or control the employer’s conduct; any action taken to ensure the employer was aware of their obligations; the person’s arrangements for assessing the employer’s compliance; the person’s arrangements for receiving and addressing possible complaints; and the extent to which the person’s arrangements require the employer to comply with employment standards.
17. While no cases have yet been brought in Australia, we understand that a number of franchisors have taken proactive steps to promote compliance, including by increasing supervision and introducing franchisee audits.

The current Australian model could be extended beyond applicability to franchisors and holding companies

18. Problems observed in this context are not limited to franchising or holding companies, and there is a case to extend liability provisions beyond those models. This would help develop a

¹ This legislation was introduced following Australia’s 2016 inquiry into temporary migrant exploitation, and in the context of high-profile cases of systematic exploitation found in large franchises – particularly 7-Eleven, but also Dominos and Caltex.

broader culture of compliance with employment standards, and mitigate the risk of people moving to business models that are not specifically captured by the definition. This approach would also add to the third party personal grievance provisions introduced through the *Employment Relations (Triangular Employment) Amendment Act 2019*.

19. As an indicative example, significant migrant exploitation was identified amongst subcontractors involved in the ultra-fast broadband rollout (briefing 1689 18-19 contains further information provided in relation to your meeting with Chorus). We have also heard from subcontractors to Visionstream and UGC, themselves primary contractors to Chorus, that they were placed under considerable pressure from those primary contractors and that Chorus enabled this behaviour (aide memoire 3764 18-19 refers).
20. Chorus has recently introduced a range of measures to mitigate the risk of exploitation occurring in its subcontracting network (briefing 3134 18-19 refers). This highlights the role that businesses at the top of a chain can play even when the exploitation is several tiers down. Introducing third party liability provisions would not necessarily prevent pressures, including cost pressures, which drive exploitative behaviour. However they would require that reasonable steps are taken to ensure the benefits to the contractor are not the result of exploitation (where they have significant control or influence).
21. In practice it is likely that these provisions would primarily apply to franchises, given the nature of franchising agreements. However, franchisors that already take reasonable steps to mitigate the risk of their franchisees engaging in exploitation would be unaffected. Any requirement to take reasonable steps, as well as the steps required, would depend on the individual circumstances but could include actions such as providing franchisees with information and training on complying with employment standards, providing payroll systems and training that facilitate compliance, and undertaking audits.
22. **Annex Two** contains hypothetical cases to provide an indicative example of how these provisions could work in practice.
23. The provisions could also be extended further such as by removing the need for a "significant" level of control or influence, or by adding a due diligence obligation rather than a reasonable steps defence. These options would broaden the number of parties captured by the provisions and require that they actively undertake due diligence. However, these would present significant departures from the status quo. They would be more complicated and expensive for both business and government, and could create substantial uncertainty. While these options may be raised in consultation, we would not recommend proactively consulting on them.

Public consultation could test demand for liability measures, and the scope of any such measures

24. Should you agree to publicly consult on this proposal, we would indicatively recommend testing the following design aspects:
 - a. What the threshold of influence or control should be (ie a "significant" or other threshold), and what factors should be considered in determining that threshold (whether through legislation or guidance)
 - b. Whether the provisions should apply to certain contractual arrangements or business models, such as franchises and/or subcontracting, or to all contractual arrangements between a business and a person
 - c. What 'reasonable steps' to prevent a breach could or should entail.

We propose consulting on one option relating to contracting and employment layers

25. Increasing numbers of intermediaries in a supply chain network can drive exploitation of migrant workers by increasing cost pressures (with each intermediary taking a cut of the payment), or enable it to be hidden within complex and opaque structures. These risks can be exacerbated the longer a contracting chain extends.
26. Workers at the end of a chain can be left in a position where minimum employment standards are not enforced, and monitoring either does not occur or is not effective. Even in triangular relationships involving only an employer, employee and client, there can be uncertainty over which parties have obligations and employment rights can be difficult to enforce – including for non-migrant workers.
27. A range of options could be considered to mitigate the risk of migrant exploitation being facilitated or hidden within contracting and employment layers, targeting either the employers directly or organisations at the start of the chain. Three broad options are summarised and indicatively compared against our criteria for analysis in Table Three below; however, we note that limitations on the data available also limit our ability to accurately compare these options against the criteria:

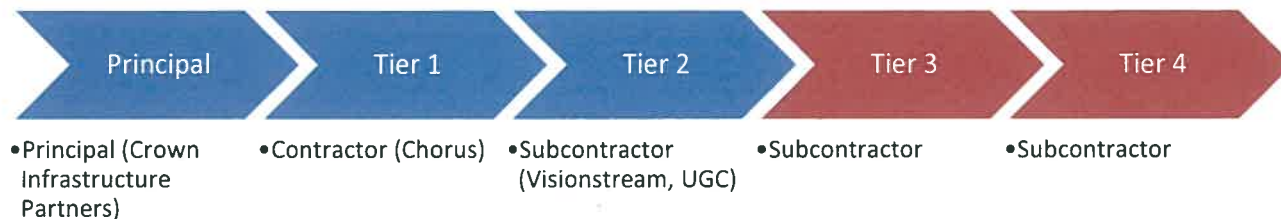
Table Three: Contracting layers – one option of three is recommended for consultation at this time

Options	Efficiency	Effectiveness	Confidential advice	Simplicity
We propose to consult on mitigating risks associated with contracting layers				
2. Require certain subcontractors and franchisees to meet additional criteria under the employer-assisted visa gateway system [recommend testing in public consultation]	?	?	Confidential advice	?
3. Introduce supply chain reporting requirements (not recommended at this time)	x	?		✓
4. Introduce a labour hire licensing scheme providing certain protections for workers (not recommended at this time)	?	?		?

Subcontracting models present risks particularly in longer chains where cost pressures may be higher

28. Subcontracting involves contracting a person to perform part of a contract that has been awarded by a principal. It is a popular and effective model used to access specialist skills and additional labour, and reduce costs. However, subcontracting chains are also associated with exploitation, with increasing cost pressures along each stage of a subcontracting chain. Exploitation has recently been observed in the construction industry, including in relation to the rollout of ultrafast broadband (see Figure 1 below). We have also heard of exploitation associated with subcontracting in industries including horticulture and cleaning.

Figure 1. Subcontracting chain example



29. **Figure 1** illustrates the subcontracting chain in the ultrafast broadband rollout, under which significant exploitation was found at tiers 3 and 4. The MartinJenkins review of the Chorus contracting model noted 365 subcontractors had been engaged through Visionstream and UGC to deliver connection services. Of that number, the review noted that the Labour Inspectorate had identified 76 subcontractors with potential breaches (though it noted six were found to have not breached legislation), and internal investigations had identified an additional 33 subcontractors with potential breaches.
30. A challenge with taking action on subcontracting is the lack of knowledge in this area. Businesses themselves may not know where they sit in a subcontracting chain; and businesses may enter into and exit out of subcontracting chains at different tiers at different times. However, there could be value in publicly consulting on an option to reduce exploitation in a subcontracting context. This could serve as a means of seeking thoughts and ideas on the issue more broadly, and to build our knowledge of subcontracting in practice.

Franchises are also associated with exploitation

31. Franchises can present a particular risk of exploitation arising from downward pressures placed on franchisees by franchisors. This can include pressures associated with, for example, ongoing fee/royalty payment obligations, the price-setting function of franchisors, and requirements to use particular providers of goods and services. Franchising is also an attractive business model to new business owners, including migrants, who may be less familiar with their employment obligations. Issues with the franchising model were investigated in Australia's recent Parliamentary Inquiry into franchising², which noted that:
- "Franchising has traditionally been promoted as a safe option for new business owners to get started with a proven system. However, there is a power asymmetry within franchising that is governed by a franchise agreement drawn up by the franchisor. This power imbalance is inherent to the structure, given the franchisor owns the business and has control over operations and franchisee contracts. However, it also means that franchisees are exposed to the risk of being exploited by unscrupulous franchisors."
32. While the Australian Inquiry investigated the franchising business model itself, which is not in scope of this review, we are concerned that cost pressures can flow through to temporary migrant workers. Although New Zealand has not observed exploitation in a franchising context (both of franchisees and employees) to the same extent observed in Australia, the general risk factors remain present.
33. The Labour Inspectorate introduced a "franchise" tag to its case management system in November 2018, providing an indicative sense of the number and outcomes of investigations into franchises. The data suggests that between December 2018 and June 2019, 51 investigations were completed of which breaches were found in 28 (though it is unknown

² Australian Parliamentary Joint Committee on Corporations and Financial Services Report on The operation and effectiveness of the Franchising Code of Conduct, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Franchising

how many victims were included). However, work to verify the accuracy of this information is due to be undertaken in due course.

Additional employer accreditation standards for certain subcontractors and franchises could provide a means of lifting compliance in contracting chains

34. We recommend that you agree to publicly consult on options to require subcontractors, particularly those that contract deeply within subcontracting chains, and franchises to meet more stringent accreditation standards under the employer-assisted visa gateway model. Under the currently proposed employer-assisted changes, labour hire companies would be required to meet higher standards and have more in-depth checks to mitigate the higher risk that labour hire employers pose of exploitation. It would be possible to require other high-risk business models to meet these higher standards (or set specific standards).
35. In practice, accreditation standards for subcontractors could be difficult to monitor and enforce. We do not hold data on subcontracting, and do not have access to information that could determine or verify whether a business subcontracts at a particular tier. A final solution would likely require asking subcontractors that are applying for accreditation whether they perform work as a subcontractor at a certain tier of contracting. However, even then businesses may not know what tier of contracting they work at, and the tier of contracting may vary depending on the contract.
36. We recommend that the consultation be used to build better evidence on the risks associated with subcontracting and franchising business models, and the impacts of requiring employers with these models to meet higher accreditation standards.

Supply chain reporting could help to mitigate risks from the top down, but this approach adds costs to all affected businesses and the effectiveness is uncertain

37. Supply chain reporting obligations for businesses, as introduced in the United Kingdom (UK) and Australia, have gained traction as a means of encouraging businesses to take action to address modern slavery in their supply chains. Officials have previously noted that many large New Zealand businesses will be subject to the UK and Australian legislation, so the practical impact of adopting the same legislation in New Zealand may be marginal (aide memoire 0868 18-19 refers).
38. Meanwhile, reporting obligations would add costs to all businesses subject to the legislation, regardless of the practices they apply. Substantial resourcing from government would also likely be required to effectively promote compliance (for example, Australia budgeted \$3.6 million over four years for its Anti-Slavery Business Engagement Unit), while the value-for-money of this approach is uncertain at this stage.
39. A supply chain reporting approach that is adapted to capture exploitation more broadly could also be considered. However, a broader approach would further increase costs for businesses, regardless of whether or not they already adopt good practices, as well as government. A UK review of their Act recommended a number of amendments in line with the Australian model, which will be reported on annually and formally reviewed in three years. We would therefore recommend considering evaluations of this legislative approach and its effectiveness, before implementation in New Zealand.

A mandatory labour hire licensing scheme could mitigate risks observed in the labour hire model, but forthcoming labour hire accreditation standards may achieve this aim

40. Labour hire arrangements can be confusing for workers, and particularly migrant workers, which can present difficulties when those workers seek redress for breaches of employment standards. Labour hire licensing schemes have been introduced or are in the process of being introduced to the Australian States of Queensland, South Australia and Victoria to

mitigate risks associated with the labour hire model. The Australian Government has also agreed in principle to establish a mandatory National Labour Hire Registration Scheme, as recommended by the Migrant Workers Taskforce to drive out unscrupulous labour hire operators and provide assurance to employers who rely on labour hire.

41. Exploitation has also been observed in labour hire companies in New Zealand. Although data on the extent of exploitation is limited, a licensing scheme could address some risks associated with the labour hire model. Such a scheme could include criteria such as: a fit and proper person test; the provision of information to workers; regulations on the timeliness and/or amount of pay; and the provision of formal mechanisms to facilitate disputes.
42. However, in relation to migrant exploitation we note that labour hire accreditation criteria, to be extended outside of Canterbury through the employer-assisted visa gateway model, will increase obligations for labour hire companies that sponsor temporary migrant workers. We would therefore recommend evaluating the impact of the extended accreditation requirements before introducing a new mandatory licensing regime, which would create further obligations for all labour hire businesses. This review has not considered the broader case for a labour hire licensing scheme to address breaches of employment standards and poor business conduct generally.

We propose consulting on one option relating to mitigating risks associated with company structures

43. Directors can liquidate companies to avoid law enforcement and liability, and then create new companies with a clean record. However, amendments to the *Employment Relations Act 2000* in 2016 allow persons “involved in” a breach of employment standards to be held liable as accessories, enabling company officers to be held personally liable for offences they have been involved in. This also has the effect of preventing individuals from avoiding penalties (such as placement on the stand-down list) and liability through liquidating their company.
44. To date, these accessory liability provisions have successfully been used to seek penalties against a number of company directors involved in breaches of employment standards. This has sent a strong message that company officers cannot escape the consequences of their offending by leveraging limited liability company structures. As the provisions are still relatively new, there are opportunities to further test their scope as new situations arise.
45. There are also opportunities to further test the use of banning orders under the *Employment Relations Act*. A court can make a banning order against a person for serious or persistent breaches of employment standards, or if the person is convicted of an offence under s351 of the *Immigration Act* (‘exploitation of unlawful employees and temporary workers’). A banning order stops people from being employers, officers of employers and/or from being involved in the hiring of employees for up to 10 years. However, only one banning order has been issued to date, and there is a particular opportunity to test this in a case involving an s351 conviction.
46. As there is considerable room to further test these existing provisions enabling individuals to be held accountable for their involvement in exploitation, we have focused on a potential option to further penalise serious employment offences under the *Companies Act 1993*. This option is measured against our criteria for analysis in Table Four below:

Table Four: Company structures – option recommended for consultation

Options	Efficiency	Effectiveness	Confidential advice	Simplicity
We propose to consult on an option to further mitigate risk associated with company structures				
5. Prevent persons convicted of serious employment offences under the Immigration Act from managing or directing a company [recommend testing in public consultation]	✓	✓	Confidential advice	✓

Preventing individuals convicted of serious employment offences from managing a company could further deter offending and mitigate risk

47. Under the *Companies Act 1993* a person can be prohibited for five years, and a Court can disqualify a person permanently, from directing a company where they have been convicted of certain imprisonable offences such as crimes involving dishonesty. Expanding these offences to include serious employment offences under the *Immigration Act* could increase the deterrents against offending and help to mitigate risk.
48. The existing banning order tool can prevent individuals from being an employer; however, enforcement would primarily rely on third party reporting to the regulator. Meanwhile, preventing an offender from directing a company would mitigate risk by prohibiting their use of the limited liability structure under which exploitation is primarily carried out.
49. Consistent with the definition of “director” in the *Companies Act*, this change would not just apply to individuals who are formally appointed as directors of a company. It would also apply to certain other individuals including “a person in accordance with whose directions or instructions the board of the company may be required or is accustomed to act” – sometimes referred to as shadow directors.
50. We do not have a view regarding whether this option should be introduced, but consider that public consultation would provide a useful opportunity to hear stakeholder views and perspectives.³

Next steps

51. After you have provided us your feedback, and given us direction, we will develop a draft Cabinet paper and public consultation document. We will formally consult relevant internal teams and government agencies. The Cabinet paper will be a tool for you to update Cabinet on the Review and to seek their agreement to public consultation on the proposals; including the proposals you have chosen to progress and those that require further exploration (along with the work already being done). It will note the complexity of the issue and the range of mechanisms needed to address temporary migrant worker exploitation. It will inform Cabinet that there are likely to be costs associated with any proposals that they agree to at a later date. Some may also result in the need for legislative, regulatory or policy change.

Annexes

Annex One: Options table – mitigating migrant exploitation risks in business models and practices

Annex Two: Hypothetical case study examples under proposed liability option

³ For example, the Employers and Manufacturers Association (Northern) proactively recommended that persons convicted of a s351(1) offence be disqualified from directing a company, in their 2014 submission on the Immigration Amendment Bill (No 2).

Annex One: Options table – mitigating migrant exploitation risks in business models and practices

Problem	Option	Efficiency	Effectiveness	Cost	Simplicity
Legal liability for breaches of employment standards	1. Introduce liability for parties with significant control or influence over another [Recommend testing in public consultation]	This legislation is already part of Australia's Fair Work Act; except it applies only to franchisors and holding companies (with the scope currently under review to potentially cover all contractual arrangements between a business and person). A number of franchises covered by the Australian legislation may have established practices across their network. This option would make little or no difference to entities that already apply good practices (such as those which apply the Franchising Association of NZ's recommendations), but would likely require many entities to review their operating practices.	Australian legislation came into force in 2017, but there has been no formal evaluation as yet and no proceedings have been brought. Commentary suggests there has been improved engagement and forms of supervision between franchisors and franchisees.	Confidential advice to Government Overall level of requirement and cost to business would depend on the level of control/influence. Businesses that already have good practices would be unaffected. Confidential advice to Government Confidential advice to Government	Uncertainty as to what constitutes 'significant influence or control', and what actions would be considered reasonable. Could be mitigated through the provision of guidance, informed by the Australian approach and resources.
Contracting and employment layers facilitate or hide exploitation	2. Require certain subcontractors and franchisees to meet additional criteria under the employer-assisted visa gateway system [Recommend testing in public consultation]	May require changes to migrant-dependent sectors/projects over time in sectors with high levels of subcontracting or franchising; either to adopt good practices or to change to a new business model, which may take time. Efficiency would depend on standards to be implemented.	Aimed at addressing some risks in higher-risk business models. Proposal is to consult at a high-level; standards that are more effective may come at higher cost, with less efficiency and simplicity. This option does not address the issue of cost and other pressures directly; instead it attempts to mitigate risk of those pressures transferring to temporary migrant workers	Confidential advice to Government	Simplicity would depend on the agreed standards. In a subcontracting context it could be difficult to monitor and enforce; particularly if applied to a particular tier of subcontractor, as subcontractors themselves may not know where they are placed. This option could help employees identify who their employer is, in the event there is a dispute.
Contracting and employment layers facilitate or hide exploitation	3. Introduce supply chain reporting requirements [Not recommended for consultation at this time]	Many large NZ businesses trade in the UK and/or Australia and are subject to their legislation. Adopting the same legislation would be efficient, but potentially have low impact. Adopting separate criteria or changing the scope (such as to cover wider issues beyond modern slavery, or apply to smaller businesses) would be less efficient and higher cost for business and government. All businesses subject to the requirement would have costs, regardless of the practices they take. Would have some lead-in time between implementation and reporting. Identifying businesses that fall in scope might be challenging, particularly those which are privately owned.	Effectiveness of this approach is uncertain. UK experience suggests there has been variable compliance and low-quality reporting, but it has prompted public discussion and Board-level conversations. Australian approach will be reviewed annually, and then comprehensively in three years. Effectiveness will likely vary depending on policy design (including scope, content and penalties) and consumer sentiment/awareness.	Preparation of reports would impose some cost to businesses (estimated \$21,950 per business in Australia). Actions taken by businesses (such as supply chain mapping) would impose higher costs, though there would be no additional cost if no further action is taken. Confidential advice to Government (Australia has allocated \$3.6m over four years; the UK £1.5m per year).	Would impose additional reporting requirements depending on the agreed criteria. A simple and flexible reporting form would risk low-quality reporting; while a less flexible approach would be less simple and likely more costly.
Contracting and employment layers facilitate or hide exploitation	4. Introduce a labour hire licensing scheme providing certain protections for all workers [Not recommended for consultation at this time]	Efficiency of the scheme would vary depending on the criteria. Criteria focused around ensuring minimum standards would be easier for businesses to implement and accept; criteria aimed at lifting standards (for example, paying labour hire workers no less than the relevant market rate for the work performed) would be more challenging but would help to promote good business practices. In a temporary migrant worker context,	The employer-assisted labour hire accreditation requirements will have an impact on labour hire companies that employ temporary migrant workers. However, it is unknown how many labour hire companies employ migrants on open work visas, and how many of those also sponsor employer-assisted visas (and will therefore need to meet accreditation criteria). A licensing scheme could be effective in managing risks across the labour hire model more broadly (ie including those that do not sponsor temporary migrant workers, but may hire migrants on open visas), but the impact on migrant workers is uncertain.	Confidential advice to Government Queensland budgeted \$2.2m per annum for implementation of their labour hire licensing legislation. Impact analysis for the Victorian scheme, which included creating a Licensing Authority, estimated it would cost \$45.1m over 10 years. They did not estimate the potential cost savings from reduced exploitation. There are an estimated 600 firms in the NZ labour supply services industry ⁴ ; 21 labour hire companies are currently accredited with INZ to sponsor migrants for Canterbury construction work.	The simplicity for users would depend on the scheme criteria. A balance may need to be reached between having criteria that are worthwhile (ie that reduce the risk of exploitation) and criteria that are feasible and workable in practice.

⁴ Access to the anonymised data used in this study was provided by Statistics New Zealand in accordance with security and confidentiality provisions of the Statistics Act 1975, and secrecy provisions of the Tax Administration Act 1994. The findings are not Official Statistics. The results in this paper are the work of the authors, not Statistics NZ, and have been confidentialised to protect businesses from identification.

Risk associated with company structures

5. Prevent persons convicted of serious employment offences under the Immigration Act from managing or directing a company

[Recommend testing in public consultation]

Would require amending the Companies Act to include convictions for serious employment offences under the Immigration Act as grounds for banning a person from managing or directing a company. Amending s382 of the Companies Act could provide for an automatic 5-year ban upon a conviction for exploitation (unless the person is granted the leave of the court); while s383 would allow the court to order a longer penalty. An information sharing arrangement may be needed between INZ and the Companies Office. No implementation or adjustment would be needed for employers that do not commit serious employment offences.

Option would have a deterrent and risk mitigation effect. Increases the penalties/deterrents for serious immigration offences by preventing convicted persons from managing a company as well as, under existing law, from being an employer (if a banning order is issued). Banning orders more directly address the problem by preventing a person from being an employer, but enforcing a banning order requires notification from a third party (eg a worker or competitor). This measure would prevent a company from being created in the first place, which prevents the key mechanism by which workers are exploited.

Management prohibition would prevent someone from managing a company, regardless of whether they employ or intend to employ another person. Possible economic costs in stopping business creation. However, this would likely apply to a very small number of people and they could still either operate as sole traders (under which they would be personally liable for any debts incurred) or work as an employee.

Confidential advice to Government

People may not understand the prohibition and why it would apply even if they do not intend to employ another person. However, this would have no impact on the significant majority of directors, who have not been convicted of serious employment offences. People may also question why serious employment offending against migrant workers should be met with harsher penalties than serious breaches of employment standards against citizens. However, the current range of offences for which an automatic prohibition from managing companies applies are all imprisonable offences. Breaches of employment standards more generally, outside of the Immigration Act, would not meet that threshold.

Note: Information on the criteria used to assess the options above is provided in the Overview briefing (0080 19-20 refers). A summarised view of the options is provided as Table One on page 2.

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Annex Two: Hypothetical case study examples under proposed liability option

The following examples are included to provide an indicative illustration of how the proposed option to extend liability for parties with significant control or influence over another could work in practice.

Example One – franchising scenario involving significant control or influence

A franchisee trades using a franchisor's branding. The franchisor is a large multinational headquartered in a foreign jurisdiction, with its New Zealand affairs managed by its Australasian regional subsidiary.

The franchisor charges fees and royalties, and controls the franchisee's store design, opening hours, prices, territory, and advertising. The franchisor also specifies the particular suppliers the franchisee must procure goods and services from, including its accounting and payroll system providers. The franchisee is required to participate in training specified by the franchisor, including full and complete training on the accurate use of accounting software using the franchisor's accounting methods. The franchisee is also required to maintain and send detailed accounting records to the franchisor periodically, as well as be available for audits from time to time as reasonably requested and conducted by the franchisor. The franchisee is responsible for employment matters, including recruitment and the setting of wages and working hours for any employees. The employment agreements are between the franchisee and its employees.

The franchisee is subsequently alleged to have misrepresented the number of hours worked by its front-line staff and paid them below the minimum wage. The franchisee's director is also alleged to have ordered staff to withdraw cash from their bank accounts and pay this back to the director.

In this case the franchisor has control or influence over many of the franchisee's operations, including its financial and operational affairs, and could be determined to meet the 'significant influence or control' threshold. If the franchise agreement is between the franchisee and the franchisor's Australasian subsidiary, it is likely that the Australasian subsidiary would be determined to have significant influence or control and not the franchisor's headquarters. However, this would depend on the relationship between each party.

The next test would be whether or not the franchisor knew about the breach or could reasonably be expected to have known that a breach would occur. It would not be a defence that the franchisor had no direct control over the franchisee's employment affairs. In this case the franchisor requires the franchisee to provide detailed accounting records and be available for audits. Even if this is to verify the amount of royalties owed, it is likely that doing so would require some investigation into expenses – including employee expenses. A franchisor could reasonably be expected to have known that a breach would occur if, for example, the franchisee's employment expenses and/or wage and time records were materially different from what the franchisor could expect, given their oversight and knowledge of records amongst all franchisees in the region. It is unlikely that the franchisor would be expected to have known that employees were making cash payments back to the franchisee's director, provided this occurred on an entirely private basis.

The final test would be whether the franchisor took reasonable steps to prevent the breach. This can include general steps, such as providing training to franchisees on their employment obligations (which could be as straight-forward as requiring them to complete employment.govt.nz online learning modules) and providing a mechanism for workers to raise employment concerns. It also includes specific steps in relation to the relevant breach. In the case above, reasonable steps could include making reasonable inquiries into the cause of the deviation between the franchisee's records and what the franchisor could expect, and then taking steps to ensure any discrepancies are remedied. Reasonable steps in relation to staff being instructed to repay the franchisee's director would likely be limited, as a franchisor is generally unlikely to be aware of private transactions between individuals.

The particular steps to be taken could also depend on factors such as the size and resources of the franchisor, and their ability to influence or control the franchisee in relation to the breach.

Example Two – franchising scenario without significant control or influence

A franchisee trades using a local franchisor's branding, and receives up-front support from the franchisor in using the branding for their business. In exchange, the franchisor charges a one-off fee and an ongoing advertising contribution. It also provides the franchisee with training on the franchisor's working methods, including access to particular suppliers. However, it is largely for the franchisee to manage their own business. The franchisor has no control or oversight of the franchisee's working or opening hours, location of work, employment practices, accounting systems,

In this case the franchisor is unlikely to have significant control or influence over the franchisee, and would therefore not be held accountable if the franchisee breached employment standards.

Example Three – contracting scenario involving significant control or influence

A Principal contracts Company X to perform certain duties as a contractor. The Principal determines the price it is willing to pay under the contract, including the particular prices it will pay for the completion of certain jobs. The Principal also provides Company X with those job opportunities, and requires Company X to use the Principal's branding when carrying out the work. As part of the contract, Company X is unable to complete work for a competitor organisation.

In this case the Principal appears to have a significant level of influence or control over Company X's affairs. In such a case, the Principal should undertake reasonable steps to ensure their contractor does not breach employment standards. The particular steps to be taken could also depend on factors such as the size and resources of the Principal, and their ability to influence or control Company X in relation to a breach. These steps could include, for example: having a contractual requirement that Company X comply with all employment laws; ensuring that Company X is aware of their employment obligations; providing reporting mechanisms that are accessible to Company X's employees; and/or undertaking appropriate checks of Company X.

Example Four – contracting scenario without significant control or influence

A Principal contracts Company Y to supply and install shop fixtures as specified by the Principal. The Principal and Company Y agree on price and the time of delivery and installation.

The Principal has control over some aspects, such as the goods and services to be provided by Company Y, but does not have control or influence over the way Company Y conducts its business. This would appear to be a contract under which the Principal would not have significant influence or control over Company Y. The Principal would therefore not be subject to the extended liability provisions.