MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

New Zealand Income Insurance – enforcement of bridging and notice period obligations

Date:	3 November 2022	**Priority:**	High
Security classification:	In Confidence	**Tracking number:**	2223-1384

Action sought	Action sought	Deadline
Hon Grant Robertson **Minister of Finance**	**Agree** to the approach proposed in this briefing for the enforcement of the bridging payment and notice period obligations in the event of employer non-compliance. **Agree** to maintain the approach to governance arrangements for Iwi/Māori as agreed by Cabinet in July or agree to strengthen these governance arrangements. **Agree** to the recommendations on minor and technical policy issues that have arisen during the drafting process.	7 November 2022
Hon Carmel Sepuloni **Minister for Social Development and Employment** **Minister for ACC**		
Hon David Parker **Minister of Revenue**		
Hon Michael Wood **Minister for Workplace Relations and Safety**		

Contact for telephone discussion (if required)			
Name	**Position**	**Telephone**	**1st contact**
Libby Gerard	Manager, Income Insurance Policy	Privacy of natural persons	✓
Hayley Aikman	Policy Advisor, Income Insurance Policy		
Lesley Parker	Principal Advisor, Income Insurance Policy		

The following departments/agencies have been consulted
ACC, the Ministry of Justice and MBIE's Employment Services Branch were consulted on this briefing.

Minister's office to complete:

- ☐ Approved
- ☐ Declined
- ☐ Noted
- ☐ Needs change
- ☐ Seen
- ☐ Overtaken by Events
- ☐ See Minister's Notes
- ☐ Withdrawn

Comments

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Purpose

This briefing seeks your agreement to issues relating to the New Zealand Income Insurance (NZII) Scheme. It covers:

- the proposed approach to enforcing the new bridging payment and notice period obligations in the event of non-compliance by employers
- the views of the Pou Tāngata Skills and Employment Iwi Leaders Group on NZII governance arrangements and sets out options to strengthen the role of Iwi/Māori in NZII governance, and
- recommendations on three smaller policy issues that have arisen in the NZII drafting process.

Executive summary

When taking decisions on New Zealand Income Insurance (NZII) in July 2022, Cabinet agreed that employers would be required to provide a paid notice period of up to four weeks and a lump-sum bridging payment of up to 80 percent of four-weeks' pay when an employee was economically displaced [CAB-22-MIN-0250.02 refers]. You subsequently sought further advice on whether these obligations should apply to all economically displaced employees or be limited to those eligible for NZII.

We understand that Ministers have now agreed that the bridging payment and notice period should be applicable to all economically displaced employees, regardless of their eligibility for the scheme, and that this decision will be formally confirmed at Cabinet on 7 November 2022. Delegated Ministers had previously agreed in-principle that if Cabinet took this approach, these obligations would constitute new employment standards and be enforced through the usual employment dispute resolution system [BR 223-1111 refers].

Following further work on the enforcement options officials recommend:

- specifying the paid notice period and bridging payment as statutory requirements (not an employment standard), and
- enabling disputes to be heard within the usual employment dispute resolution system.

A series of options are already available to employees through the employment relations and employment standards (ERES) system to resolve disputes over whether a redundancy has occurred, for example, or about the fairness of that process. We propose these dispute resolution options also be available to an employee if after agreeing to or being determined that the employer must meet their notice or bridging payment obligations, an employer does not meet them. These responses are graduated and start with the Ministry of Business, Innovation and Employment's (MBIE's) dispute resolution services (early resolution and mediation), followed by escalation to the Employment Relations Authority (ERA) and the Employment Court.

There is a choice as to whether the new bridging payment and notice period obligations should be enacted as general statutory employment provisions or employment standards. Employment standards provide the Labour Inspectorate with some additional tools such as banning orders that can be used in the event of sustained breaches, through the Employment Court. If designated as such, breaches can also result in employers being placed on the immigration stand-down list.

However, the drawback of making the new obligations employment standards is that many of the disputes relating to these provisions are also likely to involve a dispute over the redundancy itself or wider contractual provisions relating to the end of employment, which cannot be dealt with by the Inspectorate. These employment relationship matters by statute go to dispute resolution (i.e. mediation) in the ERES system. On balance, we consider the benefit of having a wider range of dispute resolution processes to deal with the whole of a dispute relating to redundancy, including processes more efficient than seeking an ERA determination, means the new obligations should be established as general provisions in employment law and not employment standards. Such an approach also allows flexibility for different approaches to dispute resolution.

This role for the employment dispute resolution institutions would add a potentially significant volume of work to existing cost and capacity pressures given the potential for disputes. [redacted] urther work is needed to determine the detailed resourcing implications for the ERES system, to ensure capacity and potentially mitigate some timing risks due to the current workload of the system. Confidential advice to Government [redacted]

Subject to your agreement to the enforcement approach proposed in this paper, officials will work with Parliamentary Counsel Office to give effect to this in the NZII Bill. Your confirmation of the proposed approach is sought as soon as possible to inform legislative drafting and ensure these provisions are reflected in the Ministerial consultation version of the NZII Bill which will be provided to delegated Ministers on 17 November.

Other matters addressed in the paper

The paper also outlines a proposal from the Pou Tāngata Skills and Employment Iwi Leaders Group (the SE ILG) to strengthen the governance arrangements agreed by Cabinet in July 2022, for Iwi/Māori, and officials' views on mechanisms to strengthen the governance arrangements for Iwi/Māori.

A set of three minor and technical decisions relating to other policy questions that have arisen during the NZII drafting process that we seek your agreement to are also included as **Annex Two.**

Recommended action

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

1. **Note** that when taking decisions on New Zealand Income Insurance (NZII) in July 2022, Cabinet agreed that employers would be required to provide a paid notice period of up to four weeks and a lump-sum bridging payment of up to 80 percent of four-weeks' pay when an employee was economically displaced but subsequently sought further advice on whether these obligations should apply to all employees, or be limited to NZII recipients.

Noted

2. **Note** that we understand that Ministers have now agreed to maintain the July 2022 Cabinet position (broad eligibility for the bridging payment and notice period), and this will be confirmed by Cabinet on 7 November 2022.

Noted

3. **Note** that on 10 October 2022, delegated Ministers agreed in-principle that if Cabinet determined that the bridging payment and notice period applies to all economically displaced employees, these would constitute new employment standards and be enforced through the Employment Relations and Employment Standards (ERES) system [BR 223-1111 refers].

Noted

4. **Note** that officials have since then reconsidered this position and recommend that the notice period and bridging payment be statutory employment provisions, rather than employment standards, which would enable a wider range of dispute resolution services (MBIE's Early Resolution Service, Mediation Service) in the event of disputes or breaches of these obligations.

Noted

5. **Agree** that the bridging payment and notice period be established as new statutory employment provisions, within the jurisdiction of the ERES system and its institutions of MBIE's dispute resolution services and the Employment Relations Authority (the ERA).

Agree / Disagree

6. **Note** that although primary responsibility for enforcing the bridging and notice obligations and resolving related disputes will sit with the ERES system, ACC will play an early role in informing employers and employees of their obligations in this regard.

Noted

7. **Note** that additional resourcing will be required for the ERES system to prepare for and undertake these roles within the NZII system, Confidential advice to Government If insufficient resources are provided, the additional demand likely as a result of the NZII scheme will reduce current service levels, resulting in further slowing of access to justice across the employment system and/or employers and employers being potentially unable to resolve disputes of the notice and bridging obligations. Further detailed advice on resource requirements will be provided separately.

Noted

Pou Tāngata Skills and Employment Iwi Leaders Group feedback on governance provisions

8. **Note** that in July 2022, Cabinet agreed that the responsible Minister be required to seek nominations for prospective ACC Board appointments from Iwi/Māori.

Noted

9. **Note** that in July 2022, Cabinet agreed that the existing skills and capability framework for ACC Board members be amended to reflect additional responsibility for Māori interests in NZII but that it would not be legislated for.

Noted

10. **Note** that the Pou Tāngata Skills and Employment Iwi Leaders Group (SE ILG) has raised concern that the agreed governance arrangements noted in recommendations 8 and 9 of the July 2022 Cabinet paper do not adequately support rangatiratanga or provide representation for Iwi/Māori as a Treaty partner.

Noted

11. **Note** that to strengthen governance arrangements for NZII, the SE ILG propose that the responsible Minister should seek ACC board member nominations from Iwi and nominations from the general Māori population and must appoint from the nominations put forward by Iwi.

Noted

12. **Note** that officials' view is that directors should be appointed solely for their skills in delivering ACC's outcomes (across both the ACC scheme and the NZII scheme), rather than as representatives of particular groups and that the responsible Minister should ultimately make final decisions on Board appointments as per the framework set by the Crown Entities Act 2004.

Noted

13. **Agree** to further changes to strengthen the governance arrangements for Iwi/Māori:
    i. codifying in legislation the collective knowledge, experience and expertise required for the Board, including in relation to te Tiriti o Waitangi/Treaty of Waitangi) and tikanga Māori and mātauranga Māori (reflecting the existing skills and capability framework for ACC Board members), **AND/OR**

    Agree / Disagree

    ii. a provision in legislation that the responsible Minister seeks advice from an appointed Māori Advisory Group before exercising any powers to appoint members to the Board and that the Group's advice is made publicly available.

    Agree / Disagree

Minor and technical policy issues

14. **Note** that **Annex Two** sets out policy recommendations and accompanying rational for a set of three minor and technical NZII policy issues that have arisen during the drafting process.

Noted

15. **Agree** to the policy recommendations set out in **Annex Two.**

Agree / Disagree

Privacy of natural persons

Libby Gerard
Manager, Income Insurance Policy
Labour, Science and Enterprise, MBIE
..... / ..... / .....

Hon Grant Robertson
Minister of Finance
..... / ..... / .....

Hon Carmel Sepuloni
Minister for Social Development and Employment
Minister for ACC
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Hon David Parker
Minister of Revenue
..... / ..... / .....

Hon Michael Wood
Minister for Workplace Relations and Safety
..... / ..... / .....

Background

1. On 4 July 2022, Cabinet agreed to proceed with New Zealand Income Insurance (NZII) and the introduction of a requirement for employers to provide a four-week bridging payment and four-week notice period when making an employee's position redundant.

2. Cabinet agreed that these obligations would be applicable to all economically displaced employees, regardless of their eligibility for the scheme [CAB-22-MIN-0250.02 refers]. Delegated Ministers subsequently sought further advice on whether these obligations should apply to all economically displaced employees, or be limited to NZII recipients.

3. We understand that Ministers have now agreed to maintain the original July 2022 Cabinet position and that this decision will be formally confirmed at Cabinet on 7 November 2022.

4. This briefing provides advice on the enforcement of the bridging payment and notice period obligations in the event of non-compliance by employers. Your agreement to the proposed approach is sought as soon as possible to inform legislative drafting. Advice on other scheme offences and penalties was provided on 30 August 2022 to the Social Unemployment Insurance Governance Group (SUIGG) and drafting is proceeding.

5. This briefing also provides you with advice on approaches to strengthen the NZII governance arrangements for Iwi//Māori and seeks agreement to three smaller policy issues that have arisen in the NZII drafting process.

Overview of bridging payment and notice period obligations

6. Once the scheme is established, employers will need to provide employees (and NZII) with four weeks' notice of redundancy before the redundancy takes effect. Employers will also be required to pay a bridging payment to cover the first four weeks of the initial period of unemployment before NZII entitlements commence. The bridging payment would be 80 percent of an employee's normal pay for up to four weeks.

7. Cabinet agreed that these obligations would not apply to employers of employees impacted by a health condition or disability. Under the Human Rights Act 1993, employers have existing obligations to take reasonable measures to support an employee with a health condition or disability to continue working, including redeployment where possible.

8. The purpose of the bridging payment is to discourage unwarranted claims against the scheme – particularly sham redundancies. Putting a cost on a decision to disestablish a position encourages employers to consider carefully whether redundancies are the best choice for the business and discourages them from colluding with employees to lodge spurious claims. A key rationale for making bridging payments applicable to all displaced employees, rather than just those eligible for NZII, is that limiting bridging to employees that are eligible for NZII risks making ineligible employees (especially temporary migrants) relatively more attractive to hire, and to displace.

9. The objective of the notice period is to provide more time for employees to adjust to job loss and look for work, as well as providing certainty for those employees who do not have contractual redundancy provisions. It also provides opportunities for the wider system to intervene early to support people to look for work and potentially prevent people from needing the scheme or welfare supports.

10. These obligations would not apply to situations where an employment agreement has been terminated due to poor performance, gross misconduct, within a 90-day trial, constructive dismissal, and voluntary resignation.

Enforcement of bridging payment and notice period obligations

Most employers are expected to meet their bridging and notice period obligations, but there will be a degree of non-compliance

11. We anticipate five likely scenarios of employer non-compliance with the notice period and bridging obligations. These are where:

    a. a business has become insolvent or is in receivership and therefore neither of these obligations can be met.

    b. employers are unaware of or unclear about the notice and bridging payment requirements and require education or clarity about their obligations.

    c. employers understand their notice and bridging payment obligations, and are working in good faith to meet them, but are yet to do so.

    d. employers dispute that the employment separation is a redundancy, and/or that a future expectation of work exists (in the case of casual employees).

    e. the economic displacement is agreed or confirmed, but there is intentional non-compliance from an employer.

12. In scenario (a) above, Cabinet has agreed that the scheme could step in and pay the bridging payment for all employees [CAB-22-MIN-0250.02 refers]. This would be treated as debt owed by the employer and the scheme be treated as an unsecured creditor. The scheme would then seek to recover funds alongside other unsecured creditors. The scheme would do this for all employees, not just those eligible for the scheme, which has not been taken into account for scheme costings.

13. Scenarios (b) to (e) are the subject of the dispute resolution and enforcement proposal set out below.

Responsibility for enforcing these new obligations would sit primarily in the ERES system

14. On 10 October 2022, we provided you with initial advice on potential enforcement pathways for the employer obligations [BR 2223-1111 refers]. You agreed in-principle that, if Cabinet determined that the bridging payment and notice period applies to all economically displaced employees, these would constitute new employment standards and be enforced through the Employment Relations and Employment Standards (ERES) system.

15. An employee's eligibility for the paid notice period and bridging payment will be determined by one of two processes:

    - If an employer agreed that a situation met the definition of economic displacement, either from the outset of the process or subsequently through the MBIE's dispute resolutions services (early resolution and mediation), or

    - There was a dispute about whether an eligible economic displacement occurred and either the ACC (in the case of a casual employee with an expectation of future work, or insolvency) or the Employment Relations Authority (the ERA) (in cases of a dispute over a redundancy) determines it is economic displacement.

16. We expect most employers to comply with their obligations at this stage. Enforcement will be needed if the employer subsequently does not meet those obligations.

17. The key rationale for using the employment dispute resolution system (rather than the ACC enforcement system) is that the bridging payment and notice period are obligations owed by the employer, to the employee. They form part of the employment relationship (through obligations created via the NZII scheme). Non-compliance with these obligations may be just one of a number of issues arising from the end of the employment relationship, such as a dispute over wider contractual matters or the process for ending the employment itself. Using the employment dispute resolution options can enable all relevant issues to be discussed together, and through more flexible options, before reaching enforcement action. It also minimises the extent to which a second regulator (ACC) is responsible for making the same decisions about employment matters. Enforcement of the bridging payment may require a decision by the ERA about what income should be counted, which can be highly complex, but it is something that the employment dispute resolution system deals with regularly through mediation for parties to reach mutual agreement or investigation by the ERA to reach a determination.

18. The disadvantage of using the employment dispute resolution system is the time it takes to resolve disputes through the ERA in the event of wilful non-compliance. MBIE's dispute resolutions services (early resolution and mediation) are unlikely to be effective in this scenario and the ERA's processes take significant time[1]. Any economic displacement that is disputed is unlikely to meet the income smoothing objectives of the NZII scheme, as it can take months or years to resolve which will delay scheme acceptance.

The new obligations should be established as statutory employment provisions

19. There are several categories of provisions in employment law (general employment provisions, employment standards, minimum entitlement provisions and infringement offences), each with specific compliance and enforcement levers. These categories are described in detail in **Annex One**.

20. We recommend that the bridging payment and notice period be established as new employment provisions in law. Positioning these obligations within the employment law framework means that disputes will be channelled into the MBIE's dispute resolution services (early resolution and mediation services, described in paragraph 33) in the first instance for resolution, before progression to the ERA if required.

21. An alternative would be to make these obligations new employment standards. This would provide several additional enforcement tools compared to general employment entitlements (eg the ability to for the Labour Inspectorate (LI) to apply for banning orders, employers being placed on the immigration stand down list in cases of breach and the ability to pursue persons directly involved in a breach).

22. However, breaches of employment standards cannot be mediated and will require ERA determinations to achieve resolution. This would rule out lower level (and potentially more efficient) dispute resolution pathways. We consider MBIE's dispute resolution services (early resolution and mediation) to be the pathways likely to offer speediest and lowest cost problem resolution for employees when faced with employer non-compliance, compared to seeking an ERA determination. This is particularly so given current resourcing pressures at the ERA, which is leading to lengthy wait times for determinations.

[1] In practice, the investigative processes associated with enforcement of employment standards in the ERA would take a minimum of 6-9 months if the system were fully resourced. At present, due to demand in the existing employment system, wait times for an ERA determination can be up to two years. With over 2.3m employees in New Zealand, the current capacity of the ERA is approximately 900-1000 cases per year for all employment disputes

23. In addition, the design of the NZII process means the tools available to the LI would not provide any additional benefit. The point at which enforcement for non-compliance with the notice period and bridging payment are needed is after the employer has already agreed that an economic displacement has occurred or after the ERA/ACC has determined that economic displacement has occurred. In either scenario, there is no subsequent need for the LI's main function of providing a relatively quick decision about a clear-cut matter. In these scenarios, the matter has been decided and the key outstanding issue is to ensure recovery of the payment. This is not a core function of the LI. Recovery of payments from reluctant payees is an existing challenge for the ERES system. For example, those owed payments generally need to take action in the District Court to enforce payments ordered by the ERA.

24. A further alternative would be establishing the bridging payment and notice payment as minimum entitlement provisions, which are a subset of employment standards. We do not consider this appropriate because the new obligations differ in character from existing minimum entitlement provisions (eg the minimum wage).

25. We considered creating infringement offences for breaches of the bridging payment and notice period obligations. However, because breaches may not be straightforward to establish and are not procedural in nature, we do not consider them an appropriate enforcement tool for these obligations. The bridging payment amount owed will not be simple for the LI to calculate. Additionally, by the time enforcement action is needed, the priority is to ensure recovery of the payment. An infringement offence would be unlikely to achieve this, and would likely remain unpaid, as the employer is already failing to pay money owed.

26. We recommend that the bridging payment and notice period requirements be established as new employment provisions, creating obligations on employers where economic displacement has occurred. There will need to be a range of consequential amendments to the Employment Relations Act 2000 (the ER Act) as a result. For example, the ER Act would likely require express amendment to provide that the jurisdiction of the ERA (and Employment Court) covers employment relationship problems about notice period and bridging payment obligations under the NZII Bill.

Overview of proposed dispute resolution and enforcement approach

27. Enforcement of the bridging payment and notice period obligations could only commence once economic displacement (eg redundancy) has been established. In terms of employment relationship problems, disputes could be about whether a genuine redundancy has occurred. This would need to be resolved through the ERES system before consideration could be given to whether an employer had met their bridging and notice obligations.

ACC would play an initial role in educating employees and employers about their obligations

28. In most cases, an employer will be notifying ACC of economic displacement (eg because of redundancy). We would expect most of those employers to be aware of their obligations with respect to the notice period and the bridging payment. However, ACC will play a role in educating employees and employers of bridging payment and notice period obligations by confirming the requirement to meet these obligations in their communications with employers and employees.

29. ACC will also provide employers with information on how to calculate the bridging payment (which is based on 80 percent of previous income) via an online calculator on their website. This will be available to all employers regardless of employee eligibility for the scheme.

30. Where claimants report their employer has not met these obligations, we expect that ACC would make an initial attempt to check in with these employers to remind them of their obligations before directing the claimant to the early resolution in the ERES system.

31. In cases where ACC is aware the employer is insolvent, they would inform the claimant and NZII would make the bridging payment once it has all the relevant information.

32. In some circumstances, an employee may lodge a claim directly with ACC. ACC would seek to confirm with the employer that an economic displacement event had occurred, but if this is disputed by the employer, the employee will be directed to raise the dispute with the ERES system. If eligibility is subsequently established by the ERA, an application could be made retrospectively to ACC for NZII.

Dispute resolution processes would then be available through the ERES system

33. Where an employer continues to fail to meet their obligations, or if there remains an underlying dispute about whether a redundancy has occurred, we recommend employees be able to access dispute resolution and compliance/enforcement processes in the ERES system:

    a. Facilitation and information provision through the Early Resolution Service – a free phone-based service for employees and employers which endeavours to resolve a workplace issue early, quickly, and informally, before it becomes too serious or needs a more formal process. We anticipate that this pathway would be used in the first instance, and in situations where an employer is either unaware of their obligations or is working in good faith to meet them but is struggling financially to do this. Participation is voluntary, so in cases of intentional non-compliance, employers are unlikely to participate, though early resolution facilitators would encourage employers to engage with the process.

    b. Mediation through the Employment Mediation Service – where an independent mediator helps resolve an employment relationship problem in a free, semi-formal and confidential environment. We anticipate that this pathway would be used if the Early Resolution Service did not result in a resolution as to whether a redundancy had occurred, but an employer was open to mediation. Mediation is voluntary and an agreement reached at mediation and signed by a mediator is final and binding and enforceable. We would expect mediation to be used to reach agreement over whether a redundancy has occurred. In cases where this has already been agreed but there is non-compliance regarding the bridging payment and notice period obligations (and a breach is clear), employees would be expected to seek resolution through the ERA.

    c. Escalation to the Labour Inspectorate – an employee could make a complaint to the LI that their employer has breached an employment obligation. The LI would need to rely on the assessment of NZII eligibility completed by ACC and use ACC's bridging payment calculator to determine owed monies for the bridging payment. The LI has no powers to investigate or take action on employment relationships (ie a dispute over the redundancy process itself). The primary tools the LI could use would be graduated, from managed resolution (effectively early resolution), negotiating an enforceable undertaking with employers (eg to create payment plans), or issuing an improvement notice to remediate the non-payment. If the employer refused to comply with this enforcement action, the LI could seek a compliance order from the ERA. The employer could also appeal the LI action through the ERA.

    d. Determination by the ERA – where the employee has been unable to find resolution with the employer through the ACC or other dispute resolution pathways in the ERES system, they can ask the ERA to resolve the issue by making a binding decision, set out in a determination. We anticipate that this pathway would be used where there is intentional non-compliance by the employer, as it is likely to also involve a dispute over the redundancy.

    e. Challenge to the Employment Court – employees can challenge decisions made by the ERA in the Employment Court. In some cases, the ERA might refer urgent and important cases to the Employment Court, for example, to clarify a point of law.

We expect the proposed process to be broadly applicable to casual employees

34. Cabinet agreed that pro-rated bridging and notice obligations would also apply to employers of non-standard employees based on their length of employment, where there has been an economic displacement and the casual worker has a 'reasonable expectation of future work'.

35. The intention behind this was to ensure that casual (and fixed-term) employees whose pattern of work resembled permanent employment would be able to access the benefits of the scheme. It was also to avoid the distortions that can arise when some groups are exempt from levies.

36. Cabinet agreed that when a casual worker or their employer lodged an NZII claim, ACC would make a determination on whether there was a future expectation of work (alongside consideration of other eligibility settings, such as the contributions history requirement). Evidence of an employer's commitment to future work is likely to be the determining factor in ACC's NZII eligibility assessment, with the other proposed criteria (duration worked and regularity and consistency of earnings) serving most often as validation factors to protect against sham NZII claims.

37. The concept of a casual worker with an expectation of future work does not currently exist in employment law, and it was therefore envisaged that reasonable expectation of future work test would be independent of the employment relationship, enabling ACC to quickly determine NZII eligibility (and maintain the scheme's income smoothing objectives), while preserving determinations about the nature of the underlying employment relationship for the ERES system. Empowering ACC to make these judgements enables timely resolution and access to NZII in cases where eligibility is straightforward.

38. If ACC makes a determination of future expectation of work and the employer complies with the bridging payment and notice period obligations, there will not be any need for referral to the ERES dispute system.

39. We expect that most instances of employer non-compliance with bridging and notice in the casual worker space will stem from a difference of opinion about whether a 'casual' employee had a 'reasonable expectation of future work', given that this concept is at odds with employment that is truly casual in nature. We anticipate the ERES system will be engaged in the following situations:

    a. If ACC found that there was sufficient objective evidence to determine that there was an expectation of future work (and therefore receive NZII entitlements), but the employer did not fulfil their bridging and notice obligations, then the employee would be **referred by the scheme to ERES dispute resolution system** to attempt to resolve this.

    b. If ACC determined that a person did not have an expectation of future work because of information the employer had provided, **the application for the scheme would not progress**. If the employee disagreed with the information the employer had provided (namely, whether there was a future expectation of work), they would be encouraged to **use the ERES dispute resolution system to resolve this**.

    c. If the employee believed there were other factors that meant their employment relationship went beyond that of a casual agreement, **the ERES system would be the appropriate channel** for the parties to find resolution. If as a result, an ERA determination established the real nature of the relationship was not casual (there are several factors that the ERA would consider, not just whether there was an expectation of future work), and a redundancy occurred, this would make the employee entitled to the scheme, the bridging payment and notice period.

40. There is a further cohort of casual employees who may never make a claim to the scheme (for example because they know they will not meet the contribution history criteria, or because they have already found replacement work). We anticipate that the ERES system would be engaged regarding this group in the following ways:

    a. If a casual employee believed they had an expectation of future work and were therefore entitled to the bridging payment (and notice period) but the employer disagreed, then they would need to pursue these entitlements directly through the ERES system.

    b. In the event the employer continued to dispute eligibility to those entitlements, the ERA would make a decision under the NZII Act as to whether the casual employee had an expectation of future work. This would replicate the decision-making process that ACC has in place for the same judgement and could lead to inconsistency between the two decision-makers. In some case, some employees may have the ability to choose with path to go down. The alternative would be to require ACC to make all decisions about whether a casual employee has an expectation of future work even if they are not entitled to NZII.

    c. In cases where a future expectation of work was agreed by an employer (or determined by the ERA) to exist, but the employer did not comply with the ensuing bridging and notice obligations, the enforcement approach would mirror the standard enforcement process for permanent employees set out in the section above.

41. There are significant complexities regarding the boundaries between both systems (ACC's claim eligibility processes and the ERES system) and how employees will choose to interact with them. Employees may be incentivised to engage with the system they believe will give them the most favourable outcome. Further work is needed on the intersections between the ERES system and the scheme to ensure processes can be designed in the most effective and efficient way.

The proposed enforcement approach comes with risks and implications that may impact the outcomes of the scheme

42. The initial employer follow-up by ACC will likely capture and resolve many situations where employers were unaware or unclear of their obligations, allowing for timely resolution that supports the scheme's income smoothing objective.

43. Placing enforcement within the ERES system does not mean that every breach will be enforced or that the policy objectives of the scheme (namely income smoothing) will be met for employees whose employers renege on their bridging payment and notice period obligations. The ERES system has an operational strategy about where enforcement efforts are focused. The priority would be dealing with egregious employer behaviour, systematic and severe harm, and restoration of employment relationships rather than ensuring claimants received their entitlements promptly following a redundancy.

44. The current workload/capacity of the ERES system also means that enforcement action, including determination through the ERA, takes significant time and would be unlikely to get the bridging payment to the claimant within the eight weeks before entry onto the scheme.

45. Confidential advice to Government It would be necessary to fund this, or the capacity needed to deal with these disputes could result in further delays for all disputes. Confidential advice to Government

Broader implications of the scheme for the ERES system

46. The introduction of NZII will also incentivise some level of behavioural change. We expect that NZII will lead to more sham redundancies, as well as more employment relationship disputes that result in a mutually beneficial redundancy settlement at mediation, even where a redundancy is not genuine. The bridging payment and notice period obligations may go some way to stemming this behaviour on the part of employers, but it is likely that the certainty and immediacy of an (up to) six-month NZII entitlement would seem preferable to an employee than the uncertain outcome of raising a personal grievance.

47. We are continuing to work on how we might mitigate these behaviours, and other gaming challenges posed by the introduction of the scheme.

Pou Tāngata Skills and Employment Iwi Leaders Group feedback on governance provisions

48. In July 2022, Cabinet agreed that the responsible Minister be required to seek nominations for prospective ACC Board appointments from Iwi/Māori alongside nominations from social partners. Cabinet also agreed that the existing skills and capability framework for ACC Board members be amended to reflect additional responsibility for Māori interest in NZII (but not legislated for).

49. At a hui on 13 October 2022, Pou Tāngata Skills and Employment Iwi Leaders Group (the SE ILG) raised concerns that the governance arrangements agreed by Cabinet in July do not adequately account for rangatiratanga or provide sufficient representation for Iwi as a Treaty partner, or for broader Māori interests.

50. To strengthen the governance arrangements, the SE ILG suggested an alternative approach whereby the responsible Minister would seek nominations from Iwi (recognising rangatiratanga) and nominations from the general Māori population (recognising kāwanatanga), effectively providing two nominations for Iwi/Māori. The SE ILG consider this would ensure rangatiratanga is built into NZII and seats at the table for the Crown's Treaty partner and wider Māori views and interests.

51. The SE ILG also suggested that the responsible Minister must appoint from nominations put forward by Iwi.

52. The SE ILG's suggested approach is consistent with advice to Ministers in June 2022 which reflected the wishes of Pou Tāngata to see a strong role for Iwi through co-governance of the scheme, including the ability to nominate representatives to the Board [BR 2122-4092 refers].

53. The suggested approach goes beyond appointing based on skills and expertise to include appointments that are representative. Representation on a Board is problematic as the Board's role is to act as a collective body to ensure that the entity discharges its role and responsibilities. Collective working and collective responsibility are key to the entity being effective.

54. Having representatives on the ACC board would likely create complexities for the operation of the ACC Board because those appointed to the Board would have a dual role, ie being accountable under the Crown Entities Act to the Minister, while also having an accountability to the group or organisation they represent. Representation on the board also has the potential to create challenges for the representatives themselves.

55. In June 2022 advice to Ministers noted officials' preference that the starting point for governance of NZII is the framework set by the Crown Entities Act 2004 [BR 2122-4092 refers]. This includes a requirement that board members are appointed by the Minister based on the skills required to govern a Crown entity. Subject matter expertise relevant to the organisation is also important. The skills required for each Crown entity are described in a 'skills matrix' that reflects its business.

56. Officials' view remains that board members should be appointed solely for their skills in delivering ACC's outcomes (across both the ACC scheme and the NZII scheme), rather than as representatives of particular groups and that the responsible Minister should ultimately make final decisions on Board appointments.

57. However, the *Pae Ora (Healthy Futures) Act 2022* and the *Taumata Arowai – the Water Services Regulator Act 2020*, provides a precedent and example of how the approach to governance agreed by Cabinet could be strengthened. The legislative mechanisms we consider would go some way to strengthen the governance arrangements are through:

- codifying in legislation the collective knowledge, experience and expertise required for the Board, including in relation to te Tiriti o Waitangi/Treaty of Waitangi) and tikanga Māori and mātauranga Māori (reflecting the existing skills and capability framework for ACC Board members), and/or
- a provision in legislation that the responsible Minister seeks advice from an appointed Māori Advisory Group before exercising any powers to appoint members to the Board and that the Group's advice is made publicly available.

58. We seek Ministers' direction on their preference to maintain the approach to governance arrangements as agreed by Cabinet in July 2022 or to strengthen the governance arrangements for Iwi/Māori (as set out in paragraph 57 above).

59. If Ministers wish to strengthen governance arrangements for Iwi/Māori, further work to finalise the details of the approach will be required with the SE ILG and the ACC, Public Service Commission and Te Arawhiti.

Minor and technical policy decisions

60. **Annex Two** sets out policy recommendations and accompanying rationale for a set of three minor and technical policy issues that have arisen in the drafting process. The policy issues covered are:

- How does it mean for NZII HCD eligibility if someone has an unlimited sick leave provision?
- Should private domestic workers and other IR56 taxpayers be eligible for NZII?
- What does it mean to 'have resided continuously in NZ for two years at the time of a trigger event'? (a requirement for temporary migrants).

61. Decisions are needed on the second-order policy issues as soon as possible to inform drafting of the NZII Bill.

Next steps

62. Cabinet is meeting on Monday, 7 November 2022 to take and confirm decisions on outstanding NZII policy issues, including that the bridging payment and notice period should be applicable to all economically displaced employees, regardless of their eligibility for the scheme.

63. The legislative drafting related to enforcement will be complex and likely require consequential changes to the ER Act. Decisions are needed on the recommendations in this

paper as soon as possible, to ensure they are reflected in the Ministerial consultation version of the NZII Bill which will be provided to delegated Ministers on 17 November 2022.

64. Subject to your agreement to the recommendations in this paper, officials will work with Parliamentary Counsel Office to give effect to these in the NZII Bill.

65. Situating enforcement in the ERES system will require additional resources for implementation and operation. Confidential advice to Government

66. Officials are available to discuss the proposals in this paper.

Annexes

Annex One – Overview of categories of employment law provisions

Annex Two – Recommendations on minor and technical policy issues.

Annex One: Overview of categories of employment law provisions

Category	Description
General employment provisions	These are all the entitlements, rights and obligations established in the full range of employment legislation. The ERES system provides processes to resolve disputes relating to these. In terms of compliance and enforcement action, Labour Inspectors can generally do the following: • Enter into enforceable undertakings with employers to rectify a breach of employment law, or pay money owed to employees under any provision of employment law. • Issue improvement notices to employers failing to comply with employment law. • Serve demand notices on employers who owe wages, holiday pay or other money to employees under the Minimum Wage Act or Holidays Act. • Commence an action to recover a financial penalty where this is explicitly allowed by law.
Employment standards	Employment standards are a subset of employment law. At present, these include requirements relating to the following: • Retaining a copy of an employment agreement, • Providing breastfeeding facilities and breaks, • Providing rest and meal breaks, • Keeping wage and time records, and holiday and leave records, • Not differentiating/unlawfully discriminating in rates of remuneration on the basis of sex/gender, • Minimum entitlements under the Minimum Wage Act 1983, and • Provisions of the Wages Protection Act 1983. While mediation is the primary problem-solving mechanism in the ERES system, the exception is for enforcing employment standards. Mediation is generally not appropriate for breaches of employment standards. For example, while the ERA has a duty to refer matters to mediation before a determination, the exception is breaches of employment standards. In terms of compliance and enforcement action, Labour Inspectors can apply to the Employment Court for banning orders in situations of persistent breaches of employment standards. This is in addition to their regulatory tools for all employment law more generally. Employers who receive a penalty for breaching employment standards will also be placed on the immigration stand down list. This means they will not be able to hire migrant workers for a given duration. Company directors or partners can be held personally liable for breaches of employment standards.
Minimum entitlement provisions	Minimum entitlement provisions are a subset of employment standards. Breaches of minimum entitlement provisions generally attract the most serious compliance and enforcement regulatory response. Minimum entitlement provisions are those under the Holidays Act 2003, Minimum Wage Act 1983and Wages Protection Act 1983. In the future, some terms of Fair Pay Agreements will also be minimum entitlement provisions. Generally, for serious breaches of minimum entitlement provisions, a Labour Inspector can apply to the Employment Court for a declaration of breach, a pecuniary penalty order or a compensation order.

Category	Description
	An employer who commits a serious breach of minimum entitlement provisions will also be placed on the immigration stand down list for one year, or two years if a pecuniary penalty is ordered.
Infringement offences	There is an infringement regime for certain breaches of the Employment Relations Act by an employer: • Failing to keep a copy of an employment agreement, • Failing to keep wages and time records, or holiday and leave records, and • Failing to ensure an employment agreement is in writing. Before issuing an infringement notice, a Labour Inspector must have reasonable grounds to believe the person has committed an infringement offence. Employers who receive an infringement notice are placed on the immigration stand down list.

Annex Two: Recommendations on minor and technical policy issues

Policy Issue	Recommendation	Rationale
1. Employment agreements with unlimited sick leave provisions		
What happens if someone has an unlimited sick leave provision?	A person can be eligible for NZII once their 'unlimited' or 'managed' sick leave is exhausted, if they meet the entry criteria of a 50% reduction in work capacity expected to last at least 4 weeks.	A range of minimum sick leave provisions are set out in the Holidays Act 2003 (eg the minimum 10 days of annual paid sick leave, to a maximum accumulation of 20 days) but employers can, and do, choose to exceed statutory provisions. • Some employers offer 'unlimited sick leave' as a workforce retention policy. Some package this as 'managed sick leave', where there is no limit, but employers retain the right to limit at a later date (ie. if an employee is abusing the provision or the sick leave is becoming excessive). • We may see some market adjustments over time, as some employers currently offering 'unlimited' or 'managed' sick leave provisions may decide that the scheme, and the NZII levy they are paying, can take over the cost pressure of significant periods of sick leave. Cabinet agreed that a person who has a qualifying health condition or disability will become eligible for NZII payments once their available sick leave has been used. The scenarios for 'unlimited' or 'managed' provisions are: 1. Where there is genuine 'unlimited' sick leave, the leave will not be exhausted, and a person will not need to receive NZII payments (nor would they likely choose to receive 80% rather than 100% of their income). 2. For 'managed' sick leave, a person will become eligible if their employer ceases their sick leave provision. Once NZII is established some employers may do this, and allow the scheme to step in, if work capacity is impacted for a significant period. Under the current policy setting, a person in scenario 2 (with a qualifying health condition or disability), would become eligible for NZII payments if their employer ceases their sick leave. This may occur soon after, or significantly later than, the person's work capacity was impacted. While we can't predict when employers may end people's sick leave, a situation where an employer may allow a person several months of paid sick leave, but then ends their provision is feasible. Even though this may be significantly after their work capacity was affected, we consider they should still be eligible for NZII payments if they had an initial medical certificate identifying a 50% reduction in work capacity expected to last at least 4 weeks.

Policy Issue	Recommendation	Rationale
2. Coverage of IR56 taxpayers		
Should IR56 taxpayers be eligible for NZII?* *The term IR56 taxpayer is used to identify the small group of workers who are required to pay their own taxes (PAYE) on their wage or salary. This group includes: • Embassy staff • NZ-based representatives of overseas companies • US Antarctic Program workers • Private domestic workers who work part-time, such as home-helpers, caregivers, nannies, gardeners and domestic odd-jobbers.	No, IR56 taxpayers would not be eligible for NZII and would not be liable for levies.	IR56 taxpayers are employees but share many characteristics with self-employed workers, such as being responsible for their own tax withholdings, and (in the case of private domestic workers) paying both the employer and employee components of the ACC levy. We recommend excluding them from NZII coverage for three main reasons: 1. *Lack of an identifiable employer who is subject to the NZII employer obligations* – IR56 taxpayers do their PAYE withholdings and ACC deductions instead of a registered employer. We consider that NZII eligibility should be tied to an identifiable employer being subject to the employer obligations integral to the viability of NZII (scheme notification of displacement, notice period, bridging payment, sick leave provisions, and obligation to attempt to keep job open). 2. *Difficulty in verifying economic displacement* – without an identifiable employer, ACC consider it would be challenging to determine and verify the trigger event for redundancy/loss of work. 3. *Impost of double levy* - If included, IR56 taxpayers would need to pay both the employer and employee levy. We do not think this double levy impost is justifiable given the low likelihood of this group successfully claiming NZII (see point above). They would also be the only group for whom a double levy would apply.
3. Temporary migrant residency requirement for NZII eligibility		
What does it mean to 'have resided continuously in NZ for two years at the time of a trigger event'? (requirement for temporary migrants)	To be eligible for NZII payments, temporary migrants meet both parts of the following criteria to demonstrate that they have resided in NZ for two years; 1. have been lawfully residing in NZ for at least 24 months prior to the trigger event, and 2. spent 184 days in NZ in each of the two 12-month periods immediately before the trigger event occurred.	One of the requirements to be eligible to be a permanent NZ resident, is to hold a resident visa for two years. Although not defined in the Immigration Act 2009, Immigration New Zealand define "two years" on their website as being lawfully present in NZ for at least 184 days in each of the last 12 months. We propose to align with Immigration NZ's definition of two years, so that temporary migrants must have spent 184 days in each of the last 12 months to be eligible for the scheme. However, this requirement alone could mean that those who have been in NZ for 18 months and not left the country, would be eligible for the scheme. So, to ensure that the temporary migrant has demonstrated a meaningful connection to NZ, and ensure they have resided in NZ for at least two full years, temporary migrants must also have been living in NZ for at least 24 months prior to the trigger event.