



## BRIEFING

### Advice on process and powers for determination of FPA coverage by the Labour Inspectorate

<b>Date:</b>	4 November 2021	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2122-1308

Action sought		
	Action sought	Deadline
Hon Michael Wood <b>Minister for Workplace Relations and Safety</b>	Agree to the proposed approach to expanding the Labour Inspectorate's powers so that it can undertake its new function of determining whether an employee is in coverage of a Fair Pay Agreement.	8 November 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Tracy Mears	Manager, Employment Relations Policy	04 901 8438		✓
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The following departments/agencies have been consulted
Ministry of Justice, Office of the Privacy Commissioner

Minister's office to complete:

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

Comments



# BRIEFING

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### Purpose

To provide advice on expanding the powers of the Labour Inspectorate (LI) so that they can undertake their new function of determining whether an employee is covered by a Fair Pay Agreement (FPA). This briefing also summarises the process to apply for and appeal a determination about coverage from the LI.

### Executive summary

The LI's existing powers would only enable them to make determinations in straightforward cases where coverage is either clear cut or not being disputed. In order to meet your policy objective that most coverage determinations are made by the LI, so that the determination process is quick and cost-effective, the LI may require new powers to effectively undertake their new function of determining whether an employee is in coverage of the FPA.

Currently a Labour Inspector has no power to require information from third parties or interview relevant people who are not at the work premises when they enter to investigate.

The options proposed set out a graduated expansion of powers from the most-rights consistent to least. There are trade-offs between

- a more rights-consistent approach, but with fewer determinations and enforcement able to be done at the lower level (which will add to the workload of the Employment Relations Authority (ER Authority)), and
- more expansive powers that may be more intrusive on rights of third parties, but with more determinations and enforcement able to be made by the LI.

MBIE recommends expanding the LI's powers for the purposes of determining coverage so that an 'employer' includes a controlling third party (for example, the client of a labour hire company where the employee actually performs the work). This would provide the LI the power to require information and question a controlling third party as if they were the direct employer. This would also enable the LI to interview employees of the controlling third party. This would ensure that those in a triangular employment relationship would be covered.

MBIE also recommends enabling the LI, for the purposes of determining coverage, to interview employees of a business who has a contract with the employer that is subject to the coverage determination, where the LI has a reasonable belief that the employee has information that is important to determining whether a worker is in coverage of an FPA.

This allows the LI to interview employees of a third party who are not at the employer's premises, where they have important information that could help determine coverage. For example, take a food manufacturer where the employee spends a small portion of their time preparing the food and most of their time delivering food to clients. The employees of the stores that have the food delivered would have evidence of frequency of delivery which would help the LI to determine if the employee was primarily a truck driver or food manufacturer.

## Recommended action

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

### Powers of the LI

- a **Note** you decided that the LI would be empowered to make determinations about whether an employee is covered by an FPA. *Noted*
- b **Note** the LI's existing powers would only enable them to make determinations in straightforward cases where coverage is either clear cut or not being disputed. *Noted*
- c **Note** there are direct trade-offs inherent in the options: options resulting in more determinations able to be made by the LI come with arguably a less rights-consistent approach that may impact on the Bill of Rights Act assessment for the FPA Bill. *Noted*
- d **Note** for the purpose of this briefing 'interview' means that a Labour Inspector can ask questions, and the interviewee is under no compulsion to agree to the interview, nor to give answers. *Noted*
- e **Note** for the purpose of this briefing 'require' means that the LI can compel certain information to be provided, and if it is not provided, may seek a penalty via the ER Authority. *Noted*
- f **Agree** that for the purposes of determining coverage:

<b>Option 0:</b> The LI's powers are the same as the status quo.	<i>Agree / Disagree</i>
<b>OR</b>	
<b>Option 1:</b> The LI's powers are expanded so that an 'employer' includes a 'controlling third party'.	<i>Agree / Disagree</i>
<b>OR</b>	
<b>Option 2:</b> The LI's powers are expanded to include option 1 and to empower the LI to interview employees, with their consent, of a business if that business has a contract with the employer that is subject to the coverage determination and if the LI reasonably believes the information would be <u>important</u> to determining coverage. <b>MBIE's recommended option.</b>	<i>Agree / Disagree</i>
<b>OR</b>	
<b>Option 3:</b> The LI's powers are expanded to include option 1 and 2, and to empower the LI to require information from those with a contractual relationship with the employer if that party is a business and if the LI reasonably believes the information would be <u>important</u> to determining coverage. <b>MBIE does not recommend.</b>	<i>Agree / Disagree</i>
<b>OR</b>	
<b>Option 4:</b> The LI's powers are expanded to include option 1 and 2, and to empower the LI to	

require information from any third party if the LI reasonably believes the information would be important to determining coverage.

**MBIE does not recommend.**

*Agree / Disagree*

- g **Agree** that important for the purposes of options 2-4 in recommendation (f) means that the information would contribute meaningfully to the assessment of whether an employee is within coverage of an FPA, and sufficient information has not been provided by the employer or employee subject to the application in order to make the determination.

*Agree / Disagree*

- h **Note** the options to expand the LI powers in recommendation (f) will only apply when Labour Inspectors are undertaking the function of determining coverage and will not apply to any other function they undertake.

*Noted*

- i **Agree** to clarify that when the LI requires documents be provided for the purposes of determining whether an employee is covered by an FPA that, for the avoidance of doubt, those documents include information stored electronically.

*Agree / Disagree*

- j **Agree** for the purposes of determining coverage to enable the LI to conduct any interviews with employees within its powers at any location, including online, so long as the interview proposed is at a reasonable time and the employee has agreed to the time and location of the interview.

*Agree / Disagree*

### **Process for appealing the LI determination**

- k **Agree** that impacted parties may appeal a coverage determination to the ER Authority within 28 days of the LI issuing the determination.

*Agree / Disagree*

### **Flexible work**

- l **Note** during preparation of the drafting instructions for the LI's functions and powers we identified a concern with the recommended approach to flexible work.

*Noted*

- m **Agree** that flexible work terms in an FPA are treated like any other term that is not a minimum employment provision and if disputed would go through the standard dispute resolution process.

*Agree / Disagree*

## Seeking Attorney-General Approval

- n **Note** any expansion of the LI powers, or any changes made to the previous decisions about flexible work, will likely require Cabinet approval.

*Noted*

- o **Agree** to seek Attorney-General approval to draft in advance, if you decide to expand the powers of the LI or change the decisions in relation to flexible work.

*Agree / Disagree*



Tracy Mears  
**Manager, Employment Relations Policy**  
Labour, Science & Enterprise, MBIE

04 / 11 / 21

Hon Michael Wood  
**Minister for Workplace Relations and Safety**

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## Background

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1. In April 2021, Cabinet authorised you to decide whether and how the LI could decide if an employee is in coverage of a Fair Pay Agreement (FPA) and take enforcement action based on that decision [recommendation 77, CAB-21-MIN-0126 refers].
2. You subsequently decided that the LI should be empowered to make decisions on whether or not an employee is within coverage of an FPA, but with the ability for LI to refer a matter to the ER Authority for more complex cases [briefing 2021-3561 refers]. The ER Authority has wide powers, including the ability to summon any person to provide any evidence.
3. We indicated that your decision would require further policy work around what additional powers the LI would need in order to undertake this new function.
4. This briefing recommends new powers for the LI and sets out the process for seeking a determination about coverage.

## The LI will have a new function under the FPA system to determine if an employee is in coverage of an FPA

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5. The LI will have a new function in the FPA system to determine whether an employee is in coverage of an FPA. This will involve determining what work the employee is undertaking and whether that work is in coverage of an FPA.

### The existing powers of the LI

6. The LI's existing powers are set out in section 229 of the *Employment Relations Act 2000* (ER Act) - **see Annex 1**. To summarise, the powers allow a Labour Inspector to:
  - a. **Enter** – at any reasonable hour, any premise where any person is employed or where the Labour Inspector has reasonable cause to believe that any person is employed, accompanied, if the Labour Inspector thinks fit, by any other employee of the department qualified to assist or by a constable.
  - b. **Interview** – any person at the premises entered into via (a) above, and the power to interview any employer or employee.
  - c. **Require** an employer to produce, and inspect or take copies of –
    - i. Wages and time record of any holiday and leave record
    - ii. Any other document held which records the remuneration of any employees
    - iii. Any other document which the Labour Inspector reasonably believes may assist in determining whether the certain legal requirements have been complied with.
  - d. **Require** any employer to supply the Labour Inspector a copy of the wages and time record of holiday and leave records or employment agreement or both of any employee and that employer.
  - e. **Inspect** –and take copies of, any record of a strike or lockout
  - f. **Question** – any employer about compliance with any specified Acts
7. If the LI uses their power to require the production of records or documents, and the employer fails to comply with the requirement, the employer is liable in an action by a Labour Inspector to a penalty imposed by the ER Authority for up to \$10,000 for an individual or \$20,000 for a company.

### There are possible gaps in the existing powers of the LI

8. There are limitations to the existing powers of the LI. In situations where the employer is being uncooperative and does not provide the information relevant to determining coverage

or refuses to be questioned, or where the employee does not wish to be interviewed, the LI is likely have very little evidence on which to base a coverage determination. Under the existing powers, this will mean that where there is an unwilling participant most cases will have to go to the ER Authority, who has broad powers to summon any person and any evidence.

9. However, cases taken to the ER Authority are likely to take a significant amount of time, as the ER Authority currently faces a backlog. Also, the less determinations made at LI level will add significantly to the ER Authority's workload, this will have flow on impacts to the timeliness of the wider ERES dispute resolution system.
10. If you consider the policy objective of providing the new determination function to the LI is not just about determining the straightforward cases, but also those complex cases where parties dispute coverage, then more powers could support this objective.

### **Expanding LI's powers need to be done carefully, ensuring a balanced and proportionate approach to respect individuals' and companies' rights**

11. The Legislation Design Advisory Committee (LDAC) provides advice for officials considering expanding search powers that may impact on the rights of people. Section 21 of the *New Zealand Bill of Rights Act 1990* (BORA) affirms the right to be secure against unreasonable search and seizure. Search powers require balancing the rights of people to respect for liberty, dignity, privacy, and the right to peaceful enjoyment by people of their property, with the regulatory and law enforcement objectives underlying powers.
12. What constitutes a "search" within that right can be difficult to define. The Court of Appeal has expressed the view that a "search" involves state intrusion into reasonable expectations of privacy<sup>1</sup>.
13. The LDAC guidelines state that a well-designed set of search powers will strike a balance between respecting individual rights and providing an agency with the vital tools it needs to give effect to a policy or Act. Some of the key principles LDAC highlight are:
  - a. Generally, the more intrusive the search power is, or the more significant the consequences for the individual of the use of the power, the greater the need is for both a strong policy justification and safeguards on the exercise of the power.
  - b. Safeguards can include prerequisites for the exercise of the power (such as a warrant), conditions on how the power is exercised, or limits on who may exercise the power.
  - c. More intrusive powers should be restricted to classes of people with higher levels of accountability.
  - d. If the information or evidence concerned can be obtained by means other than by granting new search powers (for example, by recourse to the common law, consent, or existing powers), those alternatives should be used.
  - e. If new search powers are required, the approach that results in the least limitation on privacy rights should be adopted.
  - f. The more invasive a particular search power is, the greater the justification required to create it is and search powers must be proportionate to their objective.
  - g. In some cases, the effective exercise of search powers might necessitate the inclusion of a power to require information to be produced (such as codes to access computers) or questions to be answered. However, these powers are likely to be used in situations where prosecutions are likely to follow, and the privilege at general law (and in the Evidence Act 2006) against self-incrimination should be respected.
  - h. In general, the more invasive the search or surveillance power is, the more expertise and accountability the person holding the power should have.

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<sup>1</sup> *Lorigan v R* [2012] NZCA 264 at [22].

## Options to expand the Labour Inspectorate's powers

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14. The LI have described the situations that they consider their powers may need to be expanded in order to make a determination. This includes where:
  - **Situation (A):** The employer is actually a labour hire company whose employees do work at a client's worksite (known as a triangular employment relationship). In this situation, the client or the client's employees may have the information that is relevant to assess what work the employee is actually undertaking.
  - **Situation (B):** The employee works onsite but the employer isn't willing to provide or does not have useful records of the work the employee undertakes, but third party information (or information gathered through interviewing that party) could establish the type of work the employee is undertaking.
  - **Situation (C):** The employee undertakes work offsite i.e. as a cleaner or sales representative, and the employer isn't willing to provide or doesn't have information of the type of work the employee does, but third party evidence (or information gathered through interviewing that party) could establish the type of work the employee is undertaking.
15. The options proposed set out a graduated expansion of powers from the most-rights consistent to least. There are trade-offs between:
  - a more rights-consistent approach, but with fewer determinations and enforcement able to be done at the lower level (which will add to the workload of the ER Authority), and
  - more expansive powers that may be more intrusive on rights of third parties, but with more determinations and enforcement able to be made by the LI.
16. When assessing the options, we considered the following criteria:
  - a. **Determinations settled at LI level:** more cases are likely to be resolved by a quick determination by the LI rather than get escalated to the ER Authority due to not being able to get the information needed to make a decision.
  - b. **Expectation of privacy:** expectation of privacy is in line with the obligation to provide information (ie it is foreseeable that this information would be required to be provided)
  - c. **Rights-consistent:** the option that is most consistent with BORA (ie is least intrusive, is proportionate to the need and has adequate safeguards).
  - d. **Degree of intrusiveness:** there is a higher expectation that a power may be used to gather information where the party is a regulated party and where it is reasonably foreseeable. If a party is unregulated we consider the degree of intrusiveness would be considered higher where powers are used to gather information from that party.

### Option 0: Status quo, existing powers apply to the new function

17. This option proposes that the existing powers apply to the LI's new function of determining if an employee is covered by an FPA. This would mean that there is a consistent application of powers across the LI's functions.
18. Under this option only straightforward determinations are likely to be made by the LI. This will likely be where the employer and employee concerned are willing to provide the information needed to make a determination.
19. We do not think this would meet the policy objective of more quick and cost-effective determinations being made at the LI level. This option would not address the three situations



described in paragraph 14 and is likely to result in a higher proportion of cases being escalated to the ER Authority than under the other options. This will add significantly to the ER Authority's workload, which will have flow on impacts on the timeliness of the wider ERES dispute resolution system.

### **Option 1: expand powers to require documents from a 'controlling third party' in certain circumstances**

20. This option extends the concept of 'employer' to include a 'controlling third party'<sup>2</sup> where the LI has a reasonable belief that the party has information that would be relevant to determining whether a worker is in coverage of an FPA. This would allow LI to require documents and question a controlling third party as if they were the direct employer. This would ensure that those in a triangular employment relationship would be covered.
21. This option would also enable the LI to interview employees of the controlling third party. An "interview" is voluntary – a Labour Inspector can ask questions, and the interviewee is under no compulsion to agree to the interview, nor to give answers.
22. For example, if a retailer engaged a labour hire company to provide a cleaner to clean its store, then the LI would be able to use their powers to seek documents from the retailer, and interview any of the retailer's employees, when trying to ascertain whether the labour hire employee was indeed a cleaner.
23. This option is the most rights-consistent approach. The imposition on rights is narrowly applied, to only 'controlling third parties'. The entity which has the knowledge and evidence of the type of work that the employee is doing on a day to day basis, is less likely to be the labour hire company, but the client who has hired the labour company (i.e. they have sought the work that the employee is performing). The client should have a reasonable expectation that this information might be required from them, given that the person is performing work at their worksite for them.
24. If the controlling third party failed to provide the information required by the LI, the LI would be able to take a case to the ER Authority to seek a penalty<sup>3</sup>.
25. However, this option would not provide the LI with powers to capture third party information outside of controlling third parties. This option would not allow the LI to gather third party information in situation (B) or (C) in paragraph 14.
26. This means that in any situation where there is no controlling third party (ie most employment arrangements) the LI would be limited in its ability to make a determination based on the information they can gather via their powers. In those situations the LI will have the option to escalate the case to the ER Authority which does have the wider powers to summon anyone and require any evidence be provided. However, there is a risk with this option that more cases would need to be taken to the ER Authority, and thus may not achieve your policy objective.

### **Option 2: option 1 and the power to interview employees of companies that have a contract with the employer with that employee's consent**

27. This option includes option 1, plus extends the power to also be able to interview employees of a business who has a contract with the employer that is subject to the coverage determination where the LI has a reasonable belief that the employee has information that is

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<sup>2</sup> **controlling third party** is defined in the ER Act and means a person—

(a) who has a contract or other arrangement with an employer under which an employee of the employer performs work for the benefit of the person; and

(b) who exercises, or is entitled to exercise, control or direction over the employee that is similar or substantially similar to the control or direction that an employer exercises, or is entitled to exercise, in relation to the employee

<sup>3</sup> The penalty is up to \$10,000 for an individual or \$20,000 for a company or body corporate.

important to determining whether a worker is in coverage of an FPA. The employee's participation would be voluntary – they would be able to decline to participate in an interview, or decline to answer any specific question.

28. In this context, we define important as where the LI reasonably believes that the information would contribute meaningfully to the assessment of whether an employee is within coverage of an FPA, and sufficient information has not been provided by the employer or employee subject to the application.
29. This option would allow the LI to interview employees of third parties, who are not at the employer's premises who are subject to the coverage determination, where they have important information that could help determine coverage. An example of where this option could be used is where the employee of a food manufacturer spends a small portion of their time preparing the food and most of their time delivering food to clients. The employees of the stores that have the food delivered could be asked questions about the frequency of delivery which would help the LI to determine if the employee was primarily a truck driver or food manufacturer.
30. This option attempts to balance the interests of employees of third parties (in relation to privacy) by putting in additional safeguards around when the LI can ask the employee to be interviewed, by requiring that the information sought would be important to determining coverage.
31. Such employees would probably not expect to be interviewed about the employment details of an employee from another business, so it is likely outside their **expectation of privacy**. However, this option is not very **intrusive**, as any interview is voluntary: there is no corresponding requirement or ability to take action if an employee refuses to provide answers. There is a risk that employers frown on employees undertaking an interview with the LI, which could impact their job. We consider that this risk can be mitigated by the employee declining the interview. The **importance to the LI** of being able to gather information via interviews with third party employees could be significant. Given that employees who have concerns about being interviewed can decline, we consider that broadening the interviewing power to include this category of employees would be a proportionate regulatory response to the degree of intrusiveness.

### **Option 3: option 2, plus the power to require documents from those with a contractual relationship with the employer in certain circumstances**

32. This option builds on option 1 and 2, plus expands the power to require documents, to include documents from companies with a contractual relationship with the employer, where the LI has a reasonable belief that the contracting business would have information that is important to determining coverage. The definition of important as described in option 2 applies here.
33. It is possible that the information the LI needs is not held by the employer, due to the employer having contracted out a service e.g. the employer contracts a security company for the employer's worksite, and the security footage contains evidence of what work the employee does, but the footage is owned by the contracted security company. This option would allow the LI to require that information from the security company.
34. Some companies, like a security company, may have a reasonable expectation that the footage would be used for a purpose related to enforcement. Others, for example, the caterer contracted to provide the morning tea service for the employer, may not. We consider that proximity to the employer via a contract would not in and of itself warrant requiring the provision of any documents relevant to determining coverage. We have not identified a clear bright line test to be able to distinguish between the two types of contracting companies based on their level of expectation that their information may be used for a regulatory purpose. However, where information is important to making a determination there could be

a greater justification for requiring parties with a contract with an employer to provide information that is relevant to determining coverage.

35. If the third party failed to provide the information required by the LI, the Inspectorate would be able to take a case to the ER Authority to seek a penalty.
36. On balance, we do not consider expanding the power in this manner would be a proportionate response to the function required. In making this assessment we have considered that these powers already exist and are available at the ER Authority and the LI can escalate these cases at their discretion. We consider that while third party information could be important to determining whether a worker is in or out of coverage, this power is likely to have a high level of **intrusiveness** and the party (as well as others whose private information may be contained in the evidence) will likely have a high **expectation to privacy**. In addition, the power would come with an ability to penalise the party for not providing the information. We consider penalising an unregulated third party in this context is **not proportionate** to the nature of the function.
37. Not proceeding with this option, however, will have flow on impacts for the number of coverage determinations the LI can make. In situations where third party information may be helpful, for example, where an employee does not work at the employer's premises or if the employer is not willing to provide the required information, then the LI may be less likely to be confident enough to make determinations about coverage. This can have flow on impacts on whether or not the LI is able to take enforcement action. This is because the Inspectorate may not be willing to take enforcement action if they consider, after investigating, that they are not confident about whether the person is in coverage or not.

#### **Option 4: the power to require documents from any third party if the Labour Inspectorate reasonably believes it is important to determining coverage**

38. This option is the most expansive, it includes option 2 and 3, and it broadens the LI's power to require any third party to provide evidence where the LI has a reasonable belief that the third party has important evidence to determining whether an employee is covered by an FPA. The definition of important described in option 3 applies here.
39. We **do not** consider that this option is a **proportionate** response to the determination function. This power would be difficult to safeguard against, ie it would be hard to construct the power in a way that didn't capture every person. This could mean that a bystander who had filmed the work that an employee performed could be captured. This person would have no connection to the dispute at hand, and would have a **strong reasonable expectation** that their recorded information is **private**.
40. We do not recommend this option.

#### **Privacy implications of the options**

41. The options have privacy implications as they involve collecting information from third parties about an employee in order to ensure that the LI can make a determination. Regardless of the option, the LI will, as they do for their existing function, take reasonable steps to ensure that the employee subject to the determination about coverage knows:
  - a. What information is being collected, why it is being collected and who will receive the information,
  - b. Whether the person is required to provide the information to the LI (ie whether it is compulsory or voluntary), and
  - c. What will happen to the information (the use, storage and retention).

42. The LI does this currently with their existing powers and will be responsible for acting in line with privacy principles with their expanded powers.
43. The options will override the Privacy Act where the LI compel the third party to provide personal information, this has been taken into account in our assessment of the proportionality of the options.

**We consider that option 2 provides a proportionate expansion of Labour Inspectorate powers that balances rights with the effectiveness of the new function**

44. We consider that option 2 represents a proportionate expansion of the LI's powers, balancing the rights of the regulated and unregulated parties while ensuring that determinations can be made at the LI level. Where a case turns on the need for third party information and that third party is not willing to provide it voluntarily, we consider that these are the complex cases that should be heard by the ER Authority, and not determined at the LI level.
45. Under option 2 the LI's powers, for the purpose of determining coverage, would be expanded to:
  - a. Infer that an 'employer' includes a controlling third party. This means the LI's powers would apply to that controlling third party as if they were the employer in question, including:
    - i. The power to require the controlling third party to provide documents.
    - ii. The ability to interview employees of the controlling third party.
  - b. Allow the LI to interview employees of a business who has a contract with the employer that is subject to the coverage determination where the LI has a reasonable belief that the employee has information that is important to determining whether a worker is in coverage of an FPA.

**In addition to broadening who the powers apply to, we propose a clarification of the word 'document' in the LI's powers, where they apply to the determination function**

46. In addition to expanding the powers above to broader categories of people, the LI have sought two further changes to the existing powers to enable them to undertake this function.

*Clarifying that the word 'document' for the avoidance of doubt includes information stored on a storage device*

47. Currently the LI has the power to require an employer to provide any 'document' that they reasonably believe may assist in determining whether the requirements of the Acts they regulate have been met (section 229(1)(c)(iii)).
48. While the term 'document' has been construed broadly by the Employment Court regulations, some employers have challenged what information they are required to provide (in particular, whether the term 'document' includes electronic information) which can delay the process.
49. We consider that we can clarify the word 'document' for the avoidance of doubt includes information stored on a storage device. However, this clarification will only be able to be made for the purposes of determining whether a worker is covered by an FPA – as it's not within scope of the FPA project or Bill to change the LI's powers for its pre-existing functions.
50. We consider that there are opportunities on the horizon for taking a holistic look at the LI powers, this could include either through the dispute resolution or institutions work, which are on your work programme.

51. In the meantime, for the purposes of this new function, we recommend clarifying that the word 'document', for the avoidance of doubt, includes information stored on a storage device.

*Removing the requirement to interview employees at the 'premises' in certain circumstances*

52. The LI's powers are constrained to interviewing people who are at the premises when they enter, or any employer or employee of the work premises. While the Act could be read as giving the LI the power to interview employees (regardless of whether the interview is connected to the premises), it is not strictly clear and as a result the Inspectorate have received legal advice that any interviews should be conducted at the premises. This limitation would be impractical given that FPAs will be national and may involve determinations that concern employees across New Zealand.
53. We recommend broadening this power to enable the LI to interview an employee of the employer at any location, including online (for example via Zoom), so long as the interview is at a reasonable time, and the employee has agreed to the time and location of the interview. We consider that requiring the interview to be undertaken at a reasonable time and requiring the employee's consent to the time and location of the interview should provide sufficient safeguards that this power would not be misused.
54. We also recommend that this apply to employees who are able to be interviewed under option 2, if you agree to that option.

## **The powers will differ between the determination function and enforcement function so a clear separation of functions is required**

### **The expansion of LI's powers will only apply for the new determining coverage function and not the enforcement function**

55. Any expansion of the LI's powers will only apply to the new function of determining coverage. This is because:
- a. the FPA Bill can only introduce changes to the LI's powers that relate to the FPA system, anything broader than this will go beyond the scope of the FPA Bill and would require an omnibus Bill; and
  - b. Broadening the enforcement powers for the purposes of enforcing FPA minimum entitlements would create an inconsistent enforcement approach for minimum entitlements across the ERES system. This would be unworkable and would increase the risk and liability of the LI, particularly for workplaces that have some workers who are covered by FPA related terms and others covered by the minimum entitlements under the ERES system.

### **Differing powers across the LI's functions necessitates a clear process for when the LI is determining coverage vs enforcing an FPA**

56. As the proposed expansion of powers for determining coverage are broader than for enforcing an FPA, there needs to be a clear separation between the two functions, or else the LI may open themselves to legal risk that their actions in requiring information to be provided is ultra vires.
57. We consider that there are three likely situations:
- a. an employee or employer applies to the LI for a determination about coverage, eg for certainty, with no complaint involved.
  - b. a complaint is made that the employer is not providing the right terms and conditions of the FPA

- c. a complaint is made and during that process a party asks for a determination about coverage.

58. We set out how each function would operate in the scenarios below.

#### *A coverage determination for certainty*

- 59. An employee or employer could apply to the LI to get a determination about coverage. The LI would investigate the matter and determine whether the worker is covered by the FPA. Once they have made their determination, it would be for the employer and employee to bargain and agree in good faith the terms and conditions of the employment agreement, with the FPA terms forming the base of those discussions. The FPA terms will be automatically deemed into the employment agreement by the secondary legislation.
- 60. If the worker has not, or does not after the determination of coverage, receive the minimum entitlements provided in the FPA, they may then seek enforcement action. The LI at that point (after they have issued a coverage determination) could seek to use one of their enforcement tools, e.g. issue an enforceable undertaking, requiring the employer to comply with the minimum entitlements within a certain timeframe or face action (i.e. going to the ER Authority to seek payment for arrears that have not been paid). At this point the LI would be constrained to only use their enforcement powers, not their coverage determination powers.

#### *A complaint is made and is enforced*

- 61. An employee could make a complaint to the LI that a term or terms of the FPA are not being applied by their employer and they would like their terms enforced. In this situation the LI would, by taking enforcement action, be deciding informally (i.e. without issuing a formal determination) that the employee is covered by the FPA and which terms apply to the worker.
- 62. We consider this would not be a formal 'determination' about coverage with associated appeal rights, rather, this would be an indication that the LI believes the worker is covered by the FPA and if the employer disagrees they would need to challenge the enforcement action taken. If the employer agrees the worker is in coverage they would need to comply with the enforceable undertaking or improvement notice that the LI issued.
- 63. In this situation the LI would be able to use their enforcement powers, but would not be able to use powers associated with determining coverage.

#### *During enforcement, the LI is asked to make a determination about coverage*

- 64. Where the LI is investigating a complaint that the FPA minimum entitlements have not been complied with and the employer or employee seek a determination about coverage, the LI will need to undertake a two stage process.
- 65. The LI would first determine whether the employee is in coverage. Then the LI would use their enforcement tools to enforce the matter (i.e. an improvement notice or enforceable undertaking that the employer will comply with the FPA, and if they fail to do so, take action in the ER Authority to seek arrears).

## **Process for seeking a coverage determination and appeal**

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- 66. An employee or employer may seek clarification about whether an employee is covered by an FPA by making an application for a determination to the LI. In the case of an employer, the employer may seek a determination for a number of employees as a part of their application.
- 67. The legislation will state the application will be via a form approved by the Chief Executive of MBIE. The detail of the form will be finalised as part of implementation process, but at a

minimum it will include the name of the applicant, who the application is for and what FPA(s) are the subject of the application.

68. The LI will have full discretion under the law about whether they choose to investigate and make a determination about an application or not. This is to allow alternatives to determination to be used and to ensure the LI is able to manage its resources effectively (through their risk based prioritisation model). For example, the LI may decide that lower level tools may be more appropriate where the case is clear-cut, ie by directing the person to a 'choose your pathway' resource (ie a web-based tool where the user can enter characteristics about the role, and the tool would suggest which FPA applies) that would enable the applicant to understand which FPA applies to them.
69. The LI will be able to suggest the applicant pursue the matter via the ER Authority i.e. in this instance the LI would not take the case on behalf of the parties but would let them know that this was an available avenue for the party. The LI will also, where they have investigated the matter but it is complex, be able to take the case to the ER Authority on behalf of the applicant.
70. The LI should notify the party of what action (if any) will be taken within a reasonable timeframe, including if the LI will not issue a determination.
71. Once the LI issues a determination the impacted parties should have 28 days to appeal the decision to the ER Authority they do not agree with the decision. This aligns with the existing time limit for appeals from the ER Authority to the Employment Court in the ER Act. The usual appeal rights under the ER Act would then apply (i.e. if the applicant disagreed with the determination of the ER Authority they may seek to appeal it both on questions of law or substantively to the Employment Court within 28 days of the decision being issued).
72. If a party has already sought a determination, but later reapplies to get a new determination, the LI would have full discretion as to whether to issue a new determination. However, the LI could issue practice guidance about when a new determination may be considered, for example, a new determination may be issued where the nature of the employee's role has substantially changed, indicating that the job may now either be covered by a new FPA or a different FPA.
73. Where the LI does reinvestigate an applicant's case that has been previously determined, and they issue a new determination, the latest determination will apply.

## Flexible Work

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74. During preparation of the drafting instructions for the LI's functions and powers we identified a concern with the recommended approach to flexible work.
75. We had previously advised that the LI should have a role where a *process* has been agreed to determine flexible work arrangements or short-term flexible work arrangements under the FPA and this role should be consistent with the existing approach to short-term flexible work in the Employment Relations Act (briefing 2021-2155 and CAB-21-MIN-0126 paragraph 79 and Annex A refer).
76. In this instance, where workers apply for a short-term variation to their usual work in response to domestic violence and the employer fails to follow the statutory process, the employee may instead choose either to apply to the LI to assist in resolving the matter, seek mediation or apply to the Authority for a determination. Note, in practice, matters are primarily dealt with in mediation or at the Authority, not by the LI.
77. In order to guarantee that the bargaining parties had agreed a process that builds on or effectively replaces the existing statutory process requirements in the ER Act this would likely need to be captured in a prescribed form and then vetted by the ER Authority. This would be

very complex and would not likely provide much additional benefit other than having another avenue for dispute resolution where the employer didn't follow the process for agreeing flexible work in the FPA.

78. We do not consider that prescribing the flexible work process in the prescribed form (alongside the minimum employment provisions like the FPA base wage) is a viable option, given the number of variables that parties may wish to agree for the flexible work process. As such, we recommend that the flexible work terms be considered like any other term that is not a minimum employment entitlement, that is, the LI would not have a role. This means that if the employee disputes that the terms provided under the FPA around flexible work have not been undertaken, this would be a dispute between the parties and would go through the normal dispute resolution process.

## **Due to the nature of the expanded powers, including that penalties may be applied, further Cabinet decisions may be needed**

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79. Cabinet agreed to authorise you to [CAB-21-MIN-0126 refers]:
- a. decide whether, and how, the Labour Inspectorate could decide if an employee is in coverage of a Fair Pay Agreement and take enforcement action based on that decision. (Recommendation 77)
  - b. make decisions, consistent with the policy framework in this paper, on any issues that arise during the drafting process... (Recommendation 87).
80. It is possible that the 'how' would capture what powers the LI would need in order to make the determination. However, the extent of these powers, especially the options that place obligations on unregulated third parties are arguably outside the scope of existing decisions taken to date by Cabinet. The option set, other than the status quo, would also create the power for the LI to seek a penalty from the ER Authority where a party who is required to provide information fails to do so. This is also a decision that Cabinet would be required to make.
81. We recommend that these decisions are agreed at Cabinet. In addition, if you agree to the change the decision relating to the LI's role in flexible work this will also need to be agreed at Cabinet. We note that you are intending to seek approval from the Attorney-General to draft in advance of decisions needed at Cabinet for the termination backstop process. We recommend that you seek agreement from the Attorney-General at the same time for expanding the LI's powers.

## **Next steps**

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82. Once you have confirmed your decisions, we will draft a letter that describes the new powers and penalties that require Cabinet decisions. This is to enable you to seek approval from the Attorney General for PCO to draft ahead of Cabinet decisions being sought next year.

## **Annexes**

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Annex One: Section 229 – Powers of Labour Inspectors



## Annex One: Section 229 – Powers of Labour Inspectors

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### 229 Powers of Labour Inspectors

- (1) For the purpose of performing his or her functions and duties under any Act specified in [section 223\(1\)](#), every Labour Inspector has, subject to [sections 230 to 233](#), the following powers:
  - (a) the power to enter, at any reasonable hour, any premises where any person is employed or where the Labour Inspector has reasonable cause to believe that any person is employed, accompanied, if the Labour Inspector thinks fit, by any other employee of the department qualified to assist or by a constable:
  - (b) the power to interview any person at any premises of the kind described in paragraph (a) and the power to interview any employer or any employee:
  - (c) the power to require the production of, and to inspect and take copies from,—
    - (i) any wages and time record or any holiday and leave record whether kept under this Act or any other Act:
    - (ii) any other document held which records the remuneration of any employees:
    - (iii) any other document that the Labour Inspector reasonably believes may assist in determining whether the requirements of the Acts referred to in [section 223\(1\)](#) have been complied with:
  - (d) the power to require any employer to supply to the Labour Inspector a copy of the wages and time record or holiday and leave record or employment agreement or both of any employee of that employer:
  - (e) the power to inspect, and take copies of, any record kept under [section 98](#) of strikes and lockouts:
  - (f) the power to question any employer about compliance with any of the Acts referred to in [section 223\(1\)](#).
- (2) Where any Labour Inspector makes any requirement of an employer under subsection (1)(c) or subsection (1)(d), that employer must forthwith comply with that requirement.
- (3) Every employer who, without reasonable cause, fails to comply with any requirement made of that employer under subsection (1)(c) or subsection (1)(d) is liable, in an action brought by a Labour Inspector, to a penalty under this Act imposed by the Authority.
- (4) Where a Labour Inspector alleges that any person has not observed or not complied with any provision of [section 130\(1\)](#) or of subsection (2) of this section or of any of the Acts referred to in [section 223\(1\)](#), that Labour Inspector may commence proceedings against that other person in respect of the non-observance or non-compliance by applying to the Authority under [section 137](#) for an order of the kind described in subsection (1) of that section, and the provisions of that section apply accordingly with all necessary modifications.
- (5) No person is, on examination or inquiry under this section, required to give to any question any answer tending to incriminate that person.
- (5A) A person is not excused from answering a Labour Inspector's questions under subsection (1) on the grounds that doing so might expose the person to a pecuniary penalty under [Part 9A](#), but any answers given are not admissible in criminal proceedings or in proceedings under that Part for pecuniary penalties.
- (6) Despite subsection (1), the power of a Labour Inspector to enter any defence area within the meaning of the [Defence Act 1990](#) is subject to any regulations made under [section 93](#) of that Act.
- (7) A Labour Inspector may recover a penalty under this Act in the Authority for a breach of any provision that provides for the imposition of a penalty and is a provision of any of the Acts referred to in [section 223\(1\)](#).