



COVERSHEET

Minister	Hon Brooke van Velden	Portfolio	Workplace Relations and Safety
Title of Cabinet paper	Providing greater certainty for contracting parties	Date to be published	14 October 2024

List of documents that have been proactively released		
Date	Title	Author
September 2024	Providing greater certainty for contracting parties	Office of the Minister for Workplace Relations and Safety
28 August 2024	Providing Greater Certainty for Contracting Parties ECO-24-MIN-0179 Minute	Cabinet Office
15 August 2024	Regulatory Impact Statement: Contractors – Providing greater certainty for contracting parties	MBIE
11 July 2024	Briefing: Contractors – Options for an exclusion that gives more weight to intent	MBIE
7 June 2024	Briefing: Initial analysis of Proposal to put more weight on 'intention' when assessing employment status	MBIE
13 May 2024	Aide Memoire: Meeting with Freightways on 16 May 2024	MBIE
29 April 2024	Aide Memoire: Meeting with Uber on 1 May 2024	MBIE
19 April 2024	Briefing: Scope of policy work on the contractor/employee boundary	MBIE
27 March 2024	Aide Memoire: Meeting with NZ Post on 28 March 2024	MBIE
19 December 2023	Briefing: Issues related to the definition of employee	MBIE

Information redacted

YES

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Some information has been withheld for the reasons of privacy of natural persons, confidential advice to Government, international relations, information subject to an obligation of confidence, free and frank expression of opinion and legal professional privilege.

Restricted

Office of the Minister for Workplace Relations and Safety
Cabinet Economic Policy Committee

Providing greater certainty for contracting parties

Proposal

- 1 I propose to create a new exclusion from the statutory test of employment in section 6 of the *Employment Relations Act 2000* (the Act), in order to give more weight to the intention of contracting parties.

Relation to Government priorities

- 2 The commitment to give greater weight to the intention of contracting parties is part of the ACT – National Coalition Agreement.
- 3 The proposal in this paper relates to the Coalition Government’s Q3 Action Plan to take Cabinet decisions on legislative amendments to clarify the employment status of contractors.

Executive Summary

- 4 Workers can be hired on contracts *of service* (employment) or contracts *for services* (contracting). When a worker challenges their employment status under section 6 of the Act, the Employment Relations Authority (ERA) and Employment Court (EC) use a series of tests developed under common law to determine whether that worker is an employee or a contractor.
- 5 There are several issues with the ability for the courts to determine a worker’s employment status, under current settings. First, in some cases, it may undermine the freedom to contract, by limiting the beneficial terms and conditions that businesses might offer contractors. Second, it has become increasingly difficult to understand how these tests apply to innovative business models such as platform work. And it increases uncertainty for businesses because it means that even if both parties knowingly and fully intended on entering into a contracting relationship, the worker can still challenge their employment status at a later stage.
- 6 There are opportunities to improve the law and regulatory practice about the classification of workers as employees or contractors which could improve conditions for some contractors, reduce risk for firms, and help ensure firms compete on quality, price and productivity.¹
- 7 Uncertainty about worker status is a world-wide issue, due in part to the rise of the gig economy. Many countries have introduced laws that could make

¹ New Zealand Productivity Commission (2020) <https://www.treasury.govt.nz/sites/default/files/2024-05/pc-inq-tcfw-final-report-technological-change-and-the-future-of-work.pdf>

contracting more difficult and/or less attractive for businesses. New Zealand businesses are looking for more regulatory certainty. Policy changes have the potential to either enable businesses to innovate and experiment with new business models that would involve contractors, or constrain choices.

8 I want to increase business confidence and ensure sufficient weight is given to the intentions of parties when entering a contract. I seek Cabinet’s agreement to create an exclusion from the statutory test of “employee” in section 6 of the Act for contracting arrangements that meet certain specified criteria.

9 I have presented two options for how to meet the Coalition Agreement, depending on Cabinet’s appetite for enabling a significant shift in labour market settings, where not all impacts can be predicted from the outset. I believe the first option will be effective in covering some, but possibly not all, genuine contracting relationships. International relations.

10 Legal professional privilege and International Relations.
International relations.

Background

11 The predominant way of engaging workers in New Zealand is on contracts of service (employment) but contracts for services (contracting) are also used. About 82 percent (2.4 million) of workers are employees² and approximately five percent (165,500) are self-employed contractors³. Employment

² StatsNZ Household Labour Force Survey, 2023 Q4.

³ Figure taken from Household Labour Force Survey, 2018. Assuming the proportion had not changed, this is equivalent to around 165,500 people as at the December 2023 quarter.

relationships are governed by employment law⁴, while contractual relationships are governed by contract, commercial and competition laws.⁵

- 12 Contracting arrangements can be beneficial to businesses where there is a temporary need for workers (eg for a specific project), or to obtain specialist skills. Contracting may be suitable for tasks requiring less managerial control than employment and can provide greater flexibility for both parties.
- 13 Contractors accept the risks and benefits of being in business on their own account. In accepting these risks, contractors may be able to profit in a way employees cannot, for example by profiting from cost savings and efficiencies in their business. Contractors can have greater flexibility than employees, with more control over when they work, what work they do, or the ability to refuse work or take on multiple jobs.
- 14 Contracting arrangements can be particularly useful for people who cannot commit to standard hours like students, or parents with young children. Contracting can be a stopgap between roles, or a way to re-enter the job market, or to allow time to establish their own personal business on the side of ongoing contracts.
- 15 From an economic perspective, enabling flexibility in working arrangements can increase productivity and in some cases income for workers, by allocating resources more effectively and increasing output per hour worked. It can also improve income smoothing by expanding opportunities for short-term work.
- 16 Statistics suggest most contractors are happy being in a contracting relationship.
 - Almost 80 percent said they had a lot of control over how their work was organised and how their tasks were done; and
 - 90 percent said they were satisfied or very satisfied with their jobs and that they would prefer to continue being self-employed rather than have a paid job working for someone else.⁶

Challenging employment status

- 17 When a worker challenges their employment status under section 6 of the Act, the ERA and EC use the following series of tests developed under common law to determine whether a worker is an employee or a contractor.

⁴ Employees' rights include the right to: a written employment agreement; be paid at least the minimum wage; rest and meal breaks; various types of leave; the right to join a union which can bargain collectively; a specialised employment dispute resolution system. An employer has the benefit of being able to control work, and the ability to have the worker perform a wide range of tasks that are integral to the business. Parties to an employment relationship have a broad range of obligations to deal with each other in good faith and an implied duty of trust and confidence.

⁵ These laws include the *Fair Trading Act 1986*, *Commerce Act 1986* and *Contract and Commercial Law Act 2017*.

⁶ StatsNZ (2019) <https://www.stats.govt.nz/news/one-in-20-employed-new-zealanders-are-contractors/>

- 17.1 The intention test: the type of relationship that the parties to the contract intended, and can normally be worked out from the wording in parties' written agreement (if there is one).
 - 17.2 The control vs independence test: the greater the control exercised over the worker's work content, hours, and methods, the more likely it is that a person is an employee.
 - 17.3 The integration test: this looks at whether the work performed by a person is fundamental to the employer's business.
 - 17.4 The fundamental/economic reality test: this looks at whether the contractor is a person in business on their own account.
- 18 If workers hired as contractors believe their relationship is one of employment, they can ask the ERA or EC to determine the matter. This process imposes additional costs on hiring businesses, even if they genuinely believed the worker to be a contractor. These costs include those associated with defending the claim, and if the worker is found to be an employee, the need to retrospectively meet minimum employment standards, like annual and sick leave and paid public holidays.
- 19 Although employment status cases are treated on a case-by-case basis, if a worker is found to be a contractor in one sector or for one occupation, this can rapidly increase uncertainty for similar businesses who hire these types of workers.
- 20 There were an average of 17 ERA and EC employment status cases per year in the eight years from 2016 to 2024. From 1 January 2016 to 31 May 2024 there were 46 awards finalised where the worker was found to be an employee, with the business facing an average total award of \$21,400 each, along with any ongoing costs of employment. In the four years from 2019/20 to 2022/23, the Ministry of Business, Innovation and Employment (MBIE) provided mediation services to between 143 and 156 employment status disputes per annum.
- 21 This is likely to understate the true number of status disputes, as data is not collected on how many cases are settled outside dispute resolution services, or where an issue is not pursued.
- 22 While the small number of challenges are costly to both workers and businesses, the broader cost is the uncertainty that a potential challenge creates, which may have the negative effects on businesses, for example:
- 22.1 Businesses not offering terms and conditions that would benefit workers, but are similar to those of employment, in order to prevent those conditions being interpreted as an indication that the relationship is an employment relationship (eg sick leave or parental leave).
 - 22.2 Businesses being conservative and entering employment relationships even when a contract for service would be more appropriate, because

they want to avoid the possibility of challenge. Alternatively, businesses may defer hiring decisions.

- 22.3 Reduced labour market flexibility for firms that rely on hiring contractors for their business model. Some may decide not to proceed with innovative business models where the work has some of the characteristics of employment, and some of the characteristics of contracts for services because of the risk of challenge (and the costs associated with that), and the uncertainty that their intention will be upheld by the ERA and EC.

Other countries have introduced policies to address the employee/contractor boundary, increasing uncertainty for business

- 23 Other countries have introduced policy changes, or are contemplating changes, that are likely to increase the costs of adopting a contractor business model.
- 24 Changes to Australia's *Fair Work Act 2009* will come into effect in August 2024, creating minimum standards for 'employee-like' workers performing digital platform work⁷ and road transport industry contractors, enabling the Fair Work Commission to set minimum standards, resolve disputes, register collective agreements and deal with unfair deactivation and termination of a contract.
- 25 The United Kingdom has a separate 'worker' category, which sits between employees and contractors. A worker is an individual who agrees to personally carry out work under a contract, without running a business on their own. Digital platform drivers, for example, are ruled to be 'workers'. Workers are entitled to national minimum wage, holiday pay, whistleblowing and protection against discrimination, and a written statement of employment particulars, but cannot take an unfair dismissal claim.
- 26 The policy solution I propose should make it easier for businesses to offer employee-like benefits to contractors, without mandating it. In contrast to other countries, this would make it easier to adopt certain productivity-enhancing business models in New Zealand. In turn, achieving greater productivity growth could help increase incomes for workers and lower prices for consumers.

Explicitly excluding certain situations as from the 'employee test' will create greater certainty for contracting parties, and protect freedom to contract

- 27 I seek Cabinet approval to establish an 'exclusion' from the statutory test of "employee" in section 6 of the Act for contracting arrangements that meet a specified set of criteria. An exclusion would mean that contracting arrangements which meet the criteria would be classified as a contractor, without the need to apply the full test set out at paragraph 17.

⁷ Platform Work describes work that is mediated through digital platforms or online marketplaces.

- 28 This Cabinet paper sets out two options for achieving this:
- 28.1 Option One includes a set of criteria that is intended to provide a straightforward test for a subset of contracting arrangements that have characteristics indicative of a genuine contracting relationship. If Option One is agreed to, drafting instructions can be issued to the Parliamentary Counsel Office.
- 28.2 Confidential Advice [REDACTED]
- 29 While freedom to contract is an important principle, it is also important that workers understand at the outset what they are signing up to. I believe this can be addressed by allowing the worker the time to obtain legal or financial advice to understand the written agreement, so they are not expected to sign it immediately.
- 30 I propose that under both options, the business be required to give the worker a reasonable opportunity to seek advice on the written agreement. The business would need to meet this process requirement if they were to rely on the exclusion. This condition would apply to both options I propose.

Option One: A set of exclusion criteria that will apply to a subset of contracting arrangements

- 31 If a hiring business meets the criteria listed in Table 1 below, they would meet the exclusion from section 6 of the Act:

Table 1: Intended effect of the exclusion criteria for Option One

Criteria	Intended effect
<p>Intent criterion Have a written agreement with the worker that specifies they are an independent contractor rather than an employee.</p>	<p>Many challenges to employment status are in situations where there is no written agreement to begin with. Requiring a written agreement that specifies the intended nature of the relationship (that it is not one of employment) helps ensure both parties understand the nature of the arrangement they are agreeing to and provides evidence of agreed intent.</p>
<p>Restriction criterion⁸ Does not restrict the worker from working for another business (including competitors), except</p>	<p>This criterion supports freedom of contracting by ensuring the worker is free to decide who to perform tasks/provide services for, including being able to work for competitors (there can still be requirements in relation to the confidentiality of information).⁹</p>

⁸ Whether the hiring business meets the restriction, availability and termination criteria would be based on both what is in the written agreement and what occurs in practice.

⁹ This does not mean the business must restrict the worker from performing tasks for another business when they are performing tasks for them, but that they can restrict this (where appropriate) and still comply with this criterion.

<p>while they are completing paid work for the hirer.</p>	
<p>Availability criterion Does not require the worker to be available to work on specific times of day or days, or for a minimum number of hours. OR The worker can sub-contract the work.</p>	<p>This criterion protects the worker’s freedom to decide when they perform the work. This is an important distinguishing control element between employment relationships and contracting arrangements. If the contract requires the worker to perform the task on a specified day, even if they have some flexibility on what time of day they do it, it would not meet this criterion.</p> <p>If a contract does require the worker to be available, but the worker is able to sub-contract the work, then they would meet this criterion. The ability to sub-contract is intended to distinguish between employee relationships and contracting arrangements, as indirect relationships are often a characteristic of contracting arrangements (in contrast to the direct relationship in employment). It is likely that some businesses may want to allow sub-contracting, while still having assurance that the sub-contractor meets certain requirements (eg for health and safety¹⁰). I intend to enable a limited ability for the hiring party to approve sub-contracting, where appropriate.</p> <p>Having the ability to meet one of two options for this criterion allows for a broader range of contracting arrangements to access the exclusion.</p>
<p>Termination criterion The hiring business does not terminate the contract if the worker chooses not to accept an additional specific task or engagement offered (beyond what they have already agreed to do under the existing contract).</p>	<p>This criterion supports freedom of contracting by ensuring the worker is free to decide whether a particular task would be profitable for them to perform.</p>

The exclusion creates greater certainty for businesses and workers, reducing the potential for drawn-out challenges

32 This option is consistent with a recommendation from the Productivity Commission, which was that “The Government should update the legal tests for employee status. The updated tests should focus on the fundamental nature of the work relationship – the extent of employer control, worker autonomy and choice, and the extent of lock-in to a specific firm. Whether work is “fundamental” or “supplementary” to a firm’s business should not be part of the legal test.¹¹

¹⁰ Section 36 of the *Health and Safety at Work Act 2015* creates a primary duty of care to ensure health and safety for persons conducting a business or undertaking, which includes contractors.

¹¹ New Zealand Productivity Commission (2020). <https://www.treasury.govt.nz/sites/default/files/2024-05/pc-inq-tcfw-final-report-technological-change-and-the-future-of-work.pdf>.

- 33 I expect that in the medium-term, actual or potential employment status challenges will be reduced through this exclusion, and some challenges that do occur should be faster and less costly to resolve.
- 34 For businesses that have contracting arrangements that reflect the exclusion criteria, the smaller set of factors that could be considered if a worker challenged their status, including the greater weight given to intention, provides greater certainty that the intent for the worker to be an independent contractor would be upheld.
- 35 For arrangements that do not meet the criteria, the ERA or EC would still be able to apply the existing 'real nature of the relationship test' in section 6 of the Act, to determine whether the worker met the test for employee status.

The Option One exclusion is likely to cover digital platform workers and some courier driver models

- 36 Examples of working arrangements that may fall under the Option One exclusion include:
- A contractor working for a platform-based food delivery company, who can choose when they are available for work and which jobs they accept, and accept work from other companies that provide a similar service.
 - A courier driver who can sub-contract their run to a driver approved by the courier company (eg to meet health and safety, and other regulations), for example when going on holiday.
 - A plumber who has relationships with a number of construction companies and accepts jobs from those companies that fit their schedule. Once they have accepted a job, they agree to complete the work by a specific day.
- 37 Examples of working relationships that would not be covered under Option One **Confidential Advice** include situations where the worker must perform the task on a certain day (even if they can choose the time of day they complete a task), and where sub-contracting might be inappropriate (for example situations that require rigorous worker vetting, specialist knowledge, or have confidentiality requirements).

The Option One exclusion may apply to casual employees

- 38 Just over four percent of employees in New Zealand are casual employees.¹² The flexibility of casual relationships is similar to that of contracting arrangements, therefore the exclusion may be used in some situations where workers are currently engaged as casual employees. For example, someone employed as a casual kitchenhand with varying shift frequency, who has no

¹² StatsNZ Household Labour Force Survey, March 2024.

expectation of further shifts and is not required to make themselves available for work.

- 39 This test would not impact existing casual employment agreements, which would continue to operate as normal. It is possible that over time, some businesses may choose to amend their business models and hire workers on contracts for services rather than casual employment agreements. This would depend on what worker model best meets their business requirements.
- 40 For some workers, there may be little difference, particularly if the pay rate compensates them for the employment-related entitlements they had received and for the administrative costs of dealing with their own tax, ACC levies and potential liabilities. I acknowledge that for other workers, they may struggle with the requirements of running their own business, particularly if the contract does not adequately compensate or provide reward for the costs associated with contracting.

Confidential Advice

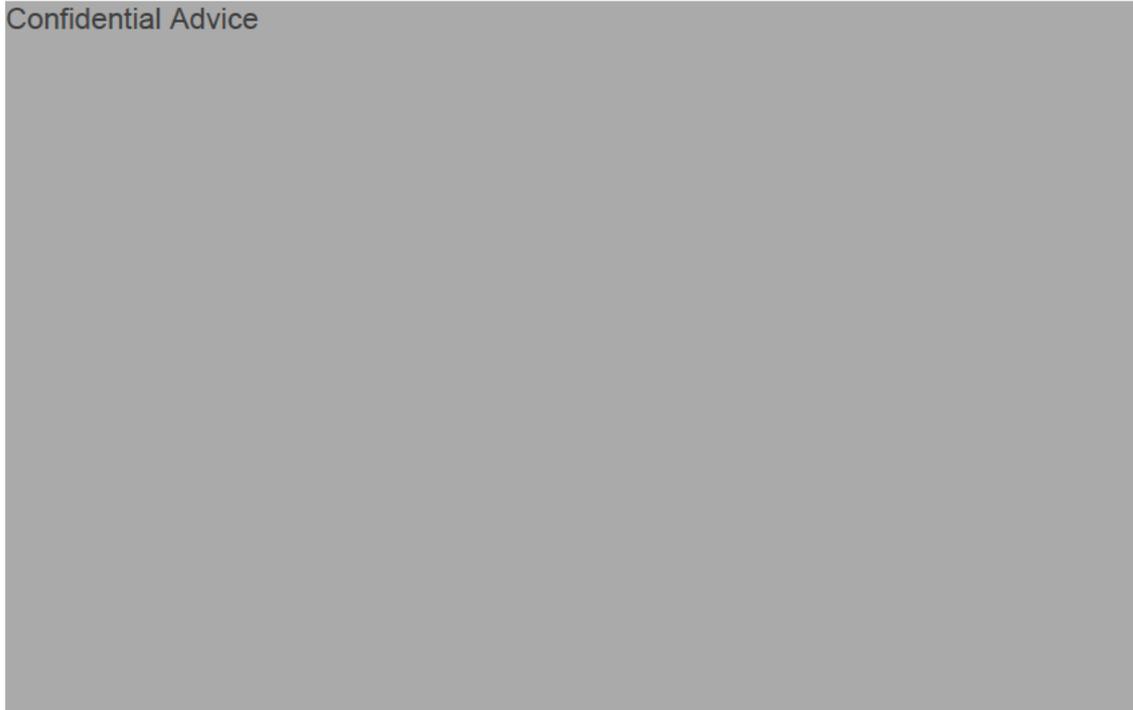


Confidential Advice



Confidential Advice

50



51 Confidential Advice



Cost-of-living Implications

52 There are no direct cost-of-living implications associated with the options.

Financial Implications

53 There are no financial implications associated with Option One, but depending
Confidential Advice



54 Option One is not expected to have any significant tax implications. Some businesses may decide to undertake more contracting arrangements if they consider they can meet the exclusion. If an employee becomes a contractor, they will have to register with Inland Revenue and pay their own tax.

55 Confidential Advice



56 Current IRD guidance to assess a person's tax status is based on the existing common law test. IRD officials will consult MBIE on any transitional issues

and guidance needed relating to the assessment of tax status if the proposals in this paper are agreed.

Legislative Implications

- 57 Legislation will be required to amend the Act to include the new exclusion.
- 58 **Confidential Advice**
[REDACTED]
[REDACTED]. Clarifying the employment status of contractors is a part of the National – ACT New Zealand Coalition Agreement.
- 59 If Option One is agreed to, I propose to issue drafting instructions for this change to be included in the Employment Relations Amendment Bill.
- 60 The Employment Relations Amendment Bill (which will also include amendments to other areas) would not change the position on whether the Act binds the Crown.

Impact Analysis

Regulatory Impact Statement

- 61 A Regulatory Impact Statement (RIS) has been completed and is attached. MBIE has internally peer reviewed the RIS and it partially meets the quality assurance criteria.

Climate Implications of Policy Assessment

- 62 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

Population Implications

- 63 There is very limited data about population groups involved in contracting arrangements. Some groups, including Māori, Pacific people, women and disabled people and tāngata whaikaha Māori have greater representation in lower paid work and some may also struggle to gain traditional employment. The impacts of the policy are likely to be mixed. It could have negative impacts for workers if it lowered incomes further, or positive impacts if it enabled more job opportunities.

Human Rights

- 64 Section 27(1) of the *New Zealand Bill of Rights Act 1990* (NZBORA) affirms that a person has the right to observance of the principles of natural justice, where a tribunal or authority is determining their rights, obligations, or interests. A worker can continue to be heard under the proposal in relation to decisions about whether they are an employee, therefore the risk of the proposal creating a significant natural justice issue appears to be low.

- 65 The Employment Relations Amendment Bill will be assessed by the Ministry of Justice for consistency with NZBORA before introduction.

International Obligations

International relations.



Legal professional privilege and International Relations.



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Free and frank.



Consultation

- 75 The following departments were consulted: Department of the Prime Minister and Cabinet, Ministry of Disabled People, Ministry of Education, Ministry for Ethnic Communities, Ministry of Foreign Affairs and Trade, Ministry of Health, Inland Revenue, Ministry of Justice, Ministry for Pacific Peoples, Ministry for Regulation, Te Kawa Mataaho Public Service Commission, Te Puni Kōkiri, the Treasury, and Ministry for Women.
- 76 MBIE officials undertook targeted consultation (including with hiring businesses, unions, employment law practitioners) on a specific proposal which shares some of the criteria in Option One. There was a general view that the exclusion criteria should include elements that are clearly associated with contracting and not employment situations in order to avoid impacting unintended groups.

Communications

- 77 The Government has publicly committed to giving greater weight to contracting parties' intention as part of the National – ACT New Zealand Coalition Agreement.
- 78 I intend to make an announcement confirming Cabinet decisions were taken on legislative amendments to give greater weight to contracting parties' intention, which is one of the Government's Q3 commitments.

Proactive Release

- 79 This paper will be proactively released (subject to redactions in line with the *Official Information Act 1982*) within 30 business days of final Cabinet decisions.

Recommendations

The Minister for Workplace Relations and Safety recommends that the Committee:

- 1 **note** that challenges by workers who are contractors, to test their employment status, create costs for workers and businesses, discourage potential business models, disincentivise businesses from offering jobs and benefits to workers, create business uncertainty, and disincentivise investment;
- 2 **note** the ACT – National Coalition Agreement commits to give greater weight to the intention of contracting parties and that the Coalition Government's Q3 Action Plan includes an action to take Cabinet decisions on legislative amendments to clarify the employment status of contractors;
- 3 **agree:**

EITHER OPTION ONE

- 3.1 that an exclusion from the test in section 6 of the *Employment Relations Act 2000* be created with the following criteria:
 - 3.1.1 there is a written agreement that specifies the worker is an independent contractor; and
 - 3.1.2 the worker is not restricted from working for others; and
 - 3.1.3 the worker is
 - 3.1.3.1 not required to be available to work certain times, days or for a minimum period; or
 - 3.1.3.2 able to sub-contract the work; and
 - 3.1.4 the business does not terminate the agreement for not accepting an additional task;

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6 Confidential Advice



If you agree to Option One

- 7 **agree** that the hiring business be required to give the worker a reasonable opportunity to seek advice on the written agreement;
- 8 **agree** that the policy changes be given effect through the Employment Relations Amendment Bill, Confidential Advice
- 9 **invite** the Minister for Workplace Relations and Safety to issue drafting instructions to the Parliamentary Counsel Office;
- 10 **authorise** the Minister for Workplace Relations and Safety to make decisions, consistent with the policy in this paper, on any issues that arise during the Parliamentary process, including any transitional provisions;

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Authorised for lodgement

Hon Brooke van Velden
Minister for Workplace Relations and Safety

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