Regulatory Impact Statement

Strengthening Enforcement of Employment Standards

Agency Disclosure Statement

1 This Regulatory Impact Statement (RIS) has been prepared by the Ministry of Business, Innovation and Employment (the Ministry). It considers options to address the high level of non-compliance with employment standards (such as the minimum entitlements under the *Minimum Wage* and *Holidays Acts* and requirements relating to record keeping*)* currently seen in New Zealand, with a particular focus on the more serious and systemic breaches that can impact not only the affected employees, but also the wider economy.

2 The recommended reforms build on the measures already in place to create a compliance and enforcement regime that is flexible, responsive and proportionate to the wide range of breaches observed, from the minor inadvertent breaches that may simply arise from a poor understanding of the legislation to the most serious and deliberate breaches that result in harm to vulnerable individuals and to the wider economy.

3 This is a policy area where robust and comprehensive data on the nature and extent of the problems with the regulatory system is not readily available. However, a picture of non-compliance (and its causes) has been built up from a number of sources, including: data from the Ministry's annual National Survey of Employers, data available from Statistics New Zealand (in particular the Survey of Working Life 2012), data and anecdotal evidence from the Labour Inspectorate, case law from the Employment Relations Authority and Employment Court, media reports (in particular in relation to migrant exploitation) and the public consultation undertaken through the discussion document *Playing by the Rules: Strengthening Enforcement of Employment Standards*. The lack of reliable data to quantify the problem does not present significant risks to the analysis and recommendations in this RIS.

4 We have not undertaken a detailed cost-benefit analysis of the recommended package, however, the costs are not considered significant. They primarily involve some increased funding (discussed below) and some capability building in the Inspectorate to make effective use of the new legislative provisions proposed. The scale of the benefits is hard to quantify. Increased compliance will primarily benefit employees (who will be more confident that they will receive their minimum entitlements), though it is also expected to benefit the wider economy through a more level playing field for employers and an enhanced international reputation.

5 A key assumption underpinning the proposals is that the institutions within the employment standards regulatory system are effectively resourced to perform their respective functions. If under-resourced, the benefits of the proposals may be diminished. [redacted] s9(2)(f)(iv) of the Official Information Act 1982

Gerard Clark
Manager, Employment Standards Policy
Ministry of Business, Innovation and Employment

Executive Summary

6 There is a high level of non-compliance with employment standards, such as employees being paid less than the minimum wage, not receiving annual holiday entitlements and not having employment agreements. Seventeen per cent of respondents to Statistics New Zealand's Survey of Working Life (2012) reported that they were not receiving at least one of these minimum employment standards.

7 There are also growing concerns that breaches are becoming more serious, systemic and widespread (such as the increasing number of reports about exploitation of migrant workers).

8 There are several factors contributing to the low level of compliance with employment standards, including:

a) a lack of understanding by employers and employees of their rights and responsibilities

b) sanctions that are appropriate for most breaches but are not adequate to deter serious and systemic non-compliance

c) the ability for directors and other individuals to avoid accountability, including commonly winding up a company to avoid paying arrears when they are found to have breached employment standards

d) inconsistent and confusing requirements for keeping records (such as wages and time records) which makes it difficult for employers, employees and for the Labour Inspectorate to ensure standards are being met

e) an inability for labour inspectors to access sufficient information from employers and from other regulatory agencies to identify and investigate breaches of employment standards

f) legislative settings and processes that are not appropriate for dealing with breaches of employment standards, in particular serious and/or intentional breaches, instead focusing on maintaining the employment relationship with mediation as the key dispute resolution process.

9 Non-compliance with employment standards impacts employees, compliant employers and the wider economy in a number of ways:

a) the most vulnerable parts of our communities are also the most susceptible to breaches of standards

b) compliant employers are undercut by the anti-competitive behaviour of non-compliant employers

c) it reduces confidence that the outcomes of employment will be better than being on a benefit (as the public has lower confidence that all employment will adhere to minimum standards)

d) it does not promote fair and productive employment relationship that lead to improved productivity across the economy, including better standards and income for workers

e) it damages New Zealand's international reputation as a place to work and do business.

Conclusion

10 This regulatory impact statement presents a comprehensive package of options to improve compliance and enforcement of employment standards across the regulatory system, using both legislative and non-legislative measures.

11 A key implementation risk for the package working well as a whole is ensuring that the system is effectively resourced. For example, under-resourcing will diminish the ability of the labour inspectors to carry out effective enforcement (in particular in Auckland where many of the more serious breaches are being seen).

12 The options have been assessed against the critical criteria of effectiveness (at deterring non-compliance and/or promoting compliance) and the cost of implementation (to all parties, including government and employers), and the secondary criteria of proportionality, and transparency and certainty. The recommended options, with our consideration of their net outcomes are summarised below.

Summary of package of recommended options	
Option	**Net outcomes**
Ensuring a broad range of sanctions, with stronger sanctions reserved for serious breaches	
Option 1b – increasing sanctions Labour inspectors can apply directly to the Employment Court (the Court) for consideration of 'serious breaches' of employment standards. The Court would be able to make pecuniary penalty orders of up to $50,000 for an individual and the greater of $100,000 or three times the amount of financial gain for a body corporate and compensatory orders for loss or damage.	Stronger penalties that are more proportionate to the harm caused are expected to improve compliance with only minor costs anticipated with this option, compared to other options. The option's effectiveness is contingent, to some extent, on receiving the increased funding sought as this will affect labour inspectors' enforcement abilities.
Option 2 - introduce criteria for consideration when awarding penalties	No costs to this option and benefits of greater transparency and consistency in penalty awards expected to improve compliance compared with the status quo.
Option 3 – expanding ability of employees to seek penalties at the Employment Relations Authority Permit employees to seek penalties for breaches of minimum entitlements under the *Minimum Wage Act, Holidays Act* and *Wages Protection Act*.	Expanding the scope of the Authority to award penalties is expected to improve deterrence and thus increase compliance, with only (very) minor costs associated with this option.
Increasing the accountability of directors and other persons	
Option 4a – increasing accountability of directors and others Introduce accessorial liability for breaches of employment standards. Under these provisions, persons 'involved in a contravention' are taken to have contravened the provision.	The significant benefits of the effectiveness of the option in establishing a strong deterrent against non-compliance outweigh the anticipated minimal cost and any initial uncertainty the option may generate compared to the status quo and option 4b.
Option 5 – introducing banning orders Permit the Court to award management banning orders in relation to the employment of employees for a maximum term of 10 years on application of a labour inspector: • if a pecuniary penalty order has been made against that person • If the person has been convicted under s351 of the *Immigration Act 2009* • for persistent breaches of employment standards Introduce an offence of breaching a banning order, with penalties of: • up to 3 years imprisonment • fine up to $200,000	Though only likely to be used rarely (and therefore not having a large impact on compliance) the benefits of protecting other labour market participants and sanctioning the most egregious behaviour outweigh the minimal costs to the regulator and initial uncertainty with the Court's application of the provision.

Summary of package of recommended options	
Option	**Net outcomes**
Improving clarity and consistency of record-keeping requirements and providing the right incentives to keep records and employment agreements	
Option 6 – improving clarity and consistency of record keeping requirements Requirements are made consistent and clarified (where possible) and a universal requirement to record hours worked each day in a pay period, and the pay received for those hours, is introduced.	The overall benefits to effectiveness as well as transparency and certainty and proportionality outweigh the minor costs anticipated for a few employers in complying with the requirements for this option.
Option 7 –providing the right incentives to keep records and employment agreements Introduce infringement notices for clear-cut breaches of record keeping and employment agreement requirements, with a max penalty of $1,000 per breach and a cap at $20,000 in any one instance. Provide that both employees and inspectors can seek penalties for failure to keep records and Individual Employment Agreements (IEAs).	This option is expected to increase incentives on employers to keep records and employment agreements, improving compliance. It also offers reduced costs for government in dealing with non-compliance quickly and effectively. However, the success of this option will be partially dependent on the increased funding sought for the Labour Inspectorate.
Extending the powers of labour inspectors to access information and improving information sharing between labour inspectors and other regulators	
Option 8a – requiring production of documents Empower inspectors to be able to require employers to produce any document or record if they have a reasonable belief that these will assist in determining whether a breach of employment standards has occurred.	The overall benefits to effectiveness (through improving the effectiveness of investigations into non-compliance) as well as proportionality outweigh the minor costs anticipated for a few employers in complying with the requirements for this option, and a potential lack of certainty about a labour inspector's "reasonable belief" regarding the need for the documents in each case. However, the success of this option will be partially dependent on the increased funding sought for the Labour Inspectorate.
Option 9a - support appropriate information sharing between labour inspectors and other relevant agencies for the purposes of identifying, investigating and enforcing non-compliance with employment standards and improving government enforcement activities Introduce an information sharing framework to achieve the above. Measures required: • Amending s233(5) of the *Employment Relations Act* – to allow for sharing of information both ways between labour inspectors and other regulators (subject to *Privacy Act*) • Initiating Approved Information Sharing Agreements (AISAs) – to provide (through regulation) specific exemptions from the *Privacy Act's* Information Privacy Principles for sharing of personal information • A series of Memoranda of Understanding (MOUs) to clarify routine and mainly entity level information sharing between labour inspectors and other regulators.	Although there are some costs involved in achieving the outcomes, these are outweighed by the overall benefits of greater effectiveness in improving compliance together with improved transparency and a consistent and proportionate approach. However, the success of this option will be dependent on the increased funding sought for the Labour Inspectorate.

Summary of package of recommended options	
Option	**Net outcomes**
Improving the legislative settings and processes for dealing with breaches of employment standards	
Option 10 – the Act and functions of labour inspectors Object of the *Employment Relations Act* and functions of labour inspectors amended to better reflect importance of enforcement of standards. High-level functions of the Ministry as regulator introduced.	While this does not translate to a direct impact on effectiveness in terms of compliance, this option will signal the importance of effective enforcement of employment standards and provide greater certainty about the role of labour inspectors, with no costs for government or other parties.
Option 11c – the role of mediation in employment standards cases New criteria are introduced so that cases that are predominantly about employment standards breaches are only sent to mediation when they are: • minor and inadvertent, or • the facts of the case are unclear, or • both parties agree.	The costs incurred by the option (and slightly lower level of certainty compared with options a and b) are offset by the increased benefits of effectiveness in improving compliance and proportionality with this option that will see standards breaches addressed at the ERA except where mediation will be appropriate.
Additional recommendations	
Option 12 – improvements to seeking compliance at the Employment Court Compliance with Employment Relations Authority (the Authority) determinations can be enforced at the Employment Court which can award, among other things, a fine of up to $40,000. The following actions are recommended to clarify elements of this process: • remove requirement that a compliance order is needed for orders, determinations etc of the Authority before the matter can be taken to the Court • permit the Crown to seek compliance with penalty awards at the Court • provide that some portion of the fine awarded by the Court be paid to the aggrieved employee. • provide that the fine can be enforced as if it were a fine under the *Summary Proceedings Act 1957*.	These improvements and clarifications offer greater certainty and timeliness relating to enforcement of compliance at the Employment Court.
Option 13 – seeking monies owed under the Wages Protection Act 1983 Provide that labour inspectors can seek monies owed as a result of illegal deductions under the *Wages Protection Act 1983.*	This option is recommended because it generates benefits of effectiveness, proportionality, transparency and certainty and is anticipated to incur only minor, if any, costs. However, the success of this option will be partially dependent on the increased funding sought for the Labour Inspectorate.

Background

13 In recent years, there has been a growing concern about compliance with employment standards in New Zealand, in particular in relation to serious breaches of those standards. For example, the media contains frequent reports about serious breaches of minimum entitlements involving migrant workers (often referred to as 'migrant exploitation'). This is a particular concern in Canterbury as large numbers of migrant workers take part in the rebuild, but is also common in Auckland (particularly in the hospitality sector).

14 This concern is reinforced by the Labour Inspectorate, a part of the Ministry of Business, Innovation and Employment (the Ministry). The Inspectorate has been undergoing a significant change in how it operates, changing from being a primarily complaints-driven and reactive agency to one which is intelligence-driven and proactive, targeting its resources where they are most needed and focussing more on the serious and systemic breaches of employment standards that have the most impact on individuals and the wider economy.

15 A consequence of this shift in focus is that the Inspectorate has also been developing a clearer picture of the nature and extent of more serious breaches of employment standards in New Zealand.

16 Motivated by these concerns, on 9 June 2014, Cabinet agreed to the release of the discussion document '*Playing by the Rules – Strengthening Enforcement of Employment Standards*' [CAB Min (14) 19/7 refers]. The document sought feedback on a number of issues, including the nature and extent of non-compliance, and presented a number of high-level options to improve compliance with, and enforcement of, employment standards in New Zealand.

17 These included options to:

a) strengthen the sanctions regime with a particular focus on ensuring an effective deterrent for serious breaches of employment standards

b) improve the identification and investigation of breaches through better record-keeping and enhanced powers for labour inspectors to request information from employers and share information with other agencies

c) ensure that employment standards cases are addressed in a low-cost, timely and appropriate way by the employment institutions.

18 This RIS is informed by feedback received from submitters to the *Playing by the Rules* discussion document as well ongoing consultation with key stakeholders and relevant government agencies.

A. Status Quo and Problem Definition

Overview of current regulatory framework

Legislation

19 By 'employment standards' we mean the set of minimum employment standards that employers must comply with under the various pieces of employment legislation. These standards set out certain rights and obligations on employers and employees that must be adhered to. For example, employment standards include requirements on employers to:

a) provide at least four weeks' annual holidays each year as well as minimum entitlements relating to public holidays, sick leave, and bereavement leave

b) pay at least the minimum wage

c) pay the entire amount of wages owing without deduction (unless the worker has consented) and not charge premiums for employment.

20 For the purposes of this current work, employment standards are defined as:

a) the minimum entitlements under the *Minimum Wage Act 1983*, *Holidays Act 2003*, *Wages Protection Act 1983* and *Equal Pay Act 1972*;

b) the requirements to keep wages and time and holiday and leave records under the employment legislation; and

c) the provisions in the *Employment Relations Act 2000* relating to the requirements to keep individual employment agreements, rest and meal breaks and breastfeeding breaks.

21 The Employment *Relations Act* is the principal piece of legislation in the employment law framework. Among other things, the *Employment Relations Act* sets out the powers and functions of the labour inspectors (who enforce compliance with employment standards); mandates the institutions and processes for addressing breaches of the employment legislation (ie mediation services, the Employment Relations Authority and the Employment Court); and sets out the various remedies – including penalties and sanctions – that can be applied in response to non-compliance.

The Employment Standards system

22 The employment standards system includes the rules, regulations and institutions established to enforce standards, as well as activities designed to encourage compliance, such as education.

23 The employment standards system comprises a number of component parts. The key elements of the system are:

a) Advice, information and education services – these are provided by the Ministry and a range of other organisations (ie Citizens Advice Bureaus, industry bodies, unions).

b) The Labour Service Centre (part of the Ministry) – this is often the first point of contact for employees wishing to make a complaint about a breach of standards. The Service Centre can also provide advice and information on employment standards.

c) The Labour Inspectorate (part of the Ministry) – identifies, investigates and enforces compliance either through its own tools or through the Employment Relations Authority or Employment Court. The Labour Inspectorate is increasingly shifting its focus to more serious breaches, and is undertaking more targeted, intelligence-led investigations.

d) Mediation services (part of the Ministry) – a confidential process with the aim of resolving issues by mutual agreement of both parties. Employers and employees may go directly to mediation if they both agree, but may also be directed to mediation by the Employment Relations Authority.

e) The Employment Relations Authority (supported by the Ministry) – can enforce compliance and hand down penalties of up to $20,000 for breaches of the legislation. Except in certain circumstances, the Authority will send cases to mediation if this has not yet been attempted.

f) The Employment Court (supported by the Ministry of Justice) – hears and determines (among other things) challenges to determinations of the Employment Relations Authority and questions of law referred by the Authority. Appeals (on points of law) can be taken to the Court of Appeal and/or the Supreme Court.

Problem definition

24 While comprehensive data on the nature and extent of the problems with the regulatory system is not readily available, a picture of non-compliance (and its causes) has emerged from Statistics New Zealand data, anecdotal evidence from the Labour Inspectorate, case law from the Employment Relations Authority and Employment Court, media reports (in particular in relation to migrant exploitation) and the public consultation on the discussion document *Playing by the Rules: Strengthening Enforcement of Employment Standards*.

25 There is a high level of non-compliance with employment standards, such as employees being paid less than the minimum wage, not receiving annual holiday entitlements, and not having employment agreements. For example:

a) ten percent of employers reported that not all of their employees had an employment agreement, with the great majority of these being employers with less than 20 employees (data from Ministry's National Survey of Employers 13/14)

b) 17 per cent of respondents to Statistics New Zealand's Survey of Working Life (SoWL 2012) reported that they were not receiving at least one of the minimum employment standards listed above.[1]

c) informal discussions with employers and payroll providers about compliance with the *Holidays Act* indicate that the problem could be even more widespread than indicated by this or by SoWL 2012.

26 There are also growing concerns that breaches are becoming more serious, systemic and widespread (such as the increasing number of reports about exploitation of migrant workers). *See case study below.*

27 Non-compliance with employment standards impacts employees, compliant employers and the wider economy in a number of ways:

a) the most vulnerable parts of our communities are also the most susceptible to breaches of standards

b) compliant employers are undercut by the anti-competitive behaviour of non-compliant employers

c) it reduces confidence that the outcomes of employment will be better than being on a benefit (as the public has lower confidence that all employment will adhere to minimum standards)

[1] Access to the data used for this analysis was provided by Statistics New Zealand under conditions designed to give effect to the security and confidentiality provisions of the *Statistics Act 1975*. The results presented here are the work of the author (the Ministry of Business, Innovation and Employment), not Statistics New Zealand.

d) it does not promote fair and productive employment relationship that lead to improved productivity across the economy, including better standards and income for workers

e) it damages New Zealand's international reputation as a place to work and do business.

Case study – migrant workers in hospitality

One current case in the hospitality sector potentially affects up to 100 workers, many from India, across a chain of Indian restaurants in Auckland. There is a network of some 15-20 companies behind the chain, and it has been a significant task for the Labour Inspectorate to identify which employees work for which companies. The employer has a history of non-compliance with employment standards.

The workers allege that they lived in overcrowded accommodation provided by the employer, and that the employer used immigration sponsorship as a form of blackmail over some employees, did not pay leave entitlements, and deducted rent from their wages leaving many with as little as $265 a week for up to 70 hours' work – equivalent to $4 an hour.

The employer has failed to maintain proper wages and time, and holiday and leave records, and to provide proper employment agreements. A New Zealander working for the company claimed that the Indian workers were underpaid, but that the New Zealanders received the minimum wage.

This case reflects how intense competition in a particular sector, often combined with cultural attitudes to employment standards, can lead to a serious erosion of workers' employment rights. Exploitation of this nature harms not only the financial and emotional well-being of the workers involved, but also the wider economy as these anti-competitive practices make it impossible for compliant businesses to compete.

28 Several factors contribute to the low level of compliance with employment standards and these are outlined below, together with submitters' comments.

Sanctions for breaches of employment standards

29 An effective sanctions regime will have a range of sanctions that can be applied flexibly and proportionately in response to the wide range of circumstances in which breaches of employment standards can occur. Under the current regime, employers can be required to pay arrears, undertake certain actions to prevent future non-compliance and, on application to the Employment Relations Authority (the Authority), pay a penalty of up to $10,000 for an individual and $20,000 for a body corporate.

30 While the available sanctions are appropriate for most breaches of employment standards they do not provide a strong enough deterrent for serious breaches, such as exploitation of vulnerable workers or breaches resulting from non-compliant business models which can result in gains of tens, if not hundreds, of thousands of dollars.

31 The current regime also does not make use of the full range of tools that are common features of other regulatory regimes, such as naming non-compliant employers, or infringement offences for clear-cut, low level breaches.

32 There was strong support from across the spectrum of submitters to *Playing by the Rules* for stronger sanctions for serious breaches, though some submitters (particularly employers) stressed that most employers are willing to comply (and should be supported to do this by appropriate provision of information) and tougher penalties should only be reserved for serious breaches.

Accountability for breaches by persons other than the employer

33 It is well recognised that deterrence is enhanced if individuals who aid and abet law-breaking can also be held accountable. When that law-breaking relates to the actions of a corporate entity, increasing individual accountability can also promote corporate compliance. There are currently only limited provisions in the *Employment Relations Act* that permit actions to be taken against a director or other individuals: under section 234, labour inspectors can (with the Authority's approval) seek arrears under the *Minimum Wage* and *Holidays Acts* from certain individuals when a company either has insufficient assets or is in liquidation or receivership (if the original case was commenced before those proceedings started).

34 Submitters to *Playing by the Rules* commented that directors and others should have some liability for non-compliance and made several suggestions for how the current provisions could be extended. Submitters also noted that increasing individual accountability is in line with the current proposals for reform in the health and safety system.

Record keeping requirements

35 Having accurate records (eg in relation to wages, hours worked, leave taken etc) and employment agreements in respect of all employees is important for assessing compliance with minimum entitlements, and a lack of these documents can be indicative of intent to avoid paying these entitlements. Breaches of these requirements are common, indicating that there are not sufficient incentives in place to encourage compliance

36 In addition, the record keeping requirements are currently spread across the employment legislation and are, in some places, inconsistent and they do not ensure that, in all circumstances, compliance with minimum entitlements can be determined. For example, a lack of a requirement to record the hours worked each day in a pay period for every employee makes assessing compliance with the *Holidays* and *Minimum Wage Acts* difficult in some circumstances.

37 Submitters to *Playing by the Rules* agreed that the record keeping requirement could be made more consistent and that hours worked should be recorded for all employees. However, they also noted that record keeping needs to be made less complex, particularly for smaller businesses.

Ability of labour inspectors to access information

38 To effectively identify, investigate and enforce breaches of employment standards, labour inspectors need to be able to access appropriate information both from employers (in the course of an investigation) and from other government agencies (in order to most effectively target non-compliance and for monitoring and audit activity).

39 Currently, labour inspectors can only request (from employers) wages and time and holidays and leave records and any documents showing the remuneration of employees. However, there is a range of other information (eg financial statements, PAYE records) that could provide important evidence when investigating breaches, especially if the records are inadequate or non-existent.

40 There are also restrictions on information sharing between the Labour Inspectorate and other government agencies (both within and outside the Ministry). Other regulators are unable to share information with labour inspectors for the purpose of achieving better enforcement of employment legislation if this is not the purpose for which the information was collected and the disclosure does not fit with one of the exceptions set out in the Information Privacy Principles in the *Privacy Act 1993*). Labour inspectors also have difficulty passing on information efficiently to other regulators for their enforcement purposes.

41 Submitters to *Playing by the Rules* were generally positive about extending the range of information that inspectors could require, though many had some reservations. For example, concerns were expressed about compliance costs for employers and whether appropriate safeguards were in place (eg in relation to privacy). Better information sharing between government agencies was also generally supported, though again, submitters raised privacy concerns.

The legislative settings for enforcement of employment standards

42 The need for effective enforcement of employment standards, particularly in relation to serious breaches, is not adequately reflected in the *Employment Relations Act*. For example, the object of the *Employment Relations Act* (in section 3) only refers to building "productive employment relationships through the promotion of good faith" and makes no mention of enforcement of employment standards. In particular the object promotes "mediation as the primary problem-solving mechanism" and "reducing the need for judicial intervention".

43 These provisions are entirely appropriate for employment relationship issues that have the relationship between the employer and employee at their core. However, they are not necessarily appropriate for employment standards breaches, particularly those that are serious and intentional, and that may have serious impacts on the employee, or wider impacts on New Zealand's international reputation. For example, mediation is not an appropriate mechanism for addressing a serious employment standards breach, where the breach was deliberate and may have also affected other employees that are not part of the mediation process.

44 While many submitters to *Playing by the Rules* commented that mediation should still play a key role in the resolution of employment relations problems, a significant number submitted that breaches of employment standards might be better addressed at the Employment Relations Authority.

45 An additional issue is that the functions of labour inspectors as currently listed also fail to reflect the fact that their primary role is one of enforcement.

B. Regulatory Impact Analysis

Objectives and criteria

46 The overall outcome sought for the *Playing by the Rules* work is for all employers to comply with employment standards.

47 Underneath this outcome, sit three objectives. These are that the employment standards system provides:

a) effective enforcement of employment standards with a focus on serious and intentional breaches

b) timely and effective resolution of employment standards breaches through the appropriate parts of the regulatory system

c) relevant information that is accessible and understandable for all users.

48 The objectives relate to a set of four criteria, and options designed to achieve these objectives have been assessed against each of the criteria. These criteria comprise:

a) critical criteria – designed to consider whether each option meets the overall outcome of employers complying with employment standards while keeping costs to all parties as low as possible. While some options may have implementation costs for government and some (minimal) compliance costs for businesses, increasing compliance should reduce costs over time, with all parties benefiting from a more level playing field which, in turn, should promote economic growth.

b) secondary criteria – based on Treasury's principles of best practice regulation relating to the proportionality of the intervention and transparency and certainty for the regulated community.

49 Throughout the options analysis, and in weighing up the net outcome of each option, more emphasis has been placed on the critical criteria than on the secondary criteria.

Critical criteria

50 Options have been assessed against the following two critical criteria:

a) ***Effectiveness***

i. encourages/improves compliance and/or deters non-compliance

b) ***Costs of implementation to all parties (government, business and employees)***

i. changes are relatively easy and cost effective to implement for the government/regulator

ii. avoids unnecessary compliance costs for business

Secondary criteria

51 Options have also been assessed against the following two secondary criteria:

a) ***Proportionality***

i. the burdens imposed on the regulated community are proportional to the benefits that are expected to result

ii. the appropriateness of different types of intervention are considered (eg legislative vs. non-legislative measures)

iii. comparison is made with other similar jurisdictions (eg UK, Australia) and regulatory systems (eg Health and Safety)

b) ***Transparency and certainty***

i. the regulated community has certainty about its legal obligations and rights

ii. the regulator acts in a transparent and predictable way

iii. there is consistency with other regulatory regimes where appropriate (eg Health and Safety)

52 Each option will be assessed against these criteria with either 1-3 crosses '×' or 1-3 ticks '✓' to indicate degree that the option meets the relevant criterion as compared to the status quo and a dash '-' to indicate where there is no difference to the status quo . The recommended option is shaded in each case. Some recommendations are 'subsidiary' to the main options considered and these have not necessarily been compared against the status quo. In these instances, only comments under each of the criteria are included.

Analysis of options against criteria

53 The analysis of the options that form the recommended package is presented in the following tables, with recommendations based on the net positive outcomes of the preferred option.

Playing by the Rules – options analysis

Option	Criteria for assessment of options				Conclusions/net outcomes
	Critical Criteria		*Secondary Criteria*		
	Effectiveness	*Costs of implementation*	*Proportionality*	*Transparency and certainty*	
Ensuring a broad range of sanctions, with stronger sanctions reserved for serious breaches					
Sanctions **Status quo** – penalties at the ERA remain at $10,000/$20,000	• Insufficient deterrent does not restrain non-compliance, adversely affecting compliant employers • Insufficient incentive for deterring non-compliance	• None • No additional costs for businesses	• Sanctions are not sufficient for more serious breaches • Lack of flexibility for awarding proportionate penalties	• Regulated community is familiar with these level of penalties though there is some inconsistency in how they are applied	Does not address the issue that current sanctions do not provide a sufficient deterrent, especially against serious breaches of employment standards.
Option 1a – increasing sanctions Introduce criminal sanctions for 'serious breaches' of employment standards. The offence would be modelled on s351 of the *Immigration Act* with penalties of: • up to 7 years imprisonment • fine up to $100,000 These offences would be pursued through the main court system (not the Employment Court). Penalties for other breaches would remain as per the status quo.	✓✓✓ • Effectively deterring non-compliant behaviour promotes a level playing field for compliant employers. • Incentive considered sufficient to promote compliance.	××× • Considerable costs involved in building capability in the Labour Inspectorate to undertake criminal investigations. • Ongoing costs for conducting criminal investigations (eg in relation to collection of evidence, interview requirements, additional time). • Labour Inspectorate unlikely to be in a position to implement this option for 3-5 years as already undergoing significant capability building as operational model changes.	✓✓✓ • Penalties would be consistent with penalties for exploitation in the Immigration Act. • Penalties are proportionate for what is, in the most serious cases, essentially criminal behaviour.	×× • No case law on what is 'serious' means some uncertainty for regulated community. • This uncertainty more marked than Option 1b as it delineates criminal/civil boundary. • Complexities for the regulator working in a mixed civil/criminal regime • Case law on 'serious' will develop over time providing greater clarity and certainty	This option would adequately sanction serious breaches, and would bring employment legislation in line with penalties for exploitation in the Immigration Act. In addition, this had strong support as a 'high-level' option in the discussion document. However, the practical costs of implementing this recommendation outweigh these considerations. Ministry of Justice also raised concerns with this option around civil/criminal threshold. We also note that the amendments to the *Immigration Act* currently before Parliament will extend the criminal sanctions to all migrant workers and will introduce a penalty of deportation for migrant employers who have held residency for less than 10 years. As a result the group most frequently subject to exploitation will be covered by these severe penalties. This option could be reconsidered in 3-5 years' time. **Net outcome**: Costs of implementation, in particular for the Labour Inspectorate, combined with the complexities of delineating the civil/criminal boundary, outweigh benefits of effectiveness for this option, comparative to the recommended option, particularly as cost will delay implementation itself.
Option 1b – increasing sanctions Labour inspectors can apply direct to the Employment Court (the Court) for consideration of 'serious breaches' of employment standards. The Court would be able to make pecuniary penalty orders of up to $50,000 for an individual and the greater of $100,000 or three times the amount of financial gain for a body corporate and compensatory orders for loss or damage. Penalties for other breaches would remain as per the status quo.	✓✓✓ • Effectively deterring non-compliant behaviour promotes a level playing field for compliant employers. • Incentive considered sufficient to promote compliance.	× • Small increase in resources required to take case direct to the Court.	✓✓✓ • Financial penalty can be higher than level of fine for exploitation in Immigration Act, but no conviction or threat of imprisonment Appropriate that Court considers serious cases due to magnitude of potential penalty.	× • No case law on what is 'serious' means some uncertainty for regulated community • This uncertainty less marked that Option 1a as it only delineates different civil penalties Case law on 'serious' will develop over time providing greater clarity and certainty.	**Recommended Option** This option provides for significant penalties for serious breaches while avoiding the issues of the civil/criminal threshold and implementation risks of Option 1a. A judicial body is considered the appropriate place for consideration of cases that could result in significant financial penalties (in line with Law Commission guidelines on pecuniary penalties) and hearing 'serious' cases at the Court sends a strong message about the seriousness of these breaches. Also provides some consistency with recommendation below that the Court has discretion to make banning orders. **Net outcome:** Stronger penalties that are more proportionate to the harm caused are expected to improve compliance with only minor costs anticipated with this option, compared to other options. The option's effectiveness is contingent, to some extent, on receiving the increased funding sought; in particular this will affect labour inspectors' enforcement abilities.

Option	Criteria for assessment of options				Conclusions/net outcomes
	Critical Criteria		*Secondary Criteria*		
	Effectiveness	*Costs of implementation*	*Proportionality*	*Transparency and certainty*	
Option 1c – increasing sanctions Increase penalties at the Employment Relations Authority (ERA) to $50,000 for an individual and the greater of $100,000 or three times the amount of financial gain for a body corporate.	✓✓ • Lesser deterrent effect than Option 1b. • While max penalty is the same as Option 1b, ERA does not have the same authority as the Employment Court, weakening the deterrent effect, and historically is reluctant to award high penalties.	- No significant increase in costs over current levels.	✓✓ • Financial penalty can be higher than level of fine for exploitation in Immigration Act, but no conviction or threat of imprisonment. • Non-judicial tribunal not an appropriate body for considering cases that could result in significant penalties. • More scope in penalty award as amount linked to financial gain.	- • Would not require definition of 'serious' (this would be implied by increased maximum penalty). • Process the same as status quo.	A non-judicial body is not the appropriate place for consideration of cases that could result in significant financial penalties. This option also weakens the signal that serious breaches must be dealt with 'seriously'. **Net outcome:** Although there are no additional costs associated with this option, this option offers fewer benefits over both critical and secondary criteria, especially in terms of effectiveness in reducing non-compliance.
Option 2 - introduce criteria for consideration when awarding penalties There are currently no criteria in the legislation (other than whether the employer has been the subject of an improvement notice) leading to some inconsistency in penalty awards.	• Limited, though more consistency in penalty awards sends a more consistent message about different breaches of standards. This should slightly improve deterrent effect of penalties which, in turn, promotes a more level playing field for compliant employers.	• None.	• Criteria will lead to greater consistency in penalty awards.	• Criteria will lead to greater transparency and certainty in penalty awards. • More consistency in penalty awards sends a more consistent message about different breaches of standards. This should slightly improve deterrent effect of penalties.	**Recommended Option** This will lead to greater consistency and transparency in penalty awards and is recommended regardless of which of options 1a-c is agreed. **Net outcome:** No costs to this option and benefits of greater transparency and consistency in penalty awards expected to improve compliance compared with the status quo.
Ability of employees to seek penalties at the ERA **Status quo** – Employees can seek penalties for a number of breaches under the *Employment Relations Act* including some standards breaches (eg failure to keep wages and time records), and the ERA awards penalties for breaches of the *Wages Protection Act* relating to payment of premiums for employment. Labour inspectors can seek penalties for breaches of minimum entitlements.	• Does not achieve optimum deterrence (and therefore compliance) outcomes.	• No costs.	• Employment legislation relies on self-enforcement as well as the actions of the regulator. Employers can avoid penalties in actions brought by employees but not inspectors – and this becomes more significant as the Inspectorate targets its limited resources on more serious breaches.	• While it is clear for which breaches employees can seek penalties, there is some inconsistency given that they can seek penalties for some standards breaches and not others.	Enforcement outcomes remain dependent on who brings the case. While in other regimes it may be important that only the state can seek penalties (which are essentially punitive/deterrent in nature), the employment regime relies on self-enforcement and employees can already seek penalties in relation to other matters in the legislation.
Option 3 – expanding ability of employees to seek penalties at the ERA Permit employees to seek penalties for breaches of minimum entitlements under the *Minimum Wage Act, Holidays Act* and *Wages Protection Act.* [**Note**: penalties relating to records and employment agreement requirements are addressed below].	✓✓ • More non-compliant employers will face actions for penalties increasing deterrence which, in turn, promotes a more level playing field for compliant employers.	× • Minor costs. ERA will be asked to consider penalty awards in a greater number of cases.	✓✓✓ • Employers can face sanctions for all minimum entitlements breaches regardless of whether the case is brought by an inspector or an employee.	✓✓✓ • Will be clear that employees can seek penalties for all minimum entitlements breaches under the listed Acts.	**Recommended Option** This option will provide more consistent enforcement outcomes as penalty awards for minimum entitlement breaches will no longer be dependent on who takes the case. **Net outcome:** Expanding the scope of the Authority to award penalties is expected to improve deterrence and thus increase compliance, with only (very) minor costs associated with this option.

Option	Criteria for assessment of options				Conclusions/net outcomes
	Critical Criteria		*Secondary Criteria*		
	Effectiveness	*Costs of implementation*	*Proportionality*	*Transparency and certainty*	
Accountability of directors and other persons **Status Quo** – under s234 of the Employment Relations Act, labour inspectors can, in certain circumstances (and with the approval of the ERA), seek arrears relating to the minimum wage and holiday pay from certain individuals	• Holding individuals accountable promotes corporate compliance (making it fairer for compliant businesses) though effectiveness of the status quo is weak	• None	• Does not sufficiently hold persons other than the corporate employer to account • Does not cover some entitlements (eg under Wages Protection Act) • Legal threshold for finding of accountability is high • Inspectorate have found it difficult to use this provision at the ERA	• Regulated community are familiar with these provisions • Some uncertainty remains over ERA's application of threshold to permit cases to proceed	The status quo does not provide sufficient scope for holding persons knowingly involved in breaching employment standards accountable. Labour inspectors and Ministry solicitors also report that these provisions can be hard to use.
Option 4a – increasing accountability of directors and others Introduce accessorial liability for breaches of employment standards. Under these provisions, persons 'involved in a contravention' are taken to have contravened the provision.	✓✓✓ • Holding individuals accountable promotes corporate compliance (making it fairer for compliant businesses) • Strong deterrent against non-compliance.	✓✓ • Regulator will need to become familiar with new provisions, though costs minimal. • May lead to slight increase in appeals early on as new provisions are tested.	✓✓✓ • Persons who are knowingly involved in contraventions of the employment standards legislation should not be able to hide behind the corporate veil. • These provisions ensure that these persons can be held accountable in all cases (not just when the company has insufficient assets or is in receivership/liquidation).	✗✗ • Likely to be uncertainty early on as to who can be found to be an accessory and in what circumstances (though a provision in the *Employment Relations Act* relating to breaches of employment agreements has some similar language). • There is well established case law in NZ and Australia around the definitions used.	**Recommended Option** This option creates the broadest provisions for finding other persons (including other corporate entities) accountable when found to be knowingly involved in contraventions of employment standards. It will provide the maximum deterrent effect of the two options, leading to greater corporate compliance. **Net outcome:** The significant benefits of the effectiveness of the option in establishing a strong deterrent against non-compliance and promoting corporate compliance outweigh the anticipated minimal cost and any initial uncertainty the option may generate comparative to the status quo and option 4b.
Option 4b – increasing accountability of directors and others Expand s234 so that, when a company has insufficient assets or is in liquidation, directors and other individuals can be pursued in wider circumstances, including: • extending coverage to Wages Protection Act • extending coverage to penalty awards • amending the 'directed and authorised' legal threshold to the language in s134 of the Employment Relations Act.	✓✓ • Holding individuals accountable promotes corporate compliance (making it fairer for compliant businesses) • This option has a stronger deterrent than the status quo, but not as strong as Option 4a.	✓✓ • Regulator will need to become familiar with new provisions, though costs minimal. • May lead to slight increase in appeals early on as new provisions are tested.	✓✓ • Slightly broadens the scope of the current provisions but still limited to circumstances in which the company is unable to pay and limited, and limited in terms of who actions can be taken against.	✗ • Changes to the legal threshold that must be met for individual accountability are likely to create some uncertainty initially, though this is mitigated to some extent by using provisions familiar in the ER Act.	This option could lead to a small increase in compliance over the status quo, but would not achieve the potential gains of Option 4a (the recommended option). **Net outcome:** this option does not achieve as strong a deterrent as the recommended option, and therefore will not be as effective in achieving the desired outcome.

Option	Criteria for assessment of options				Conclusions/net outcomes
	Critical Criteria		*Secondary Criteria*		
	Effectiveness	*Costs of implementation*	*Proportionality*	*Transparency and certainty*	
Option 5 – introducing banning orders Permit the Court to award management banning orders in relation to the employment of employees for a maximum term of 10 years on application of a labour inspector: • if the person has been awarded a pecuniary penalty (dependent on ***Option 1b***) • if the person has been convicted of a criminal offence relating to a serious breach (dependent on ***Option 1a***) • If the person has been convicted under s351 of the Immigration Act • for persistent breaches of employment standards Introduce an offence of breaching a banning order, with penalties of: • up to 3 years imprisonment • fine up to $200,000	• Holding individuals accountable promotes corporate compliance (making it fairer for compliant businesses) and banning directors is the strongest intervention for preventing future non-compliance. • Encouraging compliance with banning orders through the offence ensures that these individuals do not engage in non-compliant activity and therefore protects compliant employers.	• Regulator will need to become familiar with new provisions, though costs minimal • May lead to slight increase in appeals early on as new provisions are tested • Minimal increase in costs for regulator or defendant for banning order based on pecuniary penalty order as substantive case/cases has/have already been heard • Costs associated with offence only incurred if banning order is breached	• This would only apply for serious or persistent breaches of employment standards and its main purpose is to protect labour market participants. • Offence necessary to encourage compliance with banning orders. • Though primarily protective, also serves a punitive/deterrent purpose, encouraging compliance.	• Some uncertainty depending on how Court applies 'persistent' (but this is common language in banning orders) and on how Court exercises its discretion. • Offence is clear.	**Recommended Option** Currently individuals who have breached employment standards in serious cases are able to continue to employ staff and potentially commit further breaches of employment standards. It is recommended that banning orders be introduced because those individuals found to have committed the most serious or persistent breaches of standards should be prevented from engaging in future non-compliance by removal from positions from which this could occur. This option does not ban them from running companies altogether. The breach is in relation to the employment of employees and so it is this activity that is prevented by this measure. It is necessary to have an offence of breaching a banning order. This is in line with similar provisions in other legislation. **Net outcome:** Though only likely to be used rarely (and therefore not having a large impact on compliance) the benefits of protecting other labour market participants and sanctioning the most egregious behaviour outweigh the minimal costs to the regulator and initial uncertainty with the Court's application of the provision.

Option	Criteria for assessment of options				Conclusions/net outcomes
	Critical Criteria		*Secondary Criteria*		
	Effectiveness	*Costs of implementation*	*Proportionality*	*Transparency and certainty*	
Improving the clarity and consistency of record keeping requirements					
Record keeping requirements **Status quo** – requirements remain spread across the legislation with no universal requirement to record hours worked for each day in a pay period and the pay for those hours.	• Limited impact, though inadequate record keeping requirements can result in lower levels of compliance.	• No costs.	• Current requirements do not ensure that compliance with minimum entitlements can be assessed in all circumstances.	• Some confusion arising from records spread out across the legislation. • Some inconsistency in record keeping requirements. • However, employers at least familiar with the current requirements.	Inconsistency and a lack of universality in requirements create confusion for employers and difficulties for the regulator in assessing compliance.
Option 6 – improving clarity and consistency of record keeping requirements Requirements are brought together in regulations and universal requirement to record hours worked each day in a pay period, and the pay for those hours, is introduced.	✓✓ • Improved record keeping will promote compliance which benefits all employers. • Improved investigation ability for labour inspectors will deter non-compliance and promote compliance.	× • Limited. May require clear communication as to expectations for employers. • Limited. May be some increase in compliance costs for some employers (though those that are already complying will already be recording this information).	✓✓ • Important that requirements ensure that compliance with minimum entitlements can be assessed in all circumstances.	✓✓ • Having records in one place will address inconsistencies. • Some complexity and confusion will remain as details depend on current legislative requirements.	**Recommended Option** These improvements to the current record keeping requirements are necessary to address current issues. They will reduce some confusion for employers and will ensure that compliance with minimum entitlements can be universally assessed. **Net outcome:** The overall benefits to effectiveness as well as transparency and certainty and proportionality outweigh the minor costs anticipated for a few employers in complying with the requirements for this option.
Providing the right incentives to keep records and employment agreements					
Keeping records and employment agreements **Status Quo** – employees can seek penalties for failure to keep wages and time records and inspectors can seek penalties for failure to keep holidays and leave records and signed copy of an individual employment agreement (IEA).	• Limited. Inadequate record keeping requirements can result in lower levels of compliance. • Current incentives not adequate to promote compliance with record and IEA keeping requirements.	• No costs.	• Current provisions are inadequate. It is important that employers keep records and IEAs as compliance is hard to assess without these.	• Current requirements are easily understood, though inconsistency about who can seek penalties could cause some confusion.	Breaches of record keeping and IEA requirements are among the most common employment standards breaches indicating that current legislative settings do not provide sufficient incentive to meet these requirements.
Option 7 –providing the right incentives to keep records and employment agreements Introduce infringement notices (INs)for clear-cut breaches of record keeping and employment agreement requirements, with a max penalty of $1,000 per breach and a cap at $20,000 in any one instance. Provide that both employees and inspectors can seek penalties for failure to keep records and IEAs.	✓✓ • Will increase incentives on employers to keep records and IEAs for all employees. • Improving compliance with these requirements should lead to some improvement with provision of minimum entitlements, making it fairer for all.	✓✓ • Inspectorate will need to develop operational policy around use of INs. • Some resource savings as matters not pursued at ERA. • Reduced costs for inspectors and employment institutions in determining compliance.	✓✓✓ • Having sufficient incentives on employers to keep records and IEAs is critical to the standards system as it improves the ability of employees and inspectors to determine compliance with minimum entitlements. • Infringement notices are a common tool in regulatory regimes. • Maximum cumulative amount of INs in any one instance will ensure that incentive remains strong but penalties are not excessive.	✓✓ • Infringement offences will be clearly defined. • Provides greater consistency as to who can seek penalties for these breaches.	**Recommended Option** Breaches of record keeping and IEA requirements are among the most common employment standards breaches and can be indicative of intentional non-compliance with minimum entitlements. Increasing the incentives on employers to keep accurate records and (where relevant) IEAs in respect of all employees will make it easier (and less time-consuming) for employees, inspectors and the employment institutions to be able to determine compliance with minimum entitlements. **Net outcome:** This option is expected to increase incentives on employers to keep records and employment agreements, improving compliance. It also offers reduced costs for government in dealing with non-compliance quickly and effectively. However, the success of this option will be partially dependent on the increased funding sought for the Labour Inspectorate.

Option	Criteria for assessment of options				Conclusions/net outcomes
	Critical Criteria		*Secondary Criteria*		
	Effectiveness	*Costs of implementation*	*Proportionality*	*Transparency and certainty*	
Extending the powers of labour inspectors to access information					
Requiring production of documents **Status Quo –** inspectors can only require employers to provide wages and time and holiday and leave records and document showing the remuneration of employees.	• Investigations can be hampered by limited ability to access information from employers, leading to poorer enforcement outcomes.	• No costs.	• Requirements do not deliver the outcome sought as these records do not necessarily provide adequate information for an investigation into an alleged breach of minimum entitlements.	• Listing the documents that can be sought provides transparency and certainty to employers.	Current provisions do not provide inspectors with sufficient information to determine compliance in many cases, especially when records are inadequate or non-existent.
Option 8a – requiring production of documents Empower inspectors to be able to require employers to produce any document or record if they have a reasonable belief that these will assist in determining whether a breach of employment standards has occurred.	✓✓ • Should lead to improvements in compliance through more effective investigation and enforcement; benefiting all employers and employees.	✓✓ • Limited. Additional information could require additional resource to analyse, but, conversely, could speed up investigations • May be some small increase in compliance costs for businesses providing extra documents to inspectors.	✓✓✓ • Requirements proportional to the expected gain • Having access to a wider range of documents and records will assist inspectors to assess compliance, especially when wages and time and holiday and leave records are incomplete.	✗✗ • Less transparency and certainty than the status quo and other option - what constitutes a 'reasonable belief' in these circumstances? • Documents requested could be different in differing circumstances.	**Recommended Option** This option broadens the range of documents labour inspectors can assess and will promote more effective and efficient investigations. This is balanced by the requirement that an inspector must have a reasonable belief that the documents or records requested will assist in determining whether or not a breach has occurred. **Net outcome:** The overall benefits to effectiveness (through improving the effectiveness of investigations into non-compliance) as well as proportionality outweigh the minor costs anticipated for a few employers in complying with the requirements for this option, and a potential lack of certainty about a labour inspector's "reasonable belief" regarding the need for the documents in each case. However, the success of this option will be partially dependent on the increased funding sought for the Labour Inspectorate.
Option 8b – requiring production of documents Empower inspectors to be able to require employers to produce certain additional document records, eg: • financial records • bank statements • PAYE records • current contracts for goods and/or services	✓ • A more inclusive list of documents will provide better outcomes for inspectors in their investigations. • Should lead to improvements in compliance through more effective investigation and enforcement benefiting all employers and employees.	✓✓ • Limited. Additional information could require additional resource to analyse, but, conversely, could speed up investigations. • May be a small increase in compliance costs for businesses providing extra documents to inspectors.	✓✓ • Requirements proportional to the expected gain • Having access to a wider range of documents and records will assist inspectors to assess compliance, especially when wages and time and holiday and leave records are incomplete However, this option still limits documents to a discrete list.	- • Listing the documents that can be sought provides transparency and certainty to employers.	**Net outcome:** This option would still provide a positive net outcome, but it will not be as effective as the recommended option, as this option lacks the flexibility for labour inspectors to respond to the specific circumstances of an investigation.

Option	Criteria for assessment of options				Conclusions/net outcomes
	Critical Criteria		*Secondary Criteria*		
	Effectiveness	*Costs of implementation*	*Proportionality*	*Transparency and certainty*	
Improving information sharing between labour inspectors and other regulators					
Information sharing between labour inspectors and other relevant agencies **Status Quo** – Labour inspectors can obtain information from others if disclosure is authorised under the exceptions to the Privacy Act's Information Privacy Principles (IPP), and others provide information to labour inspectors for the purpose of achieving better enforcement of employment legislation (if this is for the purpose for which the information was collected and the disclosure fits with one of the exceptions to IPP 11).	• Current approach does not support labour inspectors' effectiveness to promote compliance (in particular the inability of labour inspectors to share personal information outside of *Privacy Act* and to assist with improving government enforcement activities).	• Inefficient – current method of requesting information reliant on labour intensive process of ensuring information requested is done so under IPP. • Some compliance cost to business in that businesses currently deal with several agencies or regulators separately, and regulators are unable to pass information between each other.	• Some but not all of the necessary information is available – but most information is subject to *Privacy Act* principles and inspectors cannot share information that is not for a purpose specified in s233 of the Employment Relations Act. • Hinders Inspectorate's intelligence capacity to build risks profiles and target non-compliance. • Does not promote a joined up approach for enforcement across regulators (especially within the Ministry), ie regulators are unaware of each other's activities, leading to doubling up or other inefficiencies.	• No formal, clear process for information sharing within the Ministry, or between the Inspectorate and other regulators. • Inspectors not clear what information can be used and for what purposes (e.g. as evidence of breaches).	Significantly constrains ability of the Inspectorate to identify, investigate and enforce non-compliance with employment standards and contribute to improving government enforcement activities.

Option	Criteria for assessment of options				Conclusions/net outcomes
	Critical Criteria		*Secondary Criteria*		
	Effectiveness	*Costs of implementation*	*Proportionality*	*Transparency and certainty*	
Option 9a - support appropriate information sharing between labour inspectors and other relevant agencies for the purposes of identifying, investigating and enforcing non-compliance with employment standards and improving government enforcement activities Information sharing framework is put in place to enable labour inspectors and other relevant regulators to share information more widely for both enforcing employment standards and improving government enforcement activities: • Amending 233(5) of the *Employment Relations Act* – to allow for sharing of information both ways between labour inspectors and other regulators (subject to Privacy Act) • Initiating Approved Information Sharing Agreements (AISAs) – to provide (through regulation) specific exemptions from the Privacy Act's Information Privacy Principles for sharing of personal information • A series of Memoranda of Understanding (MOUs) to clarify routine and mainly entity level information sharing between labour inspectors and other regulators.	✓✓ • Improved compliance through labour inspectors sharing information to achieve better identification, investigation and enforcement of employment standards, and improving other regulators' enforcement activities.	✓ • Consequential amendment to *Tax Administration Act* required for sharing of entity level information. • Additional labour inspector intelligence capacity, and training of labour inspectors in new information sharing framework including mechanisms for requesting, sharing and using information as well as the handling and storing of information. • Less compliance cost to business in that businesses won't need to deal so much with several agencies or regulators separately, with regulators able to pass information between each other.	✓✓✓ • This information sharing framework would enable a proportionate package of measures that allow information to be shared between labour inspectors and other regulators with checks and balances for the use handling and storage of the information. • Augments Inspectorate's intelligence capacity to build risk profiles and target non-compliance. • Promotes a joined up approach for enforcement across regulators (especially within the Ministry) ie regulators aware of each other's activities, and able to work together to achieve better results, and avoid inefficiencies.	✓✓✓ • Formal and clear process for information sharing within the Ministry, or between the Inspectorate and other regulators. • Framework of information sharing outlined in legislation, and series of AISAs and MOUs provides clarity about what information can be used and for what purposes (eg as evidence of breaches or for intelligence gathering), and sets out how that information is to be used, stored and handled.	**Recommended Option** This framework for information sharing will enable a more efficient and joined up approach to information sharing between labour inspectors and other relevant regulators which will see, over time, a reduced cost to the regulator. This approach will assist an all of government approach to compliance activities, including investigations and operations. Compared with status quo and other option it offers more transparency and certainty about what information can be shared and with whom, and more flexibility, for example with approved information sharing agreements set up through regulation. Appropriate information sharing agreements will be essential to provide for systematic data-sharing in the future and to enable information collected by one part of the agency to be used by different parts of the agency for a cohesive and efficient approach to enforcing compliance **Net outcome:** Although there are some costs involved in achieving the outcomes, these are outweighed by the overall benefits of greater effectiveness in improving compliance together with improved transparency and a consistent and proportionate approach. However, the success of this option will be dependent on the increased funding sought for the Labour Inspectorate.

Option	Criteria for assessment of options				Conclusions/net outcomes
	Critical Criteria		*Secondary Criteria*		
	Effectiveness	*Costs of implementation*	*Proportionality*	*Transparency and certainty*	
Option 9b - support appropriate information sharing between labour inspectors and other relevant agencies for the purposes of identifying, investigating and enforcing non-compliance with employment standards and improving government enforcement activities • Retain the information sharing parameters under the primary legislation (s233(5) – see status quo). So, inspectors cannot routinely pass information on to other regulators unless it is for a purpose specified in s233(5) of the Employment Relations Act. • Initiate Approved Information Sharing Agreements (AISAs) – within parameters of s233(5), except that specified personal information can be shared. • A series of Memoranda of Understanding (MOUs) – within parameters of s233(5).	✓ Improved compliance through labour inspectors sharing information to achieve better identification, investigation and enforcement of employment standards.	× • Additional labour inspector intelligence capacity, and training of labour inspectors in new information sharing framework including mechanisms for requesting, sharing and using information as well as the handling and storing of information. • Appropriate information sharing agreements will be essential to provide for systematic data-sharing in the future and to enable information collected by one part of the agency to be used by different parts of the agency for a cohesive and efficient approach to enforcing compliance. • Reduced information sharing ability than recommended option will mean some continuing compliance costs to business in that businesses will continue to deal with several agencies or regulators separately, with regulators not able to pass routine information between each other.	✓ • More proportionate package of information sharing than status quo but less proportionate than preferred option with reduced ability to share information routinely with other regulators, except for through AISAs under the Privacy Act. • Goes some way to addressing Inspectorate's intelligence capacity – ie building risk profiles and target non-compliance. • Does not achieve as efficient a joined up approach for enforcement across regulators (especially within the Ministry). • Narrower ability to share information - under 233(5) provides a level of safeguard in relation to the exercise of coercive powers. • Checks and balances for the use, handling and storage of the information provided through AISAs and MOUs.	✓✓ • Formal process for information sharing within the Ministry, or between the Inspectorate and other regulators. • Framework of information sharing occurs through primary legislation, and regulations as well as MOUs (like recommended option). This provides clarity about what information can be used and for what purposes (eg as evidence of breaches or for intelligence gathering). The use, storage and handling of shared information is outlined through AISAs and MOUs.	The Ministry has function-specific datasets and ad hoc information sharing processes to support compliance activities across the range of its regulatory units. Only by introducing better data sharing can the Ministry take an agency-wide view of all compliance activities, including investigations and operations. Achieving each AISA will involve a rigorous process of defining and agreeing the specific purpose for each type of information to be shared, and putting in place the necessary means for sharing the information including safeguards for its use, handling, and storage. **Net outcome:** while this option provides benefits over the status quo, its overall effectiveness is less than the recommended option. This, together with the additional costs incurred, and this being a less proportionate option for dealing with information sharing, make it a less favourable option. Like the recommended option, the success of this option too will be dependent on the increased funding sought for the Labour Inspectorate.

Option	Criteria for assessment of options				Conclusions/net outcomes
	Critical Criteria		*Secondary Criteria*		
	Effectiveness	*Costs of implementation*	*Proportionality*	*Transparency and certainty*	
Improving the legislative settings and processes for dealing with breaches of employment standards					
Object of the Act and functions of labour inspectors **Status Quo** – object of the Employment Relations Act and functions of labour inspectors remain the same.	• n/a	• No costs.	• Current object and functions do not adequately reflect the need to provide for effective enforcement of employment standards and see breaches of employment standards as simply another employment relationship problem. • This does not recognise adequately recognise the ways in which these breaches are different, including their (potentially) wider impacts.	• Current functions of labour inspectors do not adequately reflect what they do in practice.	The status quo does not reflect the ways in which employment standards breaches are different from other employment relationship issues, sending a weak signal about the importance of effective enforcement of those standards.
Option 10 – object and functions Object of the Act and functions of labour inspectors amended to better reflect importance of enforcement of standards High-level functions of the Ministry as regulator introduced	✓ • Some potential for improvement with compliance given the greater clarity about the role of labour inspectors.	✓✓✓ • No costs.	✓✓✓ • These amendments would send an appropriate signal about the enforcement of employment standards. • They would also clarify where responsibility sits for key functions such as the provisions of advice, information and education.	✓✓✓ • Provides greater certainty and transparency about the role of labour inspectors.	**Recommended Option** These legislative changes are recommended to send a signal about the importance of effective enforcement of employment standards and the role of the Inspectorate in enforcing those standards. They also support the recommended changes to the role of mediation (Option 11c below) by removing the presumption that mediation is the primary dispute resolution for mechanism for breaches of employment standards. **Net outcome:** While this does not translate to a direct impact on effectiveness in terms of compliance, this option will signal the importance of effective enforcement of employment standards and provide greater certainty about the role of labour inspectors, with no costs for government or other parties.
The role of mediation in employment standards cases **Status Quo** – current presumption in favour of mediation remains along with current discretion for the ERA to consider not directing parties to mediation.	• Criteria relating to consideration of whether cases brought by labour inspectors should go to mediation are ineffective. • Does not result in appropriate enforcement outcomes in many cases leading to weaker deterrent signal for employment standards breaches, meaning compliant employers will not get the full benefits sought from 'levelling the playing field'.	• No costs.	• Mediation does not provide the enforcement outcomes sought in most cases of breaches of employment standards. • Mediation can also prolong the resolution process if cases end up back at the ERA. • Mediation is suitable for minor or inadvertent breaches that do not require sanction and can assist in clarifying the facts of a breach (though mediators have no investigative powers).	• It is clear that the majority of employment standards cases will go to mediation under the current settings.	Does not reflect that employment standards cases are different in many ways from employment relationship problems, i.e. they are breaches of a minimum set of standards set by Parliament (as opposed to contractual arrangements agreed by employers and employees) and they can have wider impacts than just on the employee, for example they can impact compliant employers and the wider economy.

Option	Criteria for assessment of options				Conclusions/net outcomes
	Critical Criteria		*Secondary Criteria*		
	Effectiveness	*Costs of implementation*	*Proportionality*	*Transparency and certainty*	
Option 11a – the role of mediation in employment standards cases ERA has no discretion to send employment standards cases to mediation.	✓ • Would lead to better enforcement outcomes in many standards cases (with the ensuing benefits for compliance employers).	✓ • Would result in an increase in the workload of the ERA. • These costs would be balanced in part by the proposal above for serious breaches to bypass the ERA and from savings as fewer cases go to mediation. • Cases that may have been better addressed by the lower-cost mechanism of mediation will result in higher costs at the ERA.	✓ • While the ERA is the appropriate place for addressing most breaches, this option does not take into account the range of breaches that may come before the ERA. • Mediation provides a low-cost and timely resolution process that is suitable when consistent with enforcement outcomes.	✓✓✓ • Clear that all standards cases will be addressed at the ERA. • However, as standards cases are often mixed up with other employment relationship issues, there may be some uncertainty about how these cases will be addressed.	This option is the other end of the spectrum from the status quo and again does not provide the scope to address standards cases appropriately. In this case, some cases (those for which mediation is appropriate) will end up being resolved in a more costly and prolonged way. **Net outcome:** Overall, this option does not offer the same level of effectiveness and has greater costs than the recommended option.
Option 11b – the role of mediation in employment standards cases ERA retains current discretion in relation to cases brought by employees, but has no discretion in relation to cases brought by labour inspectors.	✓✓ • Will improve enforcement outcomes to some extent but not as much as if all cases were addressed at the appropriate level.	✓✓ • Some increase in workload of ERA. • Inspectors take around 50 cases a year to the ERA which is small in relation to the total number of cases considered annually (approx. 1,200). • Some increased costs for employers as ERA more expensive than mediation.	✓✓ • As inspectors have a range of investigative powers and lower level enforcement tools, it is appropriate that when inspectors bring a case to the ERA seeking a sanction, they should only be directed to mediation in exceptional cases. • However, the system also relies on a degree of self-enforcement at the ERA and employees can also seek penalties in some cases (and it is recommended elsewhere in this package that this ability is enhanced) so this option may still result in cases being inappropriately directed to mediation.	✓✓✓ • Clear that the majority of cases brought by employees will be directed to mediation (as with the status quo) and that labour inspector cases will be addressed at the ERA.	**Net outcome:** This option resolves some of the issues of the option above, but still does not offer the same level of effectiveness as the recommended option as it may still result in some cases being inappropriately directed to mediation.
Option 11c – the role of mediation in employment standards cases New criteria are introduced that cases that are predominantly about employment standards breaches are only sent to mediation when they are: • minor and inadvertent, or • the facts of the case are unclear, or • both parties agree.	✓✓✓ • Improvement in compliance through greater enforcement outcomes through all cases being addressed at the appropriate level.	✓✓ • Avoids some unnecessary costs (eg that would arise through cases better addressed at mediation being addressed at the ERA). • Some increase in workload of ERA. • Some increased costs for employers as ERA more expensive than mediation.	✓✓✓ • This option assumes cases that are predominantly about standards breaches are addressed at the ERA except where mediation will be appropriate (i.e. for lower level breaches that do not require a penalty sanction). • It also seeks to retain some ERA discretion in other circumstances in which mediation may be useful.	✓✓ • Less clear to employers and employees as criteria provide guidance and discretion to the ERA and it may be uncertain how this discretion will be exercised in any individual case.	**Recommended Option** This option seeks to ensure that employment standards cases are addressed in the most appropriate way having regard to factors such as enforcement outcomes sought, cost and timeliness. **Net outcome:** The costs incurred by the option (and slightly lower level of certainty compared with options a and b) are offset by the increased benefits of effectiveness in improving compliance and proportionality with this option that will see standards breaches addressed at the ERA except where mediation will be appropriate.

Option	Criteria for assessment of options				Conclusions/net outcomes
	Critical Criteria		*Secondary Criteria*		
	Effectiveness	*Costs of implementation*	*Proportionality*	*Transparency and certainty*	
Minor additional recommendations to clarify/streamline enforcement of compliance at Employment Court					
Option 12 – improvements to seeking compliance at the Employment Court Compliance with ERA determinations etc can be enforced at the Employment Court which can award, among other things, a fine of up to $40,000. The following actions are recommended to clarify elements of this process: • Remove requirement that a compliance order is needed for orders, determinations etc of the ERA before the matter can be taken to the Court. (This is an unnecessary step and simply prolongs the process.) • Permit Crown to seek compliance with penalty awards at the Court. (It is currently not clear how the Crown can enforce a penalty awarded to it if it wasn't a party to the original proceedings.) • Provide that some portion of the fine awarded by the Court be paid to the aggrieved employee. (This would bring the fine in line with penalties and provide some recompense to the employee who by this time will have spent considerable time and resource seeking monies owed.) • Provide that the fine can be enforced as if it were a fine under the *Summary Proceedings Act 1957*. (While this happens in practice, the Ministry of Justice recommends that this be made explicit in the legislation.)	• Improved enforcement capability through Employment Court.	• Should save time in the process of seeking compliance at the Court.	• Provides more scope for the Court in relation to the fine.	• Clarification of a number of issues associated with seeking compliance at the Court.	**Recommended options** These changes are not significant, but are recommended as they clarify and streamline certain aspects of the process of seeking compliance with Authority determinations etc at the Employment Court. **Net outcome:** These improvements and clarifications offer greater certainty and timeliness relating to enforcement of compliance at the Employment Court.
Seeking monies owed under the Wages Protection Act **Status Quo** – while labour inspectors can seek monies owed to employees under other employment legislation, this is not the case for illegal deductions under the *Wages Protection Act*.	• Monies can be recovered by employees.	• No costs.	• Not consistent with other provisions permitting inspectors to recover monies owing as a result of minimum entitlement breaches. • Does not provide maximum scope for inspectors to seek monies owed.	• Current provisions are clear, but not consistent with other provisions permitting inspectors to recover monies owing as a result of minimum entitlement breaches.	Inconsistency in the legislation regarding who can seek monies owed resulting from minimum entitlements breaches remains.
Option 13 – seeking monies owed under the Wages Protection Act Provide that inspectors can seek monies owed as a result of illegal deductions under the *Wages Protection Act*.	✓✓✓ • Will improve compliance through enhanced recovery of monies owed under this Act.	✓✓ • Minor costs (if any).	✓✓✓ • Makes provisions relating to the recovery (by labour inspectors) of monies owed consistent. • Provides maximum scope for inspectors to seek monies owed resulting from breaches of minimum entitlements.	✓✓✓ • Provisions are clear and consistent.	**Recommended option** This recommendation addresses an inconsistency in the legislation regarding who can seek monies owed resulting from minimum entitlements breaches. **Net outcome:** This option is recommended because it generates benefits of effectiveness, proportionality, transparency and certainty and is anticipated to incur only minor, if any, costs. However, the success of this option will be partially dependent on the increased funding sought for the Labour Inspectorate.

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

54 The preferred package of options will be progressed along with the changes to parental leave (announced as part of Budget 2014) in an omnibus Employment Standards Bill. This Bill needs to be introduced by mid-2015, to achieve the 1 April 2016 implementation date for the parental leave changes. Subject to Cabinet's agreement, the change to the funding arrangements will be given effect as part of the Budget 2015 process.

55 The package will require amendments to a number of pieces of employment legislation, including the *Employment Relations Act*, and a consequential amendment to the *Tax Administration Act 1994* to provide for sharing of entity level information.

56 We consider that there is minimal risk to government in implementing the preferred package of options, with the greatest risk being that the changes do not have the desired effect on levels of non-compliance.

57 There is a specific risk that option 1b may undermine the amendments to the *Immigration Act* currently before Parliament. Option 1b seeks the introduction of increased sanctions for serious breaches of employment standards but does not apply criminal sanctions. The risk is that this could undermine the amendments to the *Immigration Act* (which extend criminal sanctions to all migrant workers and will introduce a penalty of deportation for non-compliant migrant employers who have held residency for less than 10 years), in that it is easier to seek more serious sanctions through a civil regime (with its lower standard of proof). We consider that this does not pose a significant risk as the priority of both Immigration New Zealand and the Labour Inspectorate is strong sanctions for exploitation, and if action is available under the *Immigration Act* this will be pursued. Therefore we consider that this is an operational matter to be determined between the Inspectorate and Immigration New Zealand.

58 The effectiveness of the package as a whole would be reduced if the system is not appropriately resourced. Specific concerns include:

a) inadequate provision of advice and information to employers and employees

b) insufficient resourcing of the Labour Inspectorate in Auckland to address the incidence and scale of the serious and systemic breaches seen there

c) a lack of ongoing support for the complaints triaging system in the Labour Service Centre.

59 Additional funding will be necessary for measures to support the package of reforms proposed in this RIS. This includes funding to improve the provision of information to employers and employees; boost the number of labour inspectors in Auckland; and support the existing triaging system within the Labour Service Centre on an ongoing basis.

60 s9(2)(f)(iv) of the Official Information Act 1982

61 Without this additional funding and appropriate levels of funding for the effective performance of the existing functions within the employment standards system, the Ministry would have to reduce key services to employers and employees and there would be more limited enforcement of standards. This would affect services for employers and employees seeking support either through mediation or the Service Centre. In particular the effectiveness of options 9 (relating to information sharing) and 11 (relating to the role of mediation) would be compromised. In addition, it is likely to exacerbate current concerns that there are not sufficient labour inspectors to address the increasing number of significant and intentional breaches of standards being seen in New Zealand, particularly in the Auckland region.

62 There is also some risk in terms of how the reforms are seen by businesses and a comprehensive information campaign will be developed in time to support the implementation of the changes. This will provide clear messages about the changes, and timing of these, and in particular what these will require of employers. We do not foresee that the changes will directly affect employers who are complying with employment standards (most employers) and this will be emphasised in the information campaign.

63 The information campaign will directly address the areas for which we anticipate some concern from employers in terms of their understanding of what the changes mean for them. This concern could affect the effectiveness of the package and in particular: accessory provisions, the role of mediation and the tightened requirement for record keeping.

D. Impacts of preferred package

Impacts on business and employers

64 The package is overall a benefit for employers by promoting a more level playing field. It acknowledges that the ability to maintain compliance with employment standards is becoming more important as the labour market operates in an increasingly competitive global environment, and that this is a growing concern for employers, employees and government.

65 The package aims to address the concerns many New Zealand employers have that employers who do not comply with employment standards have an unfair competitive advantage over compliant employers, with reduced labour and compliance costs. This non-compliance constrains the growth of compliant businesses and can detrimentally affect New Zealand's international reputation.

66 Specific benefits for employers are: better provision of information, advice and education about rights and obligations regarding employment standards to assist employers to comply, the provision of proportionate sanctions to deter serious and systemic non-compliance, and clarity and consistency for record keeping requirements. The ability for labour inspectors to share relevant information with other regulators may mean less compliance costs for businesses in providing information to various parts of government. These benefits are contingent on receiving the increased funding sought to improve the provision of information to employers and employees and to enable stronger enforcement by the Labour Inspectorate.

67 There may be some minimal compliance costs for some businesses with record keeping but the main impact will be for non-compliant employers.

68 More cases being taken to the Employment Relations Authority and Employment Court may result in additional costs for employers in some cases. However, this may be offset in some instances by more timely dealing with breaches through the Authority and Court, and the avoidance of cases bouncing around the system and a quicker resolution.

Impacts on employees

69 The package is of overall benefit to employees, with no significant negative impacts identified. Increased levels of compliance with employment standards will mean more employees receive their entitlements.

70 While the package is of benefit to all employees, the benefits are most likely to be experienced first-hand by vulnerable groups of employees who have been more at risk of not receiving their minimum entitlements. These groups include: migrant workers, temporary workers (in particular casual or seasonal workers) and those with shorter job tenure, labourers, young people and older workers, Māori, Pasifika, women, part-time employees, those working in rural areas and those with lower qualifications, and workers in agriculture, forestry and fishing; accommodation and food services; administrative and support services; arts and recreation services; and the retail trade.

71 The package is expected to result in fairer and more productive employment relationships with improved productivity across the economy, including better standards and income for workers.

72 Better information provision means that employees will be more aware of entitlements and the process through which non-compliance is dealt with, and with standards effectively understood and enforced, it is expected that incentives will be created for employers to enhance employment practices. However, these benefits are contingent on receiving the increased funding sought.

73 Stronger and more proportionate sanctions will ensure better redress for victims of employment standards breaches and provide a sufficient deterrent to prevent breaches occurring.

74 A more streamlined and efficient system of identifying and investigating breaches will be of benefit to employees; with the enhanced ability of labour inspectors to target non-compliant activity, and for cases able to be dealt with more swiftly and effectively.

75 However, the reduced role of mediation could mean that for some individual employees there may be greater costs in having a case go through the Court or to the Authority, rather than through mediation. This is offset by the need for a more responsive system overall that deals with employment standards breaches appropriately, delivering greater benefits for all employees in dealing with employment standards breaches in this way.

Wider impacts

76 The preferred package of options to strengthen the enforcement of employment standards will result in a stronger, more efficient and more sustainable regulatory system with flow on benefits for all New Zealand businesses, employees and the wider economy due to the reduction in levels of non-compliance.

77 The package promotes fair and productive employment relationships that will lead to improved productivity across the economy (and better standards and income for workers). This will be evidenced by a more even playing field for business with compliant employers no longer being undercut by the anti-competitive behaviour of non-compliant employers and it will enhance New Zealand's international reputation as a place to work and do business.

78 Better provision of information to employers and employees on rights and obligations and improved processes for identifying and dealing with breaches of employment standards will mean a more streamlined and efficient regulatory system. However, these benefits depend on receiving the increased funding sought.

79 The package will increase public confidence that the outcomes of employment will be better than being on a benefit.

80 There may be an increased workload for the Employment Relations Authority with more employment standards cases being dealt with through the Authority rather than progressing to mediation. However, there is limited data on which to base an estimate of this increase as the database does not single out employment standards cases. Any increase will be balanced in part by the proposal to remove serious breaches to the Employment Court. There would also be a reduction in the number of cases going to mediation.

E. Consultation

81 As noted above, a discussion document, *Playing by the Rules,* was developed for public consultation on a range of options to improve compliance with, and strengthen the enforcement of, employment standards.

82 The following government agencies were consulted on the discussion document *Playing by the Rules*: the State Services Commission, the Department of Prime Minister and Cabinet, The Treasury, the Ministries of Social Development, Education, Pacific Island Affairs, Justice, the Ministry for Women, Te Puni Kōkiri, the Inland Revenue Department and the Department of Internal Affairs.

83 The public consultation on the discussion document ran for six weeks, closing on 23 July 2014. There were 84 submissions received in response to the *Playing by the Rules* discussion document from a range of individuals and organisations representing both employees and employers.

84 Following the public consultation, a more detailed options analysis was undertaken in consultation with key stakeholders and relevant government agencies, resulting in this RIS. As a result of this analysis, some options discussed in *Playing by the Rules* were not progressed. These include:

a) criminal sanctions for serious breaches (refer to options analysis table)

b) extending the powers of labour inspectors to access information, eg through obtaining search warrants – this might be appropriate if criminal sanctions had been introduced but is not necessary for a civil regime

c) extending the powers of labour inspectors to make binding determinations, eg in relation to employment status – this is a complex matter and there is no obvious gain from this option. Inspectors often have to make these kinds of determinations informally in the course of their investigations (to determine if entitlements are owing) and this can be challenged at the Employment Relations Authority

d) permitting mediators to raise concerns about serious breaches of employment standards – submitters were very concerned that this would damage the integrity of mediation. Also, the proposals for restricting standards cases going to mediation will reduce the likelihood that more serious cases will end up there

e) fast-tracking minor breaches through a separate system or process so that ‘small claims’ can be dealt with quickly and easily – this would be costly to implement and the issue is best remedied by ensuring that breaches are addressed appropriately within the system.

85 The following agencies were consulted on the Cabinet paper *Strengthening enforcement of employment standards* and this RIS: the State Services Commission, the Treasury, the Ministries of Social Development, Education, Pacific Island Affairs, Justice, the Ministry for Women, Te Puni Kōkiri, Inland Revenue, the Department of Corrections and the Department of Internal Affairs. The Department of Prime Minister and Cabinet has been informed about the Cabinet paper. Business New Zealand, the New Zealand Council of Trade Unions, the Office of the Privacy Commissioner, the Employment Relations Authority and the Employment Court have also been consulted in the development of the Cabinet paper.

F. Monitoring, Evaluation and Review

86 Labour Inspectorate and Service Centre activities, as well as follow up survey and research data, will be utilised to determine the effectiveness of the policy changes to strengthen the enforcement of employment standards.

Labour Inspectorate and Service Centre

87 The Labour Inspectorate aims to focus the majority of its compliance activity on instances of serious exploitation, non-compliant business models, and systemic breaches of minimum employment standards. This is assisted by the Service Centre providing education and self-guided resolution and by triaging incoming contacts to ensure that low level complaints are dealt with by the Service Centre (at least initially) rather than by the Inspectorate.

88 The Labour Inspectorate's two key outcomes are:

a) employers who exploit their workers or operate non-compliant business models and gain an unfair competitive advantage are found out and prosecuted; and

b) workers receive their entitlements.

89 A monitoring and evaluation framework is applied to the Labour Inspectorate's outcomes and this is assessed against four key impacts:

a) effective enforcement of employment standards;

b) public have confidence in the regulatory system;

c) employers understand their obligations; and

d) people know about labour standards.

90 The framework has a range of impact measures; including, the time to complete investigations, the percentage of serious investigations, use of the media and whether follow up audits demonstrate compliance has been maintained. These measures will be expanded to accommodate additional powers afforded to labour inspectors under the proposed package to strengthen the enforcement of employment standards. Key indicators will be incorporated into the performance metrics regularly reviewed by senior managers and the Minister.

Survey and research data

91 Data from Statistics New Zealand's planned 2017 Survey of Working Life (SoWL) will be used to monitor whether there has been a decrease since 2012 in the proportion of employees (17%) who not receiving one of the minimum employment standards surveyed.

92 Another data source of monitoring compliance with minimum standards is the Ministry's annual National Survey of Employers (NSE) which includes a question on whether the business has employment agreement for all employees. The 2013/14 NSE found that 89 per cent of employers said they had written employment agreements for all employees. We would expect to see an increase in or maintenance of this proportion in results from future NSEs.

93 Statistics New Zealand's annual Income Survey, like the SoWL, also provides data on average hourly earnings. This data source can be used to estimate the proportion of employees aged 20 years and over who were earning less than the adult minimum wage.