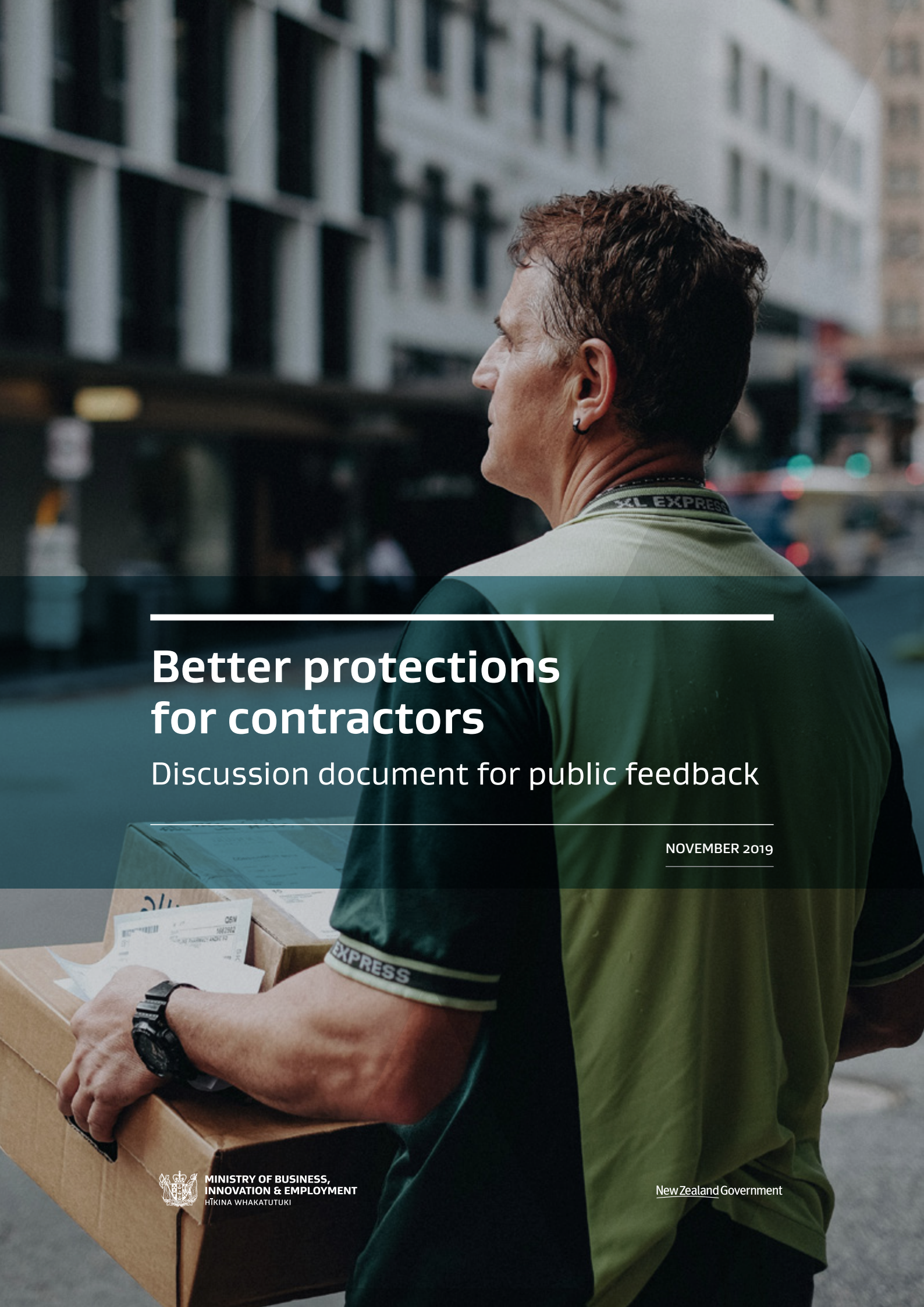

Better protections for contractors

Discussion document for public feedback

NOVEMBER 2019

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

New Zealand Government

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Ministry of Business, Innovation and Employment (MBIE)

Hīkina Whakatutuki - Lifting to make successful

MBIE develops and delivers policy, services, advice and regulation to support economic growth and the prosperity and wellbeing of New Zealanders.

MBIE combines the former Ministries of Economic Development, Science + Innovation, and the Departments of Labour, and Building and Housing.

More information

www.mbie.govt.nz

0800 20 90 20

Information, examples and answers to your questions about the topics covered here can be found on our website www.mbie.govt.nz or by calling us free on 0800 20 90 20.

Disclaimer

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CONTENTS

MESSAGE FROM THE MINISTER

Kia ora tātou,

New Zealand currently has one of the highest employment rates in the OECD and we have near record low unemployment. Our GDP growth is better than the OECD countries we like to compare ourselves with. We know our economy has solid foundations.

But there are problems that have built up over a number of decades and led to higher levels of inequality and poverty. Changes made to our labour market in the 1990s in the name of market flexibility have resulted in structural problems and left too many hard working New Zealanders struggling to make ends meet.

Some of those changes may have been useful for GDP growth, but they also increased inequality by removing the checks and balances that were needed to ensure all workers had the tools to support their wellbeing in the labour market.

Some contractors, and particularly dependent contractors, are vulnerable in the workplace. For example, employees who are labelled as 'independent contractors' by their employers miss out on their basic employment rights. Workers who are caught in the grey zone between employee and contractor status are also vulnerable.

I have heard stories of contractors who work long hours, in some cases 80 hours per week, or others who receive an income which works out to be less than the minimum wage once you account for their hours. Some workers are finding themselves dependent on one employer for all their income, with no flexibility or power to negotiate better conditions.

In some cases, workers are completely unaware that they have been engaged as contractors and not employees. These workers are surprised with tax and ACC bills at the end of the financial year which they cannot afford.

This Government is committed to taking action to ensure that businesses treat contractors fairly. We are not the only country grappling with this problem. Countries around the world are taking bold steps to ensure the benefits of innovation and firm growth do not come at the expense of workers' pay and conditions.

In February, I directed officials at the Ministry of Business, Innovation and Employment (MBIE) to look at options for strengthening rights and protections for vulnerable contractors.

This complements other work that is underway to support Fair Pay Agreements and to address the exploitation of temporary migrant workers. These three initiatives are integral to the Government's ambition to protect workers who don't have the power to negotiate higher wages or better workplace conditions.

This discussion document outlines an initial set of options designed to improve rights and protections for vulnerable contractors in New Zealand. These options aim to:

- Ensure all employees receive their statutory minimum rights and entitlements.
- Reduce the imbalance of bargaining power between firms and vulnerable contractors.
- Ensure system settings encourage inclusive economic growth and competition.

This consultation seeks your views on the benefits and risks of different options, and whether some options should be explored further. I am also open to hearing about alternative options that would address the poor working conditions experienced by some contractors.

To tackle these issues effectively, we must hear the voices of workers, unions, employers and businesses. I look forward to hearing your views.

Consultation closes at 5pm on 14 February 2020. Make sure that you have your say.

Thank you for taking the time to contribute to this vital work.

Hon Iain Lees-Galloway

Minister for Workplace Relations and Safety

HOW TO HAVE YOUR SAY

Your feedback will help improve the rights and protections contractors get under New Zealand law. Please provide your submission to the Ministry of Business, Innovation and Employment (MBIE) by **5pm on 14 February 2020.**

You can make submissions anonymously

You do not have to tell MBIE your name or provide your contact details. But you can include your name, or the name of your organisation, if you feel comfortable doing so. You can also choose to provide contact details so that we can get in touch if we require further information to clarify anything covered in your submission.

MBIE will accept submissions in any form

There is a link below to an online submission form. We hope this form will guide you through the submission process. If you feel more comfortable providing feedback in an email or letter, you are welcome to do this instead.

You may respond to some or all of the questions we ask

You may respond to some or all of the questions we ask. We also encourage your input on any other relevant areas that are not covered by the questions.

Where possible, we would appreciate any evidence you are able to share to support your views. For example, this could be references to independent research, case studies or facts and figures.

You can make a submission

Here's how you can make a submission on this discussion document:

- Use the online form at www.mbie.govt.nz/contractorsconsultation.
- Print a document at www.mbie.govt.nz/contractorsconsultation and send your submission to ContractorsConsultation@mbie.govt.nz.
- Post your submission to:

  Employment Standards Policy
  Labour and Immigration Policy
  Ministry of Business, Innovation & Employment
  PO Box 1473
  Wellington 6140

You can also complete a short survey

There is a short survey at www.mbie.govt.nz/contractorsconsultation about contractors' working experiences. Responses can be anonymous, and will only be used to help us develop our policy responses for contractors.

Please send any questions to ContractorsConsultation@mbie.govt.nz.

CONSULTATION PERIOD

Please provide your feedback by 5pm, Friday 14 February 2020

MAKE A SUBMISSION

Go online to www.mbie.govt.nz/contractorsconsultation to read more about the options and make your submission.

COMPLETE THE SURVEY

Go to www.mbie.govt.nz/contractorsconsultation to tell us about your experience of working as a contractor and the changes you think Government should make to improve your working life.

EMAIL

Got a question? Email us at ContractorsConsultation@mbie.govt.nz

Use of information

Your submissions and survey responses will be used to inform MBIE's policy development process, including advice to the Minister for Workplace Relations and Safety on final options for change. The consultation period ends on 14 February 2020. The Minister may then seek Cabinet's agreement to his preferred options.

When making a submission or filling out the survey, you can do so anonymously and choose not to provide contact details. We may contact submitters (people who make submissions) directly if we require clarification of any matters in submissions or would like further information from them.

Release of information

We may publish submissions received on our website at www.mbie.govt.nz. When you make a submission, MBIE will consider that you have consented to it being published on the MBIE website unless you clearly state otherwise. If your submission contains any information that is confidential or that you do not want published, you can say this in your submission.

We will not publish any survey responses we receive.

Submissions and survey responses we receive may be requested under the Official Information Act 1982. MBIE will consult with submitters when responding to any such requests. If you object to the release of information in your submission, MBIE will take that into account.

The Privacy Act 1993 applies to submissions and survey responses. Any personal information you supply to MBIE in the course of making a submission will only be known by the project team and used for developing policy advice relating to this project. Please clearly indicate if you do not wish your name, or any other personal information, to be included in any summary of submissions that MBIE may publish.

Other ways to get involved

Making a written submission is one way you can suggest improvements to the rights and protections for contractors. You can also join the conversation with us on the MBIE Facebook page and complete a short survey at www.mbie.govt.nz/contractorsconsultation.

If you have any questions about the consultation process or the options for change, please email us at ContractorsConsultation@mbie.govt.nz.

KEY TERMS

Parties to working relationships

Worker: a person who does work. This includes employees and contractors, but in the context of this document the term 'worker' excludes volunteers.

Employee: a person who does work (part-time or full-time) according to an employment agreement (which is not always a written agreement) in return for salary or wages. All employees have minimum employment rights under New Zealand law (eg to be paid at least the minimum wage, rest and meal breaks, various types of leave) and are protected against unfair treatment. Employees have duties of good faith.

Contractor: contractor is used throughout this document to mean those engaged by firms to perform services under a contract for services. This may include 'independent contractors' and 'dependent contractors'.

Independent contractor: a self-employed person who is engaged by a firm (the other party) to perform services under a contract. Independent contractors pay their own tax and ACC levies and are not covered by most employment-related laws. Independent contractors generally have greater levels of flexibility and control than employees – they can operate their own businesses, work for multiple organisations, and decide how their work is done.

Dependent contractor: a worker in the 'grey zone' between employee and contractor status; they operate their own businesses and may use their own equipment, but depend on one firm for most of their income and have little control over their daily work. Like independent contractors, these workers pay their own tax and ACC levies and are not covered by most employment-related laws. However, some may not enjoy the choice and flexibility commonly associated with self-employment.

Firm: used in this document to mean an individual, business, or organisation that engages workers (including employees and contractors).

Employer: a person or firm that controls and directs an employee according to an employment agreement (which is not always a written agreement), and pays salary or wages in compensation.

Labour market

Labour market: the supply and demand for workers, ie how many jobs are available, and how many people want to work. The labour market is a major part of the economy.

Gig economy: in a gig economy, large numbers of people work in temporary, flexible and/or part-time jobs, with many people working multiple 'gigs' or jobs.

Platform work: when organisations or individuals use an online platform (eg an app) to access workers who can provide specific services in exchange for payment.

Triangular employment: when a worker is employed by one employer, but works under the control and direction of another business or organisation.

Government bodies

Ministry of Business, Innovation and Employment (MBIE): a public service department in New Zealand, which advises the government on policies relating to New Zealand's economic productivity and business growth.

Inland Revenue (IR): a public service department in New Zealand, which advises the government on tax policy, collects tax, and collects and disburses payments for some social support programmes.

Labour Inspectorate: the government body responsible for enforcing employment standards.

Labour Inspectors: people working as part of the Labour Inspectorate, who enforce and monitor compliance with employment standards.

Employment Relations Authority: helps to resolve employment relationship problems, if the employer and employee cannot resolve the problem together, or through mediation. A determination by the Authority is legally binding.

Employment Court: hears and determines cases relating to employment disputes. This includes challenges to Authority determinations, questions around interpretation of employment law, and disputes over strikes or lockouts.

Commerce Commission: a New Zealand government agency, which enforces legislation that promotes competition in New Zealand's economy, and prohibits misleading conduct by traders. The Commerce Commission was established under the Commerce Act.

Legislation and regulations

Employment Relations Act: the Employment Relations Act 2000 is a New Zealand statute that sets out the duties and obligations of employers and employees. The Employment Relations Act does not cover independent contractors.

Commerce Act: the Commerce Act 1986 is a New Zealand statute prohibiting conduct that restricts competition, and gives the Commerce Commission powers of enforcement.

Legislation: laws which have been made by the government, commonly in the form of Acts of Parliament.

Statutory rights: legal rights, set out in Acts or other legislation, which are designed to protect people.

Common law: unwritten law that has developed from legal precedents established by courts. This is distinct from statutory law/legislation. Common law clarifies the meaning of legislation, and sometimes creates law where there is no legislation.

Non-legislative: does not relate to making or changing laws.

Operational changes: changes to government structures, processes, procedures or guidelines. These may change how a law is implemented or enforced, but do not change the law itself.

INTRODUCTION

Why are we consulting the public?

In New Zealand, there are broadly two types of workers: employees and contractors.

The employment relationship comes with a range of rights and responsibilities that have developed over centuries. Employees have some responsibilities to their employer and in exchange receive a number of rights and protections. These include requiring employers and employees to deal with each other in 'good faith', protections against unfair treatment and a range of minimum employment standards (such as minimum wages and various types of leave).

Independent contractors have fewer rights and protections than employees, and as a result can experience poor outcomes. There are growing concerns about workers in the following situations:

- **Workers who are, in substance, employees, but are misclassified as 'independent contractors' by firms to reduce their entitlements.** These workers are often subject to a high degree of control (eg perform tasks under close supervision and cannot send someone else to do the job on their behalf), but lack basic employment rights. They are often paid less than the minimum wage, have no paid holidays and can be dismissed without notice.
- **Workers who are in the 'grey zone' between employee and contractor status.** They operate their own businesses and may use their own equipment, but depend on one firm for most of their income and have little control over their daily work. These workers do not enjoy the choice and flexibility commonly associated with self-employment and they do not have the same legal protections as employees.

Workers in both of the situations above are in a vulnerable position, lacking both the protections offered to employees by law, as well as the power to negotiate a better deal. The changing nature of work, including the expansion of the 'gig' economy, means that these issues may impact a growing number of workers in New Zealand.

The Government wants to ensure all workers in New Zealand have access to decent work with minimum standards and conditions. We have identified some options for change, which can be grouped into four main approaches:

- **Deter misclassification of employees as contractors** (options 1 – 3),
- **Make it easier for workers to access a determination of their employment status** (options 4 – 7),
- **Change who is an employee under New Zealand law** (options 8 – 9), and
- **Enhance protections for contractors without making them employees** (options 10 – 11).

We encourage you to share your views on the benefits, costs and risks of different options. We want to hear about the potential impacts for workers, businesses, firms and the public. We also want to know how different options might work in practice and how they could be improved to deliver better outcomes for people in New Zealand. Where possible, we would also appreciate any evidence you are able to share to support your views such as case studies or facts and figures.

Your feedback will help us develop a comprehensive response to the issues faced by contractors with low bargaining power and poor outcomes in New Zealand.

THE STATUS QUO

Employees have certain legal entitlements

Where there is an employment relationship (eg between an employee and their employer), there is a duty on parties to act in good faith. This is broader than mutual obligations of trust and confidence. The duty of good faith requires parties to an employment relationship to be active and constructive in establishing and maintaining a productive relationship. It also means parties must not, directly or indirectly, do anything to mislead or deceive each other.

Employees also have minimum employment rights under New Zealand law. These include the right to:

- A written employment agreement,
- Superannuation contributions,
- Be paid at least the minimum wage,
- Get rest and meal breaks,
- Various types of leave, including annual and public holidays, sick and bereavement leave,
- Get parental leave for up to 12 months and parental leave payments (applies to contractors too),
- Bargain collectively for wages and other terms and conditions of work through a union,
- Be treated fairly,
- A fair and reasonable process if they are treated unfairly, or lose their job through being fired or made redundant, and
- Work in a safe workplace with proper training, supervision and equipment (this applies to contractors too).

An employer who does not meet these minimum standards can be investigated by the Labour Inspectorate and face significant penalties. For more information see Employment New Zealand's guide to minimum employment rights.

What is the value of minimum employment entitlements?

13% – 20% of an employee's cost to a firm through payroll will be for minimum employment entitlements (leave, holidays, ACC, KiwiSaver contributions).

There is a percentage range because levies vary depending on the type of work performed, and employees may take 0 to 5 of their minimum paid sick days, and may be paid for 0 to 11 public holidays depending on their work pattern.

The figure above does not include family violence leave (up to 10 paid days) and bereavement leave (no yearly maximum) and only accounts for minimum employment entitlements, which many employers exceed.

The difference between hiring a contractor and an employee

Contractors, on the other hand, work under contract, commercial and competition laws. These include the Fair Trading Act and the Commerce Act, which prohibit unfair practices in business-to-business transactions. The Contract and Commercial Law Act also provides some protection to parties to a contractual arrangement, such as when there may be a mistake in a contract, or when one party has been induced to enter into a contract by another party's misrepresentation.

Firms might hire a contractor instead of an employee if:

- Their business is short of a specialist skill,
- They only need help for a specific period, eg peak seasons or one-off projects,
- They need a worker at short notice, or
- They need to fill a gap while an employee is on leave.

Although many firms pay contractors a higher rate than employees, hiring contractors may still be cheaper. This is because:

- Contractors are not entitled to paid leave or paid holidays.
- Firms do not have to pay contractors' ACC or KiwiSaver payments.
- Contractors come with specialist skills, so firms do not need to train them.
- Contractors buy and use their own equipment.
- Any depreciating assets (eg trucks, computers) are risks for the contractor, not the firm.
- For fluctuating workloads, firms only need to pay contractors while work is being done.
- The firm's exposure to potential lawsuits is lower, as contractors have fewer minimum rights they can bring a claim for.

However, there are risks associated with hiring contractors:

- Firms have less control over workers who are contractors than those who are employees.
- Contractors will come and go, which can be disruptive to the workplace.
- A changing workforce can lead to uneven quality of work.
- Institutional knowledge isn't built up.

Determining whether a worker is an employee or a contractor

Whether a worker is an employee or a contractor depends on the real nature of the relationship they have with the firm that hires them. Over time, the courts have developed a series of tests to make decisions about employment status:

- **The intention test:** the type of relationship that the parties intended is relevant, but does not determine the true nature of the relationship on its own. Intention can normally be worked out from the wording in parties' written agreement (if there is one).
- **The control vs independence test:** the greater the control exercised over the worker's work content, hours and methods, the more likely it is that a person is an employee. A worker with greater freedom to choose who to work for, where to work, when to work, the tools used and so on, is more likely to be a contractor.
- **The integration test:** this looks at whether the work performed by a person is fundamental to the employer's business. The work performed by a contractor is normally only a supplementary part of the business.
- **The fundamental/economic reality test:** this looks at the total situation of the work relationship to determine its economic reality. A contractor is a person in business on their own account.

Scope of this discussion document

This document focuses on how we can improve protections for people working as contractors. This includes self-employed people with employees of their own. It can sometimes be hard to distinguish between self-employed contractors with employees from 'traditional businesses'. We therefore seek your feedback on how to distinguish between contractors in need of additional protections, and other types of businesses/companies.

Changes to the following are outside the scope of this work:

- Fixed-term employment (eg for seasonal work),
- Part-time employment,
- Casual employment (where there are no guaranteed hours of work, no regular pattern of work, and no ongoing expectation of employment), and
- Volunteering.

WHAT THE GOVERNMENT WANTS TO ACHIEVE

According to the Survey of Working Life 2018, there are over 140,000 self-employed contractors in New Zealand, which is more than 5% of the total employed population.

Contracting arrangements can be beneficial to both firms and workers. Firms with uncertain or fluctuating demand for their products or services can benefit from offering flexible, short-term contracts. There are many services that are legitimately best performed under a contract, and workers may choose to accept work as a contractor to suit their individual lifestyle and preferences. It is important that workers and firms can participate in the labour market in a way that works for them.

But these arrangements may not work for everyone. Some workers are misclassified as 'independent contractors' so miss out on basic employment rights and protections. Others have their own businesses, but rely on one firm for most of their income and have little choice around where, when and how they work. Both types of contractors are vulnerable to poor outcomes as they do not always have the power to negotiate better pay and conditions.

The Government wants to ensure a fair balance of rights and responsibilities between firms and workers which encourages productive and mutually beneficial working relationships. Striking this balance will be better for firms and workers, and for society more generally.

Objectives of this work

- All employees receive their statutory minimum rights and entitlements.
- The imbalance of bargaining power between firms and vulnerable contractors is reduced.
- System settings encourage inclusive economic growth and competition.

Risks we need to manage

- Impacting the benefits and freedoms of genuine self-employment.
- Significantly increasing costs for firms and restricting their ability to innovate and adapt.
- Introducing changes that do not work for particular types of work (eg platform work, triangular employment).

Related work underway across government

This work is part of the Government's wider agenda to build a productive, sustainable and inclusive economy that supports the wellbeing of everyone in New Zealand.

We are currently consulting on proposals to reduce **temporary migrant worker exploitation** (submissions close on 27 November 2019). These proposals aim to:

- Prevent the occurrence of workplace (and other) conditions that might enable temporary migrant worker exploitation.
- Protect temporary migrant workers in New Zealand and enable them to leave exploitative employment.
- Enforce immigration and employment law to deter employer non-compliance through a fit-for-purpose offence and penalty regime.

Legislation is being drafted to introduce a bespoke collective bargaining system for **contractors in the screen industry**. You can read more about this, including the Workplace Relations and Safety Minister's Cabinet paper on the proposals, on the MBIE website.

We are also currently consulting on the design features of a model of **Fair Pay Agreements** (FPAs), a new system of collective bargaining that would allow workers and employers across an occupation or sector to negotiate minimum terms of employment (submissions close on 27 November 2019). The FPA Working Group highlighted that excluding contractors could create perverse incentives for employers to define work outside employment (ie engaging workers as contractors rather than as employees). The Workplace Relations and Safety Minister agrees that, in principle, any FPA system introduced for employees should be extended to contractors. Option 10 in this document (see page 48) seeks your feedback on whether, and how, the FPA model should be extended to contractors. We are also interested in whether you think some other process/framework to support collective bargaining by contractors could be created either in addition to the FPA system, or as an alternative.

Legislation is being drafted to introduce protections for businesses against **unfair commercial practices,** which could enhance some contractors' ability to challenge one-sided contracts. You can read more about this work on the MBIE website.

This document sets out options for strengthening rights and protections for vulnerable contractors, and highlights links to these other initiatives where relevant.

Your views

1. Do you agree with the objectives and risks outlined in this section? Please provide a reason for your answer.
2. Do you have any other ideas for defining what we should aim to achieve through this work? If yes, please provide details.

POTENTIAL ISSUES AND CHALLENGES

Concerns about contractors' working conditions have been raised by civil society for many years. We have reviewed the evidence and believe that there are two main issues in the labour market.

- **Issue 1: Employees are misclassified as independent contractors and miss out on minimum rights and entitlements.**
- **Issue 2: Workers in the 'grey zone' between employee and contractor status can be vulnerable to poor working conditions.**

These two types of worker are likely to sit on a spectrum with different views on where the line should be drawn, if at all. For example, some people see platform workers (eg rideshare drivers) as employees who have been misclassified, while others see them as an example of workers in the 'grey zone'. The lack of consensus complicates any attempt to neatly divide the contractors into separate groups.

While acknowledging this overlap, we think there is value in thinking about them separately. They highlight different problems, which may require different policy approaches.

This section sets out our understanding of the issues. We want your views on whether we have captured these accurately, or if there are other ways of describing the challenges contractors can face.

How big is the problem of misclassifying employees as contractors?

Misclassifying employees as contractors is by its nature a 'hidden' problem. This makes it difficult to understand the scale of the issue from official data. However, we know that there are pockets of bad practice.

From March 2017 to April 2019, the Labour Inspectorate conducted three planned investigations in the takeaway food services and telecommunications sectors and investigated five complaints relating to workers who believed they were employees.

During the same period, there were 40 Employment Relations Authority determinations and one Employment Court decision regarding employment status. In 17 of these cases, workers were found to be employees, not contractors. These cases occurred in many sectors including the education, automotive, health, construction, retail, printing, transport, real estate, telemarketing and insurance industries.

Between 1 July 2018 and 30 June 2019, the MBIE contact centre received 133 calls from self-employed contractors relating to employment status, 234 calls relating to wages and pay and 89 calls relating to ending employment, including unjustified dismissal. Not all of these cases would have progressed to investigation or legal proceedings.

The data is only likely to capture a small proportion of misclassification cases in New Zealand given it is difficult to detect non-compliance in the first place and many cases are not reported.

Issue 1: Employees who are misclassified as independent contractors miss out on minimum rights and entitlements

Some employees are labelled as 'independent contractors' even though the real nature of their relationship is one of employment. They are expected to turn up to work at certain times, perform tasks under close supervision and use the firm's equipment and tools. Some workers may even work for the same 'employer' for a number of years without realising that they are engaged as an independent contractor, not an employee.

For example, Sue was employed as a hotel cleaner for two years. She was then dismissed and re-engaged as a contractor by the same company. She still works exclusively for the company, wearing their uniform every day. The cleaning company tells her how much she will be paid and what hours she has to work.

Workers such as Sue miss out on basic employment rights (see page 12 about employees' rights). They are not entitled to receive the minimum wage or paid holidays and can be dismissed at short notice without pay. Some may not understand the obligations that come with being an independent contractor, including paying their own tax and ACC levies.

Almost a year after she was engaged as a contractor, Sue's workmate explained to her that she should have been paying her own tax, KiwiSaver contributions, and ACC levies. Sue thought the money coming into her account had already had all of the necessary deductions made. Sue was confused by the process of working out how to pay her own taxes and didn't know who to go to for advice.

Firms misclassify employees as contractors for a number of reasons including:

- Misunderstanding the difference between employment and contracting.
- Reducing labour costs and avoiding employment responsibilities (eg payroll requirements) so they can grow their business more quickly.
- Hiding exploitation that would breach employment law if workers had been correctly classified (eg making deductions from their pay without agreement).
- To gain a competitive advantage over firms which comply with employment and tax obligations.

This can lead to a 'race to the bottom' in some industries with firms cutting labour costs and shifting risk onto workers to compete with one another.

A case like Sue's

In 2015, the Employment Court decided that a cleaner had been misclassified as a contractor, and was actually an employee.

The cleaner was required to wear a company uniform and drive a company-owned branded vehicle. Her hours were regular and largely determined by the cleaning company. The cleaner wanted to be an employee and didn't have a clear understanding of what it meant to be a contractor.

See *Atkinson v Phoenix Commercial Cleaners* [2015] NZEmpC 19 for the Employment Court's full decision.

. . .but non-compliance is not easily detected or penalised

When a firm misclassifies an employee as a contractor and this is later detected, the firm may be liable for unpaid PAYE tax, unpaid minimum wages, and holidays and leave entitlements. They may also receive penalties from Inland Revenue or the Employment Relations Authority.

However, it may be difficult to detect non-compliance in the first place. This relies on workers or others applying for a determination of their employment status, which doesn't always happen. Some of the reasons for this are listed below.

Many workers fear losing their job and may feel that raising an issue will lead to dismissal. In cases like Sue's, the balance of power is generally in the firm's favour, especially if workers have limited options for work elsewhere.

For example, Sue wants to go back to being an employee, but she's scared to talk to the cleaning company in case she loses her job. Sue doesn't think she could get other work in her town, because she has limited skills and there are no other companies nearby offering similar work.

Workers like Sue may not understand the implications of what they have signed up to, and may not even realise that they have been engaged as a contractor rather than an employee. Contractors often don't receive any documentation about the nature of their working relationship, which makes it difficult for them to know what their rights and obligations are. We have heard of examples where people only realise the consequences of what they have agreed to after the agreement is terminated.

Alternatively, workers may actively choose these arrangements and accept work as an independent contractor because of the belief that they will have more control over their work and could benefit from a more favourable tax regime (eg the ability to claim back tax on work-related expenses). Workers may underestimate the value of employee benefits such as paid leave and KiwiSaver contributions. In these cases, workers have an incentive to stay under the radar and not report their working arrangement.

. . .and workers may find it difficult to access the rights that they are entitled to

Some workers may want to come forward, but find it difficult to do so. Workers who believe they are employees and should have the same legal protections can file an application with the Employment Relations Authority or the Employment Court to determine the 'real nature of the relationship'. The courts have developed tests to help determine whether someone is an employee or a contractor. However, this can result in an expensive and lengthy legal battle that many workers cannot afford.

At the same time, the Labour Inspectorate has limited powers to take action against non-compliant firms. For example:

- Non-compliant firms can claim that Labour Inspectors do not have the authority to investigate matters in their workplaces as their workers are contractors, not employees.
- Labour Inspectors cannot determine whether someone is an employee or not.

Decisions made by the Employment Relations Authority and Employment Court only cover workers who make applications to them. This means every worker wanting to challenge their employment status has to be party to an application. The uncertainty, costs and time involved in taking legal action are seen as a high barrier for many workers.

Issue 2: Workers in the 'grey zone' between employee and contractor status can be vulnerable to poor working conditions

Unlike employees, contractors have limited statutory rights and protections. They are covered by the paid parental leave scheme, health and safety protections and a range of commercial legislation. However, they are not entitled to annual leave or sick leave, they can't bring personal grievances and they have to pay their own tax, ACC levies and KiwiSaver contributions (with no top-ups from the firm they contract with). Businesses also don't have to hold contractor records.

This is because contractors run their own business, and choose to accept the risks and benefits of doing so. They can contract with whoever they like and decide the terms of the arrangements between themselves. There are some general rules of contract law, but these are reasonably permissive. Many contractors generally enjoy high levels of autonomy, choice and flexibility.

However, some contractors fall in the 'grey zone' between employee and contractor status. They may run their own business and use their own equipment, but depend on one firm for most of their income and have limited control over their day-to-day work. These contractors are sometimes referred to as **dependent contractors.** Whether these workers should be classified as contractors or employees under the current law is unclear.

How many dependent contractors are there in New Zealand?

There are over 140,000 self-employed contractors in New Zealand, which is more than 5 per cent of the total employed population.

In the Survey of Working Life 2018, half of all contractors (71,200 contractors) said they relied on one client or business for most of their work. However, most (103,000 contractors) said they were usually able to work on contracts with more than one client or business at a time.

A small number of contractors said they had little or no control over how their daily work was organised (8,900 contractors), how their tasks were done (6,200 contractors) and/or decisions that affected their tasks (12,000 contractors).

This means that the number of contractors in the 'grey zone' who are both reliant and exercise limited control over their working arrangements in New Zealand is confined to a relatively small proportion of the contractor population.

However, this data may not tell the full story. It is based on people's own view of their employment status in their main job, rather than the application of any legal criteria. This means it may not capture every worker who is legally a contractor in New Zealand. The data also does not include self-employed contractors who employ people themselves.

Some dependent contractors are satisfied with their working arrangements.

For example, Anya is a specialist IT contractor. For three years, she has been working exclusively for one insurance company that has ongoing, consistent work for her. She usually spends three days a week in their offices. The insurance company asked Anya if she would like to become a part-time employee and continue with the same work and hours, but with employee benefits and protections.

Anya turned down this offer. She likes being a contractor as she has greater flexibility around when to come to work, she gets paid more, and there are favourable tax conditions. She can take on extra work when she wants more money, and take a break between contracts when she wants a holiday. Anya isn't concerned about the insurance company discontinuing her work, because her skills are in high demand and she knows she can easily find other work.

However, dependent contractors who have less information and bargaining power than the firms they contract with may not enjoy the same working conditions as Anya. Firms may take advantage of the ambiguity created by the 'grey zone' to pass more risk on to dependent contractors than they would be able to if hiring employees to do the same work.

For example, Matiu is a courier driver, contracted to a courier company. He took this job because he liked the idea of being his own boss. He had to buy a van when he started this work, and also had to pay for the courier company's branded decals to put on the vehicle, multiple sets of the company uniform, and a scanner to use in his daily work. He has ongoing costs for petrol and vehicle maintenance.

Matiu's contract is to deliver a certain number of parcels per day. He has to rush through his work and cannot take any breaks if he wants to make it home in time to have dinner with his children, which is making him stressed and tired. This leads him to drive unsafely at times.

The courier company recently changed pay rates and Matiu's delivery route without consulting him. He now has to deliver over a larger area than usual for the same amount of money as before – this often leads to him working so many extra hours that he earns less per hour than the minimum wage.

A case like Matiu's

In 2012, the High Court said in Ike v New Zealand Couriers Ltd that "an obligation of fair and reasonable treatment, which is implied as a necessary incident of an employment relationship, is not to be implied into a contract for services unless the express terms of the contract provide for it."

In this case, the applicant (Mr Ike) was a courier driver. He was required to buy and wear the company's uniform and keep it in clean, tidy condition; to drive his own van, with company branded decals; and to meet the company's behavioural standards while working.

Mr Ike's contract was terminated without notice, as New Zealand Couriers claimed he had breached his obligations regarding diligence, dress and courtesy. The High Court said his dismissal, if he had been an employee, would have been procedurally unfair, but a similar obligation to be treated fairly could not be read into a contract for services.

See *Ike v New Zealand Couriers Ltd* [2012] NZHC 558 for the High Court's full decision.

He was promised autonomy, but feels he has limited control over when and how he works. If he needs to have a day off, he has to find someone to relieve for him and he has to pay them. Matiu sometimes has to pay the relief driver more than he would have been paid for the day's work, in order to convince them to take the job. However, the courier company still requires him to "request" this day off and explain his reason for being away from work.

Contractors such as Matiu are sometimes referred to as vulnerable contractors, who are a subset of dependent contractors. Vulnerable contractors such as Matiu may face substantial challenges in securing decent work that provides adequate pay. In these cases, they may not have the benefits of employment protections nor the choice and freedom associated with self-employment. There have been reports of these kinds of situations in the trucking, telecommunications and courier industries.

...but they have limited power to resist

Vulnerable contractors could decline the contract, seek legal advice, or renegotiate the terms of the contract if they are unsatisfied with the terms. However, this may not be possible for those who lack options for work elsewhere and have limited resources to engage in a potentially expensive and lengthy dispute resolution process.

This is particularly true for contractors who are offered standard-form contracts on a 'take it or leave it' basis. In these situations, contractors may have minimal power to resist because they have no other options and need the job to survive financially.

Do contractors earn less than employees?

In 2017, Dr Bill Rosenberg from the NZ Council of Trade Unions analysed income information for employees and self-employed people in New Zealand over the 1998 – 2015 period. He concluded:

"Self-employed people earned less than wage and salary earners per hour comparing both average and median hourly incomes for each group. Their incomes also increased more slowly. However their ability to spread their incomes among family members and to take income as capital gain . . . are also important factors.

"The spread and inequality of earning rates is far greater for self-employed people than employees: the lowest income 10% had negative incomes while the highest 10% had average hourly earning rates double those of the highest 10% of employees on average over the 1998 – 2015 period.

"In 2015, an estimated 41% of self-employed were earning less than the minimum wage and 51% were earning under the Living Wage. "

Note that the term 'self-employed' includes but is not limited to contractors. These findings may also partly be attributed to the ability of self-employed people to under-report their income. Survey respondents were also separately asked about earnings and hours worked.

For example, many of Matiu's workmates have told him they are frustrated with their working conditions, but can't speak up, as they think their contracts will be terminated. Matiu is still paying off the van he bought for this job, so doesn't want to change jobs or the investment will be lost. Matiu has considered working for another courier company, but he has heard that other companies are using the same contracts to cut costs and remain competitive.

Your views

3. Do you agree with this characterisation of the key issues? If yes, do you think both of the issues identified are of equal importance? If no, what other issues and challenges should be considered?
4. From your perspective, what makes dependent contractors vulnerable to exploitation? What situations should we be most concerned about?
5. How could these problems (either as outlined in this document or in your answer to questions 3 and 4) affect different groups of people in New Zealand?
6. In your view, which sectors or occupations are most affected? Where possible, please provide evidence or information to support your view.
7. How urgent is the need for change?

OPTIONS FOR CHANGE

The proposed changes set out in this section aim to support employees who have been misclassified as contractors (such as Sue) and those whose employment status is genuinely ambiguous (such as Matiu).

In developing the options, we have been guided by three outcomes:

- **We want to ensure that employees receive their statutory minimum rights and entitlements** (helping workers like Sue).
- **We want to better balance bargaining power between firms and contractors who are vulnerable to poor outcomes** (helping workers like Matiu).
- **We want to ensure that system settings encourage inclusive economic growth and competition** (helping workers like Sue and Matiu).

As highlighted in the previous section, we think there could be significant overlap between the working arrangements of workers like Sue and Matiu. While acknowledging this overlap, this section sets out a range of possible options for addressing the different types of challenges workers like Sue and Matiu might experience.

We are interested in your feedback on the benefits and risks of different options and how they could work together to improve outcomes for all contractors who are vulnerable to poor outcomes.

What can we achieve through information and guidance?

MBIE and Inland Revenue have published a range of guidance and tools on their websites to help businesses and workers navigate the employee-contractor boundary. These are available online:

- Contractor versus employee
- Hiring: Contractors vs employees
- Self-employed or employee

Employment New Zealand also provides detailed guides for employers on their rights and responsibilities (available here) and sets out some practical steps to identify and mitigate labour rights issues in supply chains (available here).

We could build on this by providing more information and guidance for businesses and workers. For example:

- Developing an online tool that helps both firms and workers identify what the appropriate employment arrangements are for their particular circumstances.
- Publishing guidelines on the appropriate amount of risk for workers to take on so that they can make informed decisions before entering a contracting arrangement.
- Targeting educational outreach towards vulnerable workers to make them aware of their employment rights.

However, an approach that relies solely on better guidance may not address the biggest problems here. Better guidance will not help in situations like Matiu's where there is genuine confusion about whether he is an employee or a contractor. Employment status is determined on a case-by-case basis, depending on the circumstances of each individual relationship. Guidance will never be able to address every possible work arrangement in the 'grey zone' and therefore cannot eliminate this ambiguity.

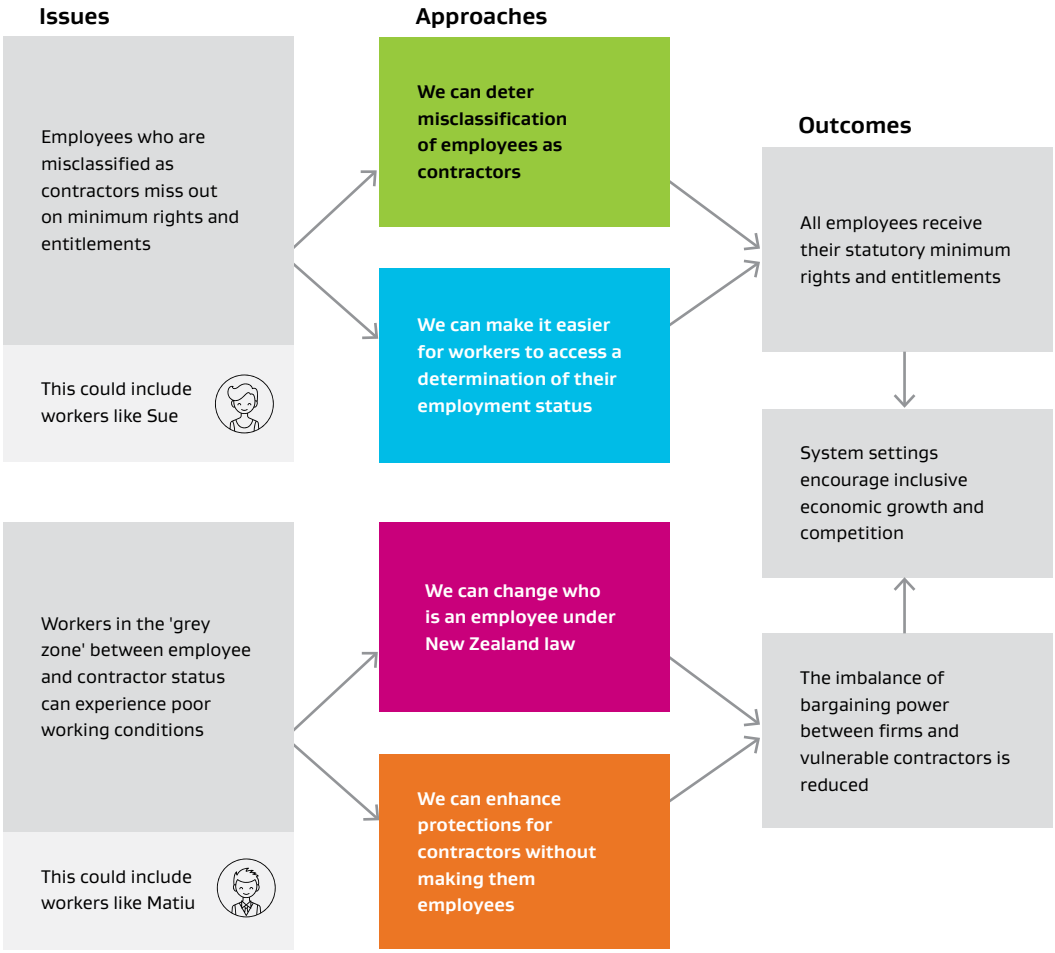
Guidance is also of limited use in situations where workers like Sue are intentionally misclassified to avoid certain costs and obligations. We know that deliberate misclassification persists because it is hard to spot non-compliance and workers may face barriers to reporting (eg in terms of time, cost and having viable alternative employment). More information or guidance will not address these barriers.

Your views

8. Is there enough information available about the difference between employment and contracting arrangements, and how to hire workers using the appropriate relationship? If yes, how helpful is it? If no, what other information or guidance would be helpful?
9. Other than guidance, what other non-legislative tools could we use to prevent misclassification and improve protections for vulnerable contractors?
10. How effective do you think non-legislative tools could be (either guidance as outlined above, or other things in your answer to the previous question)?
11. Do you think we need to change the law? Why, or why not?

Operational and legislative reform: eleven options for change

As shown in the diagram below, we propose taking different approaches to addressing the issues faced by workers like Sue and Matiu.



In total, we have identified eleven options across these different approaches. These range from targeted operational improvements through to more significant changes to the employment relations and employment standards (ERES) system. The options are not mutually exclusive. We can pursue a combination of options and want your views on the changes that are likely to make the biggest difference for workers, while managing any risks or unintended consequences (see page 15).

The eleven options are listed below, and described in more detail in the next few sections of this document:

Options to deter misclassification of employees as contractors	1. Increase proactive targeting by Labour Inspectors to detect non-compliance 2. Give Labour Inspectors the ability to decide workers' employment status 3. Introduce penalties for misrepresenting an employment relationship as a contracting arrangement
Options to make it easier for workers to access a determination of their employment status	4. Introduce disclosure requirements for firms when hiring contractors 5. Reduce costs for workers seeking employment status determinations 6. Put the burden of proving a worker is a contractor on firms 7. Extend the application of employment status determinations to workers in fundamentally similar circumstances
Options to change who is an employee under New Zealand law	8. Define some occupations of workers as employees 9. Change the tests used by courts to determine employment status to include vulnerable contractors
Options to enhance protections for contractors without making them employees	10. Extend the right to bargain collectively to some contractors 11. Create a new category of workers with some employment rights and protections

Criteria for assessing options

When thinking about the options individually, and as a package, we want to:

- Strike a fair balance between protecting contractors' freedom of contract with suitable protection for workers who are vulnerable to exploitation.
- Ensure costs on firms are reasonable, and any restrictions on their ability to compete, adapt and innovate are minimal.
- Design systems which are clear, resilient and adaptable to the needs of a changing labour market, in order to support workers now, and in the future.
- Make changes that are cost-effective to implement.

In other words, we would like to identify solutions that will help people like Sue and Matiu, who are vulnerable to exploitation. At the same time, we do not want to prevent people like Anya from working in a way that suits them best. We know some workers like being contractors, and identify more as commercial entities operating in business environments. We therefore want to ensure that any changes we introduce do not constrain the freedoms of those who choose self-employment.

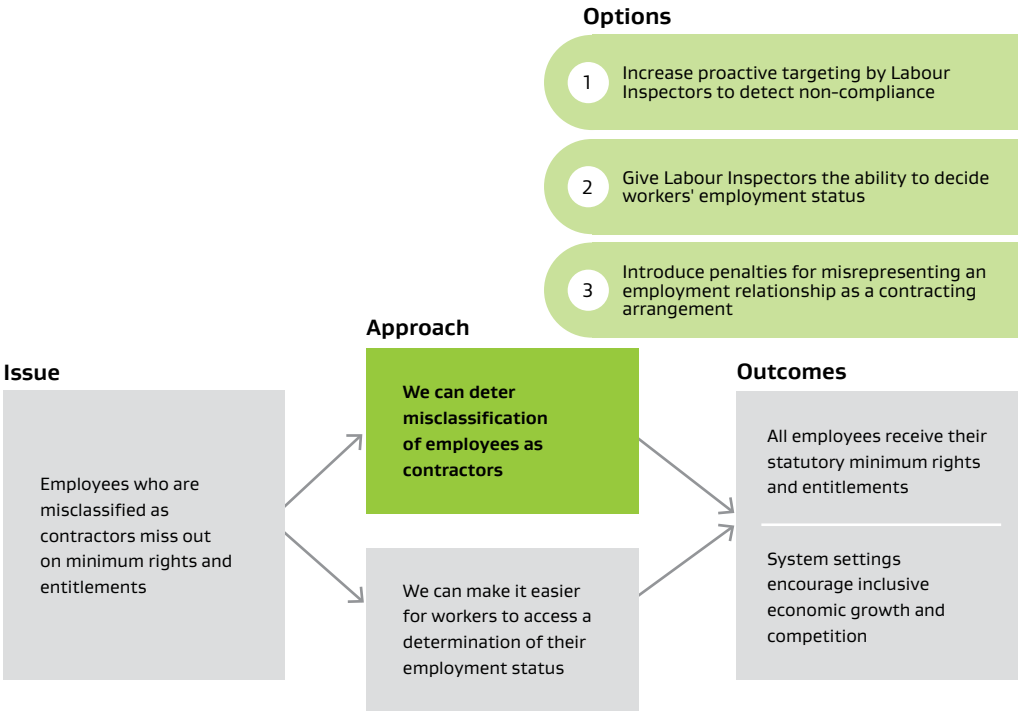
We invite your views on each option, as well as what combination of options we should pursue. Your feedback will inform further policy development, and shape any law changes.

OPTIONS TO DETER MISCLASSIFICATION OF EMPLOYEES AS CONTRACTORS

Misclassification of workers in New Zealand is not a specific breach under the Employment Relations Act. Instead, firms who are found to have misclassified employees as contractors are held liable for unpaid PAYE tax, unpaid minimum wages, and holidays and leave entitlements, as well as penalties for non-compliance with these minimum standards.

The Labour Inspectorate is the government body responsible for enforcing employment standards. In recent years, it has taken an increasingly proactive approach to enforcement in a number of sectors. However, misclassification can often be difficult to spot in the first place, which means there are few cases to demonstrate the consequences of non-compliance.

Options 1 to 3 are therefore about strengthening the Labour Inspectorate's ability to look for deliberate non-compliance by firms, and specifically target their enforcement action where they suspect there is misclassification of employees as contractors.



These three options are meant to help contractors like Sue (see page 18 – 19) who have been misclassified as contractors, without relying on them to challenge their employment status themselves.

Your views on deterring misclassification of employees as contractors

12. From your perspective, what do you think causes or contributes to the misclassification of employees as contractors?
13. Should we respond differently depending on whether misclassification is accidental or intentional? What if misclassification doesn't result in exploitation, and is knowingly accepted by all parties?
14. Are there any other options we should consider to prevent and resolve misclassification?

Option 1: Increase proactive targeting by Labour Inspectors to detect non-compliance

Labour Inspectors enforce and monitor compliance with employment standards. They use investigations and audits to find breaches of employment standards and put them right. This option would involve Labour Inspectors scaling up their efforts to proactively target investigations where they think misclassification is happening.

How this option would work

- Labour Inspectors would scale up their current inspection efforts and increase the priority attached to detecting misclassification of employees as contractors. This differs from the status quo, in which Labour Inspectors look for exploitation of workers (ie breaches of employment standards). While exploitation could happen where there is misclassification, there may also be cases of misclassification without exploitation.
- This option could involve better information-sharing between government agencies to help identify sectors and business models in which non-compliance with employment law is an issue.
- There may need to be some change to Labour Inspectors' existing powers to enable them to undertake investigations and challenge firms' behaviour where misclassification is alleged.

We think this option could have the following benefits

- It would target intervention with the aim of helping the workers who are most likely to be vulnerable.
- Workers would avoid repercussions associated with bringing a claim about their employment status themselves.
- It would level the playing field by removing the competitive advantage that non-compliant firms have over compliant firms.

We think this option could have the following costs and risks

- Labour Inspectors already have full workloads. Implementing this option would require additional resourcing and powers for Labour Inspectors.
- This option may also require individual investigations for every contracting arrangement, which would be time-consuming and costly (particularly as non-compliant firms are unlikely to keep records).
- There could be additional costs for businesses in terms of complying with investigations.

Your views on option 1

General questions

15. What do you see as the main benefits, costs and risks of this option?
16. What changes could be made to improve the effectiveness of this option?

Specific questions

17. Should misclassification be a priority for investigation by Labour Inspectors? Or should misclassification only be prioritised where there is an element of exploitation (eg employees being treated as contractors and being paid less than the minimum wage)?
18. Should Labour Inspectors be able to challenge how a firm has hired its workforce, even if individual workers do not want to make a complaint themselves?

Option 2: Give Labour Inspectors the ability to decide workers' employment status

At present, only the Employment Relations Authority and the Employment Court can decide whether a worker is an employee or a contractor. This option would give Labour Inspectors the ability to do so as well.

How this option would work

- Labour Inspectors would be given the ability to make decisions about workers' employment status. This would be supported by their investigative powers (eg they can access company records relating to all workers).
- Workers would be able to request a determination from Labour Inspectors rather than having to file a claim with the Employment Relations Authority or Employment Court.
- An extended version of this option could be to give Labour Inspectors the powers to initiate status determinations themselves. That is a Labour Inspector would not need consent from workers or firms before being able to make decisions about employment status.
- These decisions by Labour Inspectors could be non-binding or provisional (ie pending confirmation from a body such as the Employment Relations Authority). Alternatively, they could be final but still subject to challenge or appeal.

What Ontario (Canada) has done

If an employer misclassifies an employee, an employment standards officer can order the employer to comply with the Employment Standards Act, issue a notice of contravention, and/or prosecute the employer.

We think this option could have the following benefits

- This option would make it faster, cheaper and easier to get employment status decisions.

We think this option could have the following costs and risks

- There could be confusion and uncertainty, particularly if Labour Inspectors' decisions are not publicly available (like determinations of the Employment Relations Authority and decisions of the Employment Court are).
- If Labour Inspectors' decisions are non-binding/provisional, this could increase the likelihood of a drawn out appeals process, which may undermine the aim of making determinations more speedy and accessible.
- This option would require significantly more resources and capability for Labour Inspectors, because it changes the nature of their role and increases their volume of work.
- This option could increase compliance costs on firms, in terms of compiling evidence to prove their workers are not employees.

Your views on option 2

General questions

19. What do you see as the main benefits, costs and risks of this option?
20. What changes could be made to improve the effectiveness of this option?

Specific questions

21. Should Labour Inspectors be able to make decisions about workers' employment status?
22. Should Labour Inspectors need the consent of at least one of the parties to a working relationship (eg a worker or their firm) before making employment status decisions? Or is there sufficient public interest in the issue of misclassification that they should they be able to make employment status decisions without either party's consent?
23. If Labour Inspectors are given the power to make employment status determinations, what should the legal effect of these determinations be?

Option 3: Introduce penalties for misrepresenting an employment relationship as a contracting arrangement

At present, firms who have misclassified workers are held liable for unpaid employment entitlements (eg the minimum wage, holiday pay), but there is no separate penalty for the misclassification itself. This option would create a new penalty for firms who misclassify employees as contractors.

How this option would work

- The Employment Relations Act would be amended to make it a breach to misclassify an employee as a contractor. The breach would attract a penalty under the Act.
- As an extended version of this option, the penalty could also apply to firms who have significant control or influence over another employer in a supply chain, when that employer misclassifies a worker. This change would interact with a proposal that is part of consultation on temporary migrant worker exploitation, closing 27 November 2019. Proposal 1 in the temporary migrant worker exploitation consultation is to introduce liability for parties with significant control or influence over an employer that breaches employment standards. This could require those parties to take reasonable steps to ensure that employers they have significant control or influence over are not breaching employment standards, including by misclassifying their employees.

What Australia has done

In Australia, sham contracting is prohibited under the Fair Work Act 2009. This includes:

- Misrepresenting an employment relationship as an independent contracting arrangement,
- Dismissing, or threatening to dismiss, an employee for the purpose of engaging them as an independent contractor, and
- Making a knowingly false statement to persuade or influence an employee to become an independent contractor.

There are sanctions and financial penalties for breaches. These provisions do not apply if firms can prove ignorance or recklessness.

We think this option could have the following benefits

- It would send a clear message that misclassification of employees as contractors will not be tolerated.

We think this option could have the following costs and risks

- This option would still require action to be taken by someone where there is alleged misclassification (eg an application by a worker or a government body to the Employment Relations Authority).
- On its own, this would not increase the detection of misclassification. This option would therefore benefit from being combined with more investigation and enforcement activity (eg option 1).
- It may not be a strong enough deterrent for non-compliant firms, given there is already liability for unpaid minimum employment entitlements.
- It will require more resources for Labour Inspectors to undertake investigation, information and education campaigns, and capability development.
- If liability for misclassification is introduced for parties with significant control or influence over an employer, it could be difficult to enforce in large supply chains with multiple intermediaries where it is hard to tell who the primary firm is.

Your views on option 3

General questions

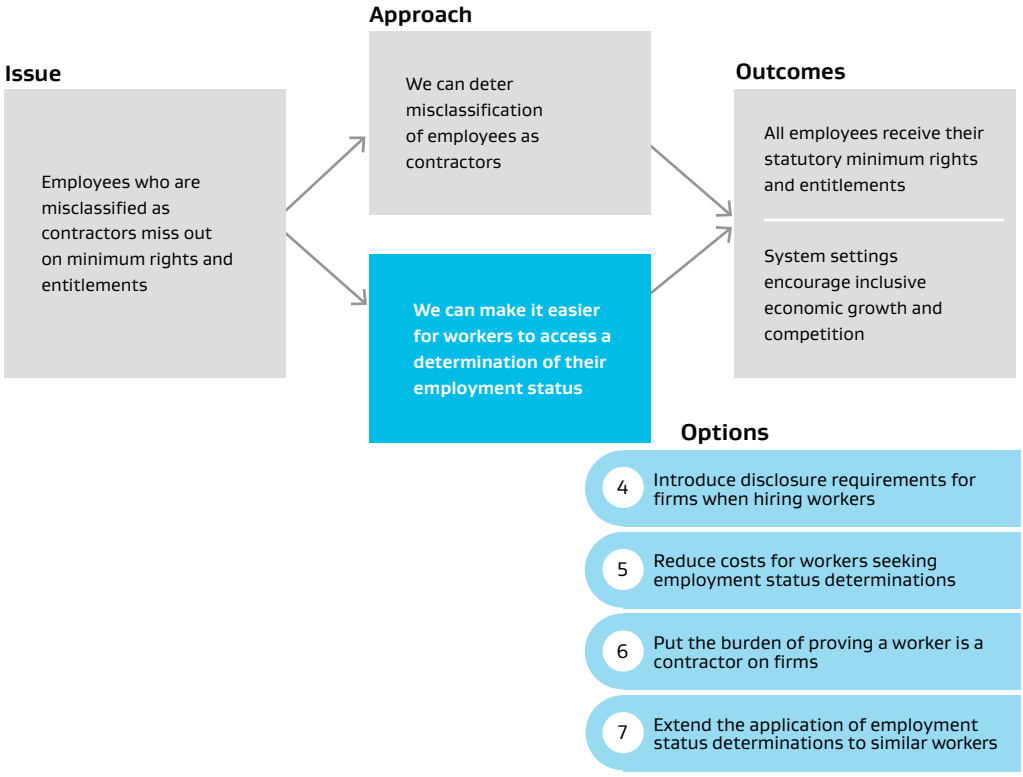
24. What do you see as the main benefits, costs and risks of this option?
25. What changes could be made to improve the effectiveness of this option?

Specific questions

26. Even if this option doesn't increase our ability to detect misclassification, is it worth pursuing? What other changes could this option be combined with?
27. In what circumstances should the penalty apply? For example:
    a. Should there be a penalty even if both parties genuinely wanted a contracting arrangement? If yes, should both firms and workers be liable for the penalty?
    b. Should there be a penalty if firms claim that the misclassification is a mistake, or a result of confusion on their part? If so, how could this be proven?
    c. Should there be a penalty for parties with significant control or influence over an employer that misclassifies an employee and breaches minimum employment standards?

OPTIONS TO MAKE IT EASIER FOR WORKERS TO ACCESS A DETERMINATION OF THEIR EMPLOYMENT STATUS

A cornerstone of our current system is that only workers can challenge their employment status. However, we know the process of filing an application with the Employment Relations Authority or Employment Court so that they can determine the 'real nature of the relationship' is time-consuming. It may also require expensive legal battles, and legal aid is not easily accessible. The uncertainty, costs and time involved could be high barriers for workers considering taking action about their employment status. Options 4 to 7 below aim to make employment status determinations more accessible to workers. These options are meant to make it easier for contractors like Sue (see page 18 – 19) to challenge their employment status.



Your views on making it easier for workers to access a determination of their employment status

28. From your perspective, what do you think hinders or stops workers from challenging their employment status?
29. Which options are likely to make the biggest difference for workers, in terms of encouraging them to come forward when they may have been misclassified as contractors?
30. Are there any other options we should consider to make it easier for workers to challenge their employment status?

Option 4: Introduce disclosure requirements for firms when hiring contractors

This option would require firms to tell workers when they have been hired as a contractor, what their legal obligations are (eg paying their own tax) and where they can seek advice before accepting the contractual arrangement.

Currently, the Employment Relations Act requires new employees (who are not party to a collective agreement) to be given sufficient information and an adequate opportunity to seek advice before entering into an individual employment agreement.

There is no similar obligation in relation to contractors. Workers are sometimes unaware that they have been engaged as a contractor in the first place.

How this option would work

- When firms hire contractors in circumstances that could lead to economic dependence, they will have to disclose certain information in writing. This information could include a statement about the worker being hired as a contractor, what obligations contractors have (eg those that would normally fall on an employer in an employment relationship) and how they can seek advice.
- A statement from the firm that a worker is hired as a contractor would not preclude that worker (or a third party such as a Labour Inspector) from later being able to assert that the real nature of the relationship is actually one of employment by applying to the Employment Relations Authority or Employment Court.
- The government could create a standard form or template to help businesses meet these disclosure requirements. For example, this could state the differences between being an employee and a contractor; the rights and obligations contractors have; and how contractors can challenge their employment status (sign-posting to relevant information where applicable). This information could be made available in multiple languages.
- This information would have to be disclosed before or at the time any contract is agreed between the parties.
- This disclosure requirement would not be extended to genuine business-to-business transactions.

We think this option could have the following benefits

- This option would address the problem of workers being unaware that they've been hired as a contractor, or not understanding what it means to be a contractor rather than an employee.

We think this option could have the following costs and risks

- This option would involve compliance costs for firms, but these could be partially mitigated by the government creating a standard form which could be given to contractors.

Your views on option 4

General questions

31. What do you see as the main benefits, costs and risks of this option?
32. What changes could be made to improve the effectiveness of this option?

Specific questions

33. In what sorts of contracting arrangements should firms have to disclose information about the arrangement to contractors?
34. What information should contractors receive before agreeing to a contract?
35. Should this requirement to disclose information also be extended to existing contractors?

Option 5: Reduce costs for workers seeking employment status determinations

We have heard that cost is a barrier to workers challenging their employment status. This option would make it less costly for workers to take legal action.

How this option would work

› The costs associated with getting an employment status determination (via the Employment Relations Authority or the Employment Court) could be reduced.

› This could include reducing or waiving application fees for the Employment Relations Authority.

We think this option could have the following benefits

› This would reduce cost barriers for contractors seeking redress.

› This could mean more contractors apply to the Employment Relations Authority or Employment Court for employment status determinations.

What the United Kingdom has done

The Taylor Review of Modern Working Practices recommended allowing workers to get a determination of their employment status without paying any fee. Following a UK Supreme Court ruling in July 2017, employment tribunal fees are currently not being charged.

In the UK government's response to the Taylor Review, it said if fees are reintroduced in the future, it will consider whether fees should be charged for proceedings about employment status.

We think this option could have the following costs and risks

› On one hand, the most vulnerable contractors may still not take legal action due to lack of knowledge about legal avenues and fear of repercussions.

› On the other, it could increase litigation, which would lead to additional costs for firms and government who would need to cover the additional costs that workers currently bear.

Your views on option 5

General questions

36. What do you see as the main benefits, costs and risks of this option?
37. What changes could be made to improve the effectiveness of this option?

Specific questions

38. What are the different types of costs involved in taking legal action?
39. Which costs present the biggest barriers, and how could these be reduced?

Option 6: Put the burden of proving a worker is a contractor on firms

Generally, any worker who takes legal action that involves determining their employment status needs to prove that they are an employee. This option would reverse that burden, and make the firm have to prove that the worker they have engaged is not an employee.

How this option would work

- If one of their workers alleged misclassification as a contractor, a firm would have to satisfy the Employment Relations Authority or the Employment Court that the worker was a contractor rather than an employee.
- If the firm could not do this, the relationship would be presumed to be one of employment.

We think this option could have the following benefits

- It would reduce the hurdles faced by workers in trying to establish that they are in an employment relationship.

We think this option could have the following costs and risks

- The most vulnerable contractors may still not take legal action due to lack of knowledge about legal avenues and fear of repercussions.
- It would require firms to keep documentation and records for contractors, which will increase compliance costs.
- It may be unreasonable to expect firms to provide information they cannot access (eg about a contractor's business, only part of which may involve engagement with that particular firm).

What Ontario (Canada) has done

In 2017, Ontario's Employment Standards Act 2000 was amended to put the onus of proving a worker to be a contractor on employers, in cases where a worker's employment status is in question.

These changes were recently reversed, as part of the Making Ontario Open for Business Act 2018 (Bill 47). The stated purpose of the legislation is to remove "the worst burdens that prevent Ontario businesses from creating jobs while expanding opportunities for workers."

The legislation repealed most of the updates to the Employment Standards Act and Labour Relations Act that were passed in 2017 through the Fair Workplaces, Better Jobs Act (Bill 148). This included maintaining the prohibition on misclassification but removing the requirement for the onus of proof to be on the employer.

Your views on option 6

General questions

40. What do you see as the main benefits, costs and risks of this option?
41. What changes could be made to improve the effectiveness of this option?

Specific questions

42. Is it fair to put the onus on firms to prove a relationship is one of contract rather than employment?
43. Is it realistic to expect firms to have the information needed to prove a relationship is a contracting arrangement rather than one of employment? If yes, what records should firms be required to keep in relation to contractors?

Option 7: Extend the application of employment status determinations to workers in fundamentally similar circumstances

Currently, when the Employment Relations Authority or Employment Court makes a decision about workers' employment status, that decision only applies to workers who are a party to that legal case. This option would broaden the applicability of these decisions to similar workers, even if they were not party to the legal action.

How this option would work

- This option would "extend" the application of Employment Relations Authority and Employment Court decisions about employment status when workers are found to have been misclassified.
- The "extension" would work by creating a presumption of employment for contractors who work for the same business and who are hired on fundamentally similar conditions to any workers who have been found to be misclassified.

We think this option could have the following benefits

- For workers, this would be a faster and more efficient way of getting certainty about their employment status, rather than having to bring cases individually. It could also be more affordable if costs (eg of legal representation) can be shared.
- Being part of a group is likely to address the imbalance of power between firms and workers, and reduce the chances of repercussion for workers involved in an employment case.
- The extension of employment status determinations may also encourage similar firms, for example those in the same industry, to correctly classify their workforces.

We think this option could have the following costs and risks

- This could increase uncertainty for firms, who may need to revisit arrangements for a number of their workers if one has been found to be misclassified.
- This option involves a significant change to the current model under the Employment Relations Act, which is based on assessing the facts of each individual case. A higher evidentiary burden may be required to extend judgements to a wider group of workers.
- Given the wider applicability of Authority or court decisions, this option could result in significant, complex and lengthy litigation, which will increase costs for firms, workers and government.

Your views on option 7

General questions

44. What do you see as the main benefits, costs and risks of this option?
45. What changes could be made to improve the effectiveness of this option?

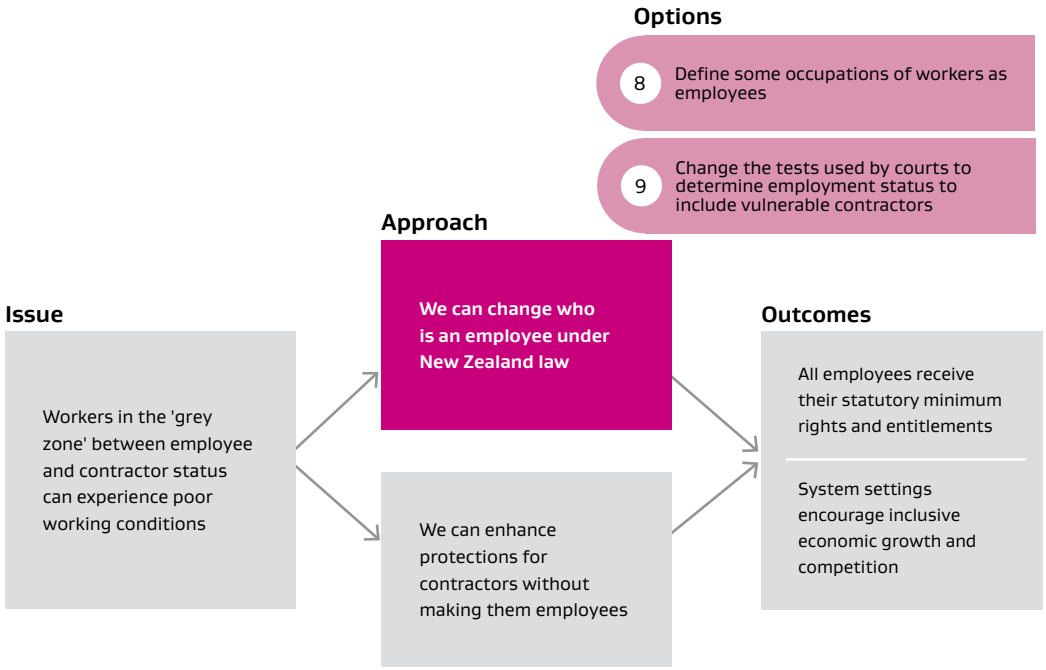
Specific questions

46. What degree of similarity should be needed between workers before a decision about employment status could be extended?
47. Should any limits be set on how far an Authority or court decision can be extended? If so, what should those limits be?

OPTIONS TO CHANGE WHO IS AN EMPLOYEE UNDER NEW ZEALAND LAW

The Employment Relations Authority and Employment Court take a case-by-case approach when applying the common law tests for employment status (see page 14). This maximises flexibility in how the tests are applied. However, some stakeholders have raised concerns that judicial decisions do not always place enough emphasis on economic dependence or imbalances of bargaining power. This means that even highly vulnerable workers may not be considered employees after the common law tests have been applied

Options 8 and 9 would, to varying degrees, change the likelihood of vulnerable contractors in the 'grey zone' being recognised as employees under law.



These options aim to address the imbalance of bargaining power between vulnerable contractors and the firms who engage them by ensuring they receive minimum employment entitlements. They are meant to help contractors like Matiu (see page 21 – 22), but not prevent contractors like Anya from continuing to work as they currently do (see page 20 – 21).

The main difference between the options is how they balance flexibility and certainty:

- Option 8 (defining some occupations of workers as employees) provides more certainty about who is an employee, but reduces flexibility for firms and contractors.
- Option 9 (changing the tests used to determine employment status) allows for decisions about employment status to continue to be made on a case-by-case basis, but may not provide increased certainty for workers or firms about employment status because it still involves a court or tribunal decision.

These options would fundamentally shift where the boundary is between being an employee or a contractor, and change how employment status is decided. Either of these options would represent a large change for the ERES and taxation systems.

Your views on changing who is an employee under New Zealand law

48. Do you agree that we should treat vulnerable contractors (who are a subset of dependent contractors) as employees? Why or why not?
49. If either of these options is pursued, should affected vulnerable contractors be allowed to keep working as contractors if they want to?
50. Is there some other way to provide protections to vulnerable contractors, without treating them as employees?

Option 8: Define some occupations of workers as employees

Whether a worker is an employee or a contractor normally depends on the real nature of the relationship between parties. However, there are some occupation-based exceptions to this. For example, homeworkers are specifically defined in the Employment Relations Act as employees.

This option would involve legally defining certain occupations as employees. This means the law would require certain types of work to be done through an employment relationship.

How this option would work

- There are choices around how occupations are chosen for inclusion in the definition of an employee.
  - There could be an application process, with groups of workers having to prove that certain conditions are met before the government adds their occupation to the legal definition of an employee. If this approach is taken, there would need to be reliable public information about any conditions that need to be met before an occupation can be deemed as employees.
  - The government could do its own assessment of occupations, and decide which (if any) should be added to the legal definition of an employee. Public consultation could happen as part of this process.
- There are also choices about how each "occupation" is defined. For example, it could be as broad as saying all of a particular occupational group are deemed to be employees. On the other hand, it could be as narrow as saying only those within a particular occupational group who also exhibit certain characteristics (eg in number of hours worked, degree of dependence) are deemed to be employees.
- There could also be opt-outs for workers who are genuinely self-employed and operating as independent businesses.

What Australia has done

The Industrial Relations Act (New South Wales) deemed people working in certain occupations to be employees; such as cleaners, carpenters and milk vendors. The aim of this was to protect people entering into contracting arrangements with limited information or understanding of how the contract would operate.

In 2006, the New South Wales Government said the "deeming" of certain occupations of workers as employees was achieving their objective of addressing the significant degree of inequality in bargaining power between the worker and the provider of work.

The New South Wales' Government's comments were part of its submission on the Independent Contractors Act 2006 (Commonwealth), which later overrode New South Wales' deeming provisions and placed emphasis on contractors' freedom of contract.

Today, instead of being deemed employees, contractors can apply to a court for a remedy if a contract is harsh or unfair.

We think this option could have the following benefits

› It could allow for entire classes of vulnerable workers to gain protection through employee status, rather than relying on individual applications to the Employment Relations Authority or Employment Court.

› There would be increased certainty in some sectors or occupations about how workers should be classified.

We think this option could have the following costs and risks

› It could result in workers being deemed employees regardless of their preferences or actual circumstances.

› It could increase compliance costs and undermine workforce flexibility for some firms, and may lead to job losses and/or consumer price increases.

› This option could be difficult to implement if it is unclear which sectors or occupations to target.

› There would be tax implications for contractors who are deemed employees, particularly in terms of tax deductible expenses and goods and services tax (GST).

Your views on option 8

General questions

51. What do you see as the main benefits, costs and risks of this option?
52. What changes could be made to improve the effectiveness of this option?

Specific questions

53. How should occupations be chosen for inclusion in the legal definition of an employee? Are there particular characteristics or conditions to look for?
54. In what situations should workers be allowed to opt-out (ie continue as contractors) if their occupation is included in the legal definition of an employee?
55. How can we manage the risk of undermining workforce flexibility for firms, and limiting parties' freedom of contract?

Option 9: Change the tests used by courts to determine employment status to include vulnerable contractors

Generally, a worker's employment status depends on the real nature of the relationship they have with the firm that has hired them. Over time, the courts have developed a series of tests to guide them in determining a worker's employment status. This option would modify the existing tests, which are used by the Employment Relations Authority and the Employment Court to figure out whether a worker is an employee or contractor.

How this option would work

- This option would involve amending the common law tests used for determining employment status. The existing tests are:
  - The intention test: the type of relationship that the parties intended is relevant, but doesn't on its own determine the true nature of the relationship. Intention can normally be worked out from wording in parties' written agreement.
  - The control vs independence test: the greater the control exercised over the worker's work content, hours and methods, the more likely it is that a person is an employee. A worker with greater freedom to choose who to work for, where to work, when to work, the tools used and so on, is more likely to be a contractor.
  - The integration test: this looks at whether the work performed by a person is fundamental to the employer's business. The work performed by a contractor is normally only a supplementary part of the business.
  - The fundamental/economic reality test: this looks at the total situation of the work relationship to determine its economic reality. A contractor is a person in business on their own account.
- New tests could be introduced to take into account the degree of economic dependence between a worker and a particular firm, bargaining power imbalance, or how much risk is passed from a firm to a worker. An example of a test for economic dependence could be whether a certain proportion (eg 80%) of a worker's income comes from a particular firm. The tests could also be weighted, to give priority to certain criteria.
- The existing intention test could also be modified. For example, contractors could be given the right to request to be treated as an employee by a firm after a certain amount of time as a contractor. Even if this request is not accepted, this would signal their intention (to change from a contracting arrangement to an employment relationship instead). This change could work well in combination with option 6 (put the burden of proving that a worker is a contractor on a firm).

What Sweden has done

In Sweden, the definition of an "employee" has widened over time. Swedish courts use a multi-factor test to decide whether someone is an employee, which includes looking at the "economic and social situation of the worker". This means a worker's dependent and insecure position can grant them employee status.

The wide definition of an employee in Swedish labour law, and the multi-factor test applied by the courts, has proved flexible over time with regard to changing labour market conditions.

Now, only a few court cases in Sweden involve questions about whether a worker is an employee or self-employed.

We think this option could have the following benefits

- It involves a lower degree of regulatory change than some of the other options in this section, because it relies on existing processes (ie having the Employment Relations Authority or the Employment Court determine employment status).
- It takes into account individual circumstances as it involves case-by-case decisions about employment status, rather than targeting a whole class of workers.

We think this option could have the following costs and risks

- We cannot predict how the tests will play out in practice because it is up to the Employment Relations Authority or Employment Court's discretion.
- This option could lead to greater uncertainty about how the law (ie any modified tests) will be applied, and there may be a period of increased litigation after any law change to determine where the new boundaries are between employee and contractor status.
- There would be tax implications for contractors who are considered employees using the new tests, particularly in terms of tax deductible expenses and GST.
- Depending on how the tests are changed, firms may need to start keeping records of different types of information.
- This option still requires workers to come forward individually to challenge their employment status, which we know there are barriers to.

Your views on option 9

General questions

56. What do you see as the main benefits, costs and risks of this option?
57. What changes could be made to improve the effectiveness of this option?

Specific questions

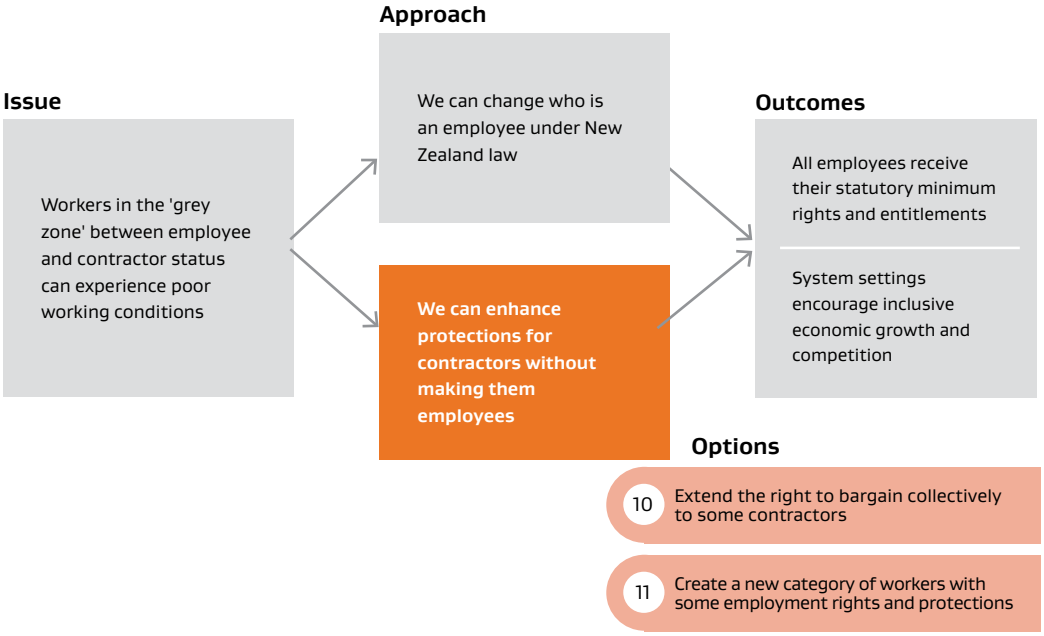
58. Should we codify the existing common law tests for determining employment status? Would this be beneficial even if the tests weren't changed? Why or why not?
59. Should new tests be added to the existing common law tests for determining whether a worker is an employee or a contractor? If yes, what indicators of vulnerability should be included?
60. How should these tests be assessed? For example, what are good indicators of dependence; the amount of risk passed on to a contractor; or bargaining power imbalance?
61. Should the tests for employment status be weighted? If so, is there a particular test that is more or less important than the rest when determining employment status?

OPTIONS TO ENHANCE PROTECTIONS FOR CONTRACTORS WITHOUT MAKING THEM EMPLOYEES

There may be some workers in the 'grey zone' who operate as genuine independent businesses. These workers may have no desire to access the full suite of employment protections, which would require asserting a legal status (of employee) they may not identify with.

Nonetheless, the numerous reports of poor working conditions among contractors suggest that some changes could be warranted to enhance their bargaining power, and reduce the likelihood of one-sided contracts.

Options 10 and 11 below would enhance protections for contractors without changing their employment status.



These options aim to help vulnerable contractors like Matiu who are in the 'grey zone' by giving them some of the rights and protections that employees have, while allowing them to continue as contractors. This would complement work underway to introduce protections for businesses against **unfair commercial practices**, which could enhance some contractors' ability to challenge one-sided contracts.

Either of these options would represent a large change for the employment and commercial law systems. We are interested in your views about the benefits, costs and risks of each option and which, if any, we should explore further.

Your views on enhancing protections for contractors without making them employees

62. What rights and protections are appropriate to extend to contractors in the 'grey zone' without changing their employment status?
63. Are there any other ways to protect vulnerable contractors, without making them employees, which we have not considered?

Option 10: Extend the right to bargain collectively to some contractors

Currently, employees can bargain collectively about their terms and conditions of employment. Contractors cannot do so, because this would amount to anti-competitive behaviour prohibited by the Commerce Act. The Commerce Commission has a process through which it can authorise collective bargaining outside employment relationships, but applications for such authorisations are rare. This option would allow contractors to bargain collectively without needing a case-by-case authorisation from the Commerce Commission.

The Government is currently consulting on the design of a Fair Pay Agreements (FPA) system, which would allow collective bargaining to set minimum terms for employees across entire sectors or occupations. The FPA consultation closes on 27 November 2019. The Workplace Relations and Safety Minister agrees in principle that any FPA system introduced for employees should extend to contractors, as one potential way to allow collective bargaining by contractors.

How this option would work

- If an FPA system is introduced for employees, it could also be extended to contractors.
- Alternatively, some other process/ framework to support collective bargaining by contractors could be created. This could either sit alongside any FPA system for contractors, or be an alternative to the FPA system.
- At the minimum, if we implemented this option, at least some contractors would be exempted from competition law to allow collective bargaining to happen.

We think this option could have the following benefits

- Collective bargaining would allow contractors to negotiate minimum terms of engagement with those who hire them. This could set a "floor" to prevent exploitation.
- If FPAs are extended to contractors, it would remove the incentive for firms to engage workers as contractors to avoid their obligations under an FPA for their sector or occupation.

What Australia has done

Similar to New Zealand's Commerce Act, Australia's Competition and Consumer Act allows businesses to apply to the Australian Competition and Consumer Commission (ACCC) for legal protection to collectively negotiate terms and conditions with suppliers or customers in some circumstances. Without such protection, collective bargaining by businesses in competition with each other could breach Australia's competition laws. So far, groups including primary producers (eg dairy farmers and chicken growers), retailers, lottery agents, truck owner-drivers and professionals (eg journalists and screenwriters) have been authorised by the ACCC to bargain collectively.

The ACCC is currently consulting on the introduction of a class exemption, which would allow collective bargaining by businesses with an aggregated annual turnover of less than $10 million. Franchisees (regardless of turnover) would also be covered by the class exemption. The class exemption would allow businesses that meet these criteria to bargain collectively without having to apply to the ACCC. The ACCC is considering this because it has generally not had concerns about collective bargaining involving groups of small businesses negotiating with larger target businesses without collective boycotts.

We think this option could have the following costs and risks

› Collective bargaining requires parties (both on the employer and worker sides) to organise themselves, which may mean creating representative organisations that do not currently exist. There will also be costs associated with the bargaining process itself.

› There is a risk of accidentally making any exemption from competition law too wide, and unintentionally reducing competition.

Your views on option 10

General questions

64. What do you see as the main benefits, costs and risks of this option?
65. What changes could be made to improve the effectiveness of this option?

Specific questions

66. Should contractors be allowed to bargain collectively?
67. If an FPA system is introduced for employees, should that be extended to contractors? If so, which contractors?
68. Other than an FPA system, is there any other framework or process we should consider to support collective bargaining by contractors?
69. Are there some contractors in particular who would benefit from collective bargaining, or who should be covered by collective agreements?

Option 11: Create a new category of workers with some employment rights and protections

This option would create a new, third category of workers (eg 'dependent contractors') in between employees and contractors.

At present, workers are either employees or contractors. Employees are covered by employment law, and contractors are covered by competition and commercial law. While there are some protections that apply regardless of employment status (eg health and safety), most employment rights and protections flow from employee status.

How this option would work

- A new, third category of worker would be created. This category of workers would have some, but not all, of the existing employment rights and protections such as the right to a minimum wage, the right to paid leave, the right to bargain collectively and protection against unfair dismissal. They would continue to be regulated by competition and commercial law in some areas.
- Entry into this new category of workers could be by request. For example, after six months of continuous work for a particular firm, contractors could ask to be treated as if they were in this new category of workers.

We think this option could have the following benefits

- It could help in situations where workers are properly characterised as contractors, but still require some protection from the ERES system.
- It could reduce the imbalance of bargaining power between workers who run their own business, but are economically dependent on one firm (see Canadian example).

What Canada has done

Some Canadian jurisdictions have created a third category of "dependent contractors". For example, at the federal level, Part 1 of the Canada Labour Code extends collective bargaining rights to dependent contractors.

Similarly, in Ontario, the Labour Relations Act 1995 expands the definition of "employee" to cover dependent contractors so that they have the right to join a union and bargain collectively. The Ontario Court of Appeal has extended the right to reasonable notice of termination to dependent contractors.

Dependent contractors in Canada are not eligible for most employee rights and protections because they are not covered by Part 1 and 2 of Canada's Labour Code and Ontario's minimum standards legislation (the Employment Standards Act 2000).

We think this option could have the following costs and risks

- This option could lead to there being two 'grey zones' instead of just one: one 'grey zone' between employees and this new category of workers, and another 'grey zone' between the new category of workers and contractors.

- Introducing a third category could cause more confusion and misclassification (see Italian example).
- The Organisation for Economic Co-operation and Development (OECD) says this option is likely to be the most difficult to implement in terms of defining this new group of workers, and determining the appropriate threshold for access and the rights that apply.

What was previously considered in New Zealand

In 2015 and 2016, Parliament considered, but did not pass, the Minimum Wage (Contractor Remuneration) Amendment Bill. This Member's Bill would have amended the Minimum Wage Act to allow minimum rates of remuneration to be set for contractors doing certain types of work.

What Italy did

In 1973, Italy created a third category of workers called lavoratore parasubordinato (quasi-subordinate). Protections were limited to access to labour courts, but these were largely procedural as quasi-subordinate workers were still considered outside the scope of labour laws.

The category sparked undesirable effects within the first decade as firms pushed workers who would otherwise be employees into the new third category.

Italy has now largely removed this category with individuals either classified as independent contractors or employees.

Your views on option 11

General questions

70. What do you see as the main benefits, costs and risks of this option?
71. What changes could be made to improve the effectiveness of this option?

Specific questions

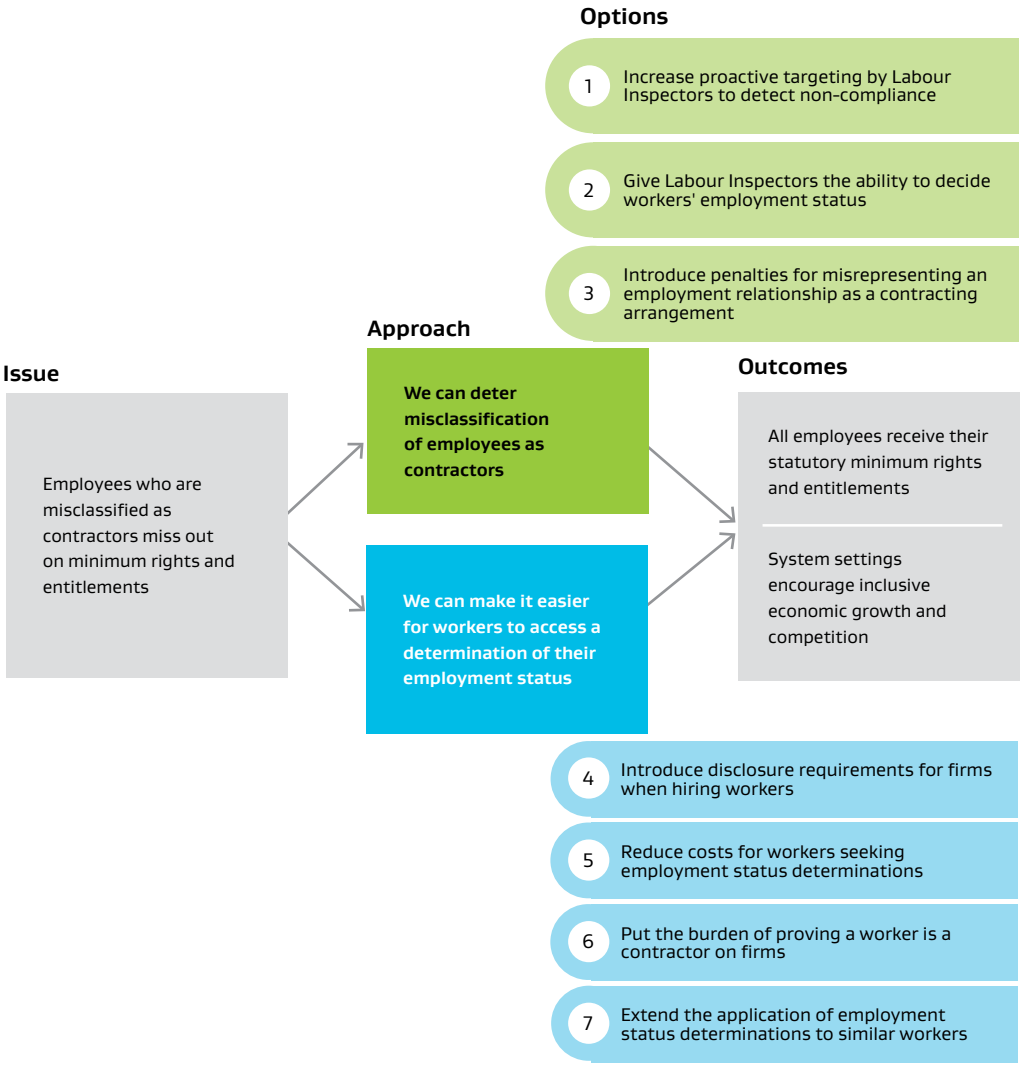
72. What employment rights and protections would make the most difference to vulnerable contractors?
73. Which contractors would benefit from a third category being introduced? What are their working conditions and experiences?
74. Is there any way of introducing a third category without increasing the risks of 'gaming the system' (ie arbitrage, where people capitalise on loopholes to move people who would otherwise be employees into a new third category)?

SUMMARY OF OPTIONS

We are considering four groups of options, which broadly correspond to the two issues we discussed earlier.

Issue 1: employees who are misclassified as independent contractors miss out on minimum rights and entitlements

Options 1 to 3 aim to deter the misclassification of employees as contractors. Options 4 to 7 aim to make it easier for workers to challenge their employment status if they think they have been misclassified.



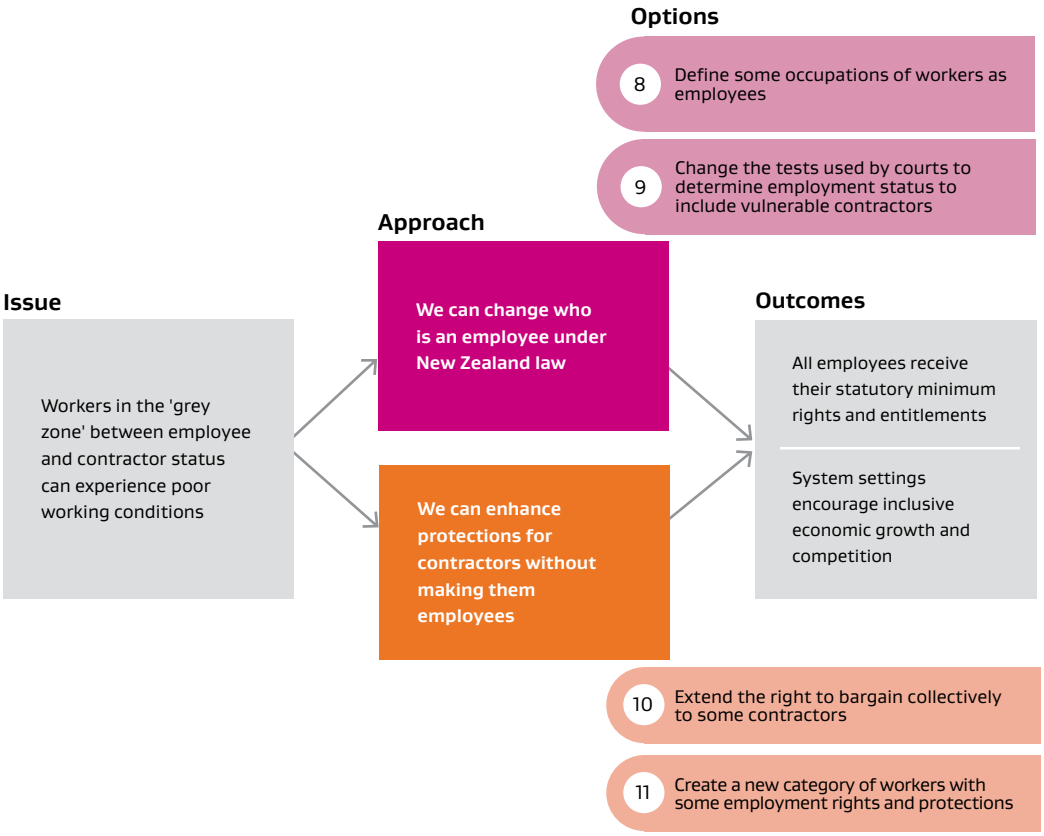
Overall, these options do not change who is considered an employee under New Zealand. They are about improving enforcement of the current law, and making sure that everyone receives the employment rights and protections they are entitled to.

Issue 2: workers in the 'grey zone' between employee and contractor status can be vulnerable to poor outcomes

Options 8 and 9 change who is an employee under New Zealand law. This would increase the likelihood of vulnerable contractors being treated as employees, and protected by employment law. These options would mean more workers will become entitled to employment rights and protection.

Options 10 and 11 increase protections for contractors, without making them employees. These options would mean more regulation of some aspects of contractors' working lives by the ERES system. Other aspects of their work will continue to be regulated by our competition, consumer and commercial laws.

For all of the options, we want to help vulnerable contractors like Matiu (see page 21 – 22), but do not want to prevent contractors like Anya (see page 20 – 21) from working in a way that suits them nor hinder or alter ordinary commercial transactions between genuine businesses.



Your views on the 11 options

75. In your view, what option (or combination of options) should we pursue? Why?
76. Are there any other ideas you think we should consider to address the problems faced by vulnerable contractors? If so, please provide details.
77. Which contractors would be most helped by your preferred options?
78. Do you think there are any options we should not pursue? Why?
79. When thinking about workers in the 'grey zone,' do you think we should do whatever it takes to help vulnerable contractors like Matiu, even if it might impact on other workers in the 'grey zone' like Anya, who prefer to work as contractors?

LIST OF QUESTIONS

What do we want to achieve?

1. Do you agree with the objectives and risks outlined in this section? Please provide a reason for your answer.
2. Do you have any other ideas for defining what we should aim to achieve through this work? If yes, please provide details.

Current issues and challenges

3. Do you agree with this characterisation of the key issues? If yes, do you think both of the issues identified are of equal importance? If no, what other issues and challenges should be considered?
4. From your perspective, what makes dependent contractors vulnerable to exploitation? What situations should we be most concerned about?
5. How could these problems (either as outlined in this document or in your answer to questions 3 and 4) affect different groups of people in New Zealand?
6. In your view, which sectors or occupations are most affected? Where possible, please provide evidence or information to support your view.
7. How urgent is the need for change?

What can we achieve through information and guidance?

8. Is there enough information available about the difference between employment and contracting arrangements, and how to hire workers using the appropriate relationship? If yes, how helpful is it? If no, what other information or guidance would be helpful?
9. Other than guidance, what other non-legislative tools could we use to prevent misclassification and improve protections for vulnerable contractors?
10. How effective do you think non-legislative tools could be (either guidance as outlined above, or other things in your answer to the previous question)?
11. Do you think we need to change the law? Why, or why not?

Your views on deterring misclassification of employees as contractors

12. From your perspective, what do you think causes or contributes to misclassification of employees as contractors?
13. Should we respond differently depending on whether misclassification is accidental or intentional? What if misclassification doesn't result in exploitation, and is knowingly accepted by all parties?
14. Are there any other options we should consider to prevent and resolve misclassification?

Option 1: Increase proactive targeting by Labour Inspectors to detect non-compliance

General questions

15. What do you see as the main benefits, costs and risks of this option?
16. What changes could be made to improve the effectiveness of this option?

Specific questions

17. Should misclassification be a priority for investigation by Labour Inspectors? Or should misclassification only be prioritised where there is an element of exploitation (eg employees being treated as contractors and being paid less than the minimum wage)?
18. Should Labour Inspectors be able to challenge how a firm has hired its workforce, even if individual workers do not want to make a complaint themselves?

Option 2: Give Labour Inspectors the ability to decide workers' employment status

General questions

19. What do you see as the main benefits, costs and risks of this option?
20. What changes could be made to improve the effectiveness of this option?

Specific questions

21. Should Labour Inspectors be able to make decisions about workers' employment status?

22. Should Labour Inspectors need the consent of at least one of the parties to a working relationship (eg a worker or their firm) before making employment status decisions? Or is there sufficient public interest in the issue of misclassification that they should they be able to make employment status decisions without either party's consent?
23. If Labour Inspectors are given the power to make employment status determinations, what should the legal effect of these determinations be?

Option 3: Introduce penalties for misrepresenting an employment relationship as a contracting arrangement

General questions

24. What do you see as the main benefits, costs and risks of this option?
25. What changes could be made to improve the effectiveness of this option?

Specific questions

26. Even if this option doesn't increase our ability to detect misclassification, is it worth pursuing? What other changes could this option be combined with?
27. In what circumstances should the penalty apply? For example:
    a. Should there be a penalty even if both parties genuinely wanted a contracting arrangement? If yes, should both firms and workers be liable for the penalty?
    b. Should there be a penalty if firms claim that the misclassification is a mistake, or a result of confusion on their part? If so, how could this be proven?
    c. Should there be a penalty for parties with significant control or influence over an employer that misclassifies an employee and breaches minimum employment standards?

Your views on making it easier for workers to access a determination of their employment status

28. From your perspective, what do you think hinders or stops workers from challenging their employment status?
29. Which options are likely to make the biggest difference for workers, in terms of encouraging them to come forward when they may have been misclassified as contractors?
30. Are there any other options we should consider to make it easier for workers to challenge their employment status?

Option 4: Introduce disclosure requirements for firms when hiring contractors

General questions

31. What do you see as the main benefits, costs and risks of this option?
32. What changes could be made to improve the effectiveness of this option?

Specific questions

33. In what sorts of contracting arrangements should firms have to disclose information about the arrangement to contractors?
34. What information should contractors receive before agreeing to a contract?
35. Should this requirement to disclose information also be extended to existing contractors?

Option 5: Reduce costs for workers seeking employment status determinations

General questions

36. What do you see as the main benefits, costs and risks of this option?
37. What changes could be made to improve the effectiveness of this option?

Specific questions

38. What are the different types of costs involved in taking legal action?
39. Which costs present the biggest barriers, and how could these be reduced?

Option 6: Put the burden of proving a worker is a contractor on firms

General questions

40. What do you see as the main benefits, costs and risks of this option?
41. What changes could be made to improve the effectiveness of this option?

Specific questions

42. Is it fair to put the onus on firms to prove a relationship is one of contract rather than employment?
43. Is it realistic to expect firms to have the information needed to prove a relationship is a contracting arrangement rather than one of employment? If yes, what records should firms be required to keep in relation to contractors?

Option 7: Extend the application of employment status determinations to workers in fundamentally similar circumstances

General questions

44. What do you see as the main benefits, costs and risks of this option?
45. What changes could be made to improve the effectiveness of this option?

Specific questions

46. What degree of similarity should be needed between workers before a decision about employment status is extended?
47. Should any limits be set on how far an Authority or court decision can be extended? If so, what should those limits be?

Your views on changing who is an employee under New Zealand law

48. Do you agree that we should treat vulnerable contractors (who are a subset of dependent contractors) as employees? Why or why not?
49. If either of these options is pursued, should affected vulnerable contractors be allowed to keep working as contractors if they want to?
50. Is there some other way to provide protections to vulnerable contractors, without treating them as employees?

Option 8: Define some occupations of workers as employees

General questions

51. What do you see as the main benefits, costs and risks of this option?
52. What changes could be made to improve the effectiveness of this option?

Specific questions

53. How should occupations be chosen for inclusion in the legal definition of an employee? Are there particular characteristics or conditions to look for?
54. In what situations should workers be allowed to opt-out (ie continue as contractors) if their occupation is included in the legal definition of an employee?
55. How can we manage the risk of undermining workforce flexibility for firms, and limiting parties' freedom of contract?

Option 9: Change the tests used by courts to determine employment status to include vulnerable contractors

General questions

56. What do you see as the main benefits, costs and risks of this option?
57. What changes could be made to improve the effectiveness of this option?

Specific questions

58. Should we codify the existing common law tests for determining employment status? Would this be beneficial even if the tests weren't changed? Why or why not?
59. Should new tests be added to the existing common law tests for determining whether a worker is an employee or a contractor? If yes, what indicators of vulnerability should be included?
60. How should these tests be assessed? For example, what are good indicators of dependence; the amount of risk passed on to a contractor; or bargaining power imbalance?
61. Should the tests for employment status be weighted? If so, is there a particular test that is more or less important than the rest when determining employment status?

Your views on enhancing protections for contractors without making them employees

62. What rights and protections are appropriate to extend to contractors in the 'grey zone' without changing their employment status?
63. Are there any other ways to protect vulnerable contractors, without making them employees, which we have not considered?

Option 10: Extend the right to bargain collectively to some contractors

General questions

64. What do you see as the main benefits, costs and risks of this option?
65. What changes could be made to improve the effectiveness of this option?

Specific questions

66. Should contractors be allowed to bargain collectively?
67. If an FPA system is introduced for employees, should that be extended to contractors? If so, which contractors?
68. Other than an FPA system, is there any other framework or process we should consider to support collective bargaining by contractors?
69. Are there some contractors in particular who would benefit from collective bargaining, or who should be covered by collective agreements?

Option 11: Create a new category of workers with some employment rights and protections

General questions

70. What do you see as the main benefits, costs and risks of this option?
71. What changes could be made to improve the effectiveness of this option?

Specific questions

72. What employment rights and protections would make the most difference to vulnerable contractors?
73. Which contractors would benefit from a third category being introduced? What are their working conditions and experiences?
74. Is there any way of introducing a third category without increasing the risks of 'gaming the system' (ie arbitrage, where people capitalise on loopholes to move people who would otherwise be employees into a new third category)?

Your views on the eleven options

75. In your view, what option (or combination of options) should we pursue? Why?
76. Are there any other ideas you think we should consider to address the problems faced by vulnerable contractors? If so, please provide details.
77. Which contractors would be most helped by your preferred options?
78. Do you think there are any options we should not pursue? Why?
79. When thinking about workers in the 'grey zone,' do you think we should do whatever it takes to help vulnerable contractors like Matiu, even if it might impact on other workers in the 'grey zone' like Anya, who prefer to work as contractors?

LINKS IN THIS DOCUMENT

Page 12

Guide to minimum employment rights

Live website available at https://www.employment.govt.nz/starting-employment/rights-and-responsibilities/minimum-rights-of-employees.

Archived website available at https://web.archive.org/web/20191013232756/https://www.employment.govt.nz/starting-employment/rights-and-responsibilities/minimum-rights-of-employees.

Page 15

Survey of Working Life 2018

Live website available at https://www.stats.govt.nz/reports/survey-of-working-life-2018.

Archived website available at https://web.archive.org/web/20191013232339/https://www.stats.govt.nz/reports/survey-of-working-life-2018.

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Page 16

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Page 20

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Page 30

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Page 32

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Page 47

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Page 48

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Page 50

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Page 51

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