



# Updated Regulatory Impact Statement: Providing greater certainty for contracting parties

Decision sought	Updated analysis produced in relation to the gateway test criteria for contractors to inform Cabinet decisions
Agency responsible	Ministry of Business, Innovation and Employment
Proposing Ministers	Minister for Workplace Relations and Safety
Date finalised	1 October 2025

In response to feedback from select committee submitters on the scope of arrangements that fall within the gateway test, the Minister intends to implement the following targeted amendments to improve the certainty and slightly expand the scope of the test:

- Amend the intention criterion to require there is a written agreement that specifies that the worker is an either independent contractor or is not an employee [*Intention criterion change 1*].
- Amend the restriction criterion to specify that contracting someone to work the equivalent of full-time hours does not in itself constitute a restriction on working for others [*Restriction criterion change 1*].
- Amend subcontracting criterion to allow the hiring business to require:
  - A vet of a subcontractor to ensure that they have particular qualifications, where it is reasonable to require those qualifications given the nature of the work; and/or
  - A criminal record check, to ensure the subcontractor does not have any relevant convictions, where justified by the nature of the role [*Subcontracting criterion change 1*].

## Summary: Problem definition and options

This document provides updated analysis to ‘Regulatory Impact Statement: Contractors – Providing greater certainty for contracting parties’ (the original RIS)<sup>1</sup>. This was provided by the Ministry of Business, Innovation and Employment (MBIE) on 15 August 2024, to support a Cabinet decision on 2 September 2024 to amend the definition of ‘employee’ in the Employment Relations Act 2000 (the Act) to exclude a ‘specified contractor’ from the test of employment, if the arrangement meets the specified criteria (this is referred to as the ‘gateway test’). The gateway test will be incorporated into the Act via the *Employment Relations Amendment Bill* (the Bill)<sup>2</sup>, which is currently at the Select Committee stage, and has received approximately 3,645 submissions.

<sup>1</sup> Available online at [Regulatory Impact Statement: Contractors - Providing greater certainty for contracting parties](#)

<sup>2</sup> [Employment Relations Amendment Bill 175-1 \(2025\), Government Bill – New Zealand Legislation](#)

The intent of the gateway test is to provide a straightforward employment status test for a subset of clear-cut genuine contracting arrangements. It consists of four key criteria: *intention, restriction, availability or subcontracting*, and *termination*. The hiring business must also ensure that the worker has the opportunity seek independent advice before entering the arrangement.

***What is the new policy problem?***

Several substantial submissions from organisations expressed concern that the criteria in the gateway were too rigid, meaning the gateway test would not be accessible for certain types of genuine contracting arrangements (e.g. *taxis or rideshares that must operate at certain peak-hours, or office-based workers who must work business hours to complete specific projects*). If these contracting arrangements fail the gateway test, they will be subject to the current section 6 test of employment status (from the Employment Relations Act 2000). Submitters expressed concern that the current section 6 test brings uncertainty to businesses and would instead prefer to be covered by the gateway test.

The Government wants to explore options to amend the gateway test criteria to clarify and potentially widen the scope of arrangements that fall within the test, without undermining the test's intent.

**What is the policy objective?**

The policy objective remains the same as described in the original RIS: “*to ensure parties to a contract for services have their original intentions upheld, while minimising risks of exploitation.*”

**What policy options have been considered, including any alternatives to regulation?**

As the Bill is at Select Committee, and the Minister for Workplace Relations and Safety has commissioned us to only consider options that widen access to the gateway test while ensuring they do not undermine the effectiveness of the criteria as markers of clear-cut contracting arrangements, this has limited the options considered.

For logical coherence, we have compiled two sets of option sets (or packages) together. The first consists of targeted amendments to improve clarity; the second consists of amendments that would substantially broaden the criteria of the test to capture more arrangements. Both build on ‘option 5’ from the original RIS (*the option Cabinet chose, therefore the status quo*) as they contain the same set of criteria, therefore are named as options ‘5A’ and ‘5B’, consisting of:

- **Option 5A** – Targeted amendments to restriction, intention and sub-contracting criteria to improve the certainty while only slightly expanding the scope of arrangements that meet the test

Intention criterion (change 1)	Restriction criterion (change 1)	Subcontracting criterion (change 1)
Amend to require a written agreement that specifies that the worker is an either independent contractor <u>or is not an employee</u> (rather	Amend to specify that contracting someone to work the equivalent of full-time hours does not in itself constitute a	Amend to allow the hiring business to require: <ul style="list-style-type: none"><li>• A vet of a subcontractor to ensure that they have particular qualifications, where it is reasonable to require those qualifications</li></ul>

than requiring it to specify the worker is an independent contractor).	restriction on working for others.	given the nature of the work; and/or <ul style="list-style-type: none"> <li>• A criminal record check, to ensure the subcontractor does not have any relevant convictions, where justified by the nature of the role.</li> </ul>
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• **Option 5B** – Includes all the changes from option package 5A, plus three other amendments to the restriction, availability and subcontracting criteria, which would substantially increase the scope of arrangements that could access to the gateway test:

Availability criterion (change 1)	Restriction criterion (change 2)	Subcontracting criterion (change 2)
Amend to allow scheduling if it is necessary for the delivery of the work and is reasonably expected to cover less than a quarter of the work performed by the independent contractor.	Amend to allow a restriction on working for others where there is a genuine reason, based on reasonable grounds, that it is necessary to protect commercially sensitive information or intellectual property rights, or to prevent a conflict of interest.	Amend to allow the business to vet a subcontractor to ensure they meet any requirements to which the primary contractor is subject, where these are justified. This could include vetting to require the sub-contractor to have a specified amount of experience or particular skills (that are not covered by a qualification).

**What consultation has been undertaken?**  
 Approximately 3,647 select committee submissions have been received on the Bill, of which approximately 624 submissions commented on gateway test. Several submissions were substantive in nature, which have informed the policy options in this document.

Before the Bill was introduced, targeted consultation on a draft of the current gateway test criteria (without the subcontracting criterion) was undertaken in the policy development process, which had input from employer representatives, unions, academics and other technical experts.

**Is the preferred option in the Cabinet paper the same as preferred option in the RIS?**  
 MBIE's preferred option, as per the existing RIS, is not to introduce the gateway test. In terms of the proposed amendments to the gateway test, the Minister's amendments to the gateway test in the Cabinet paper are the same as the amendments contained in MBIE's preferred option (5A).

## Summary: Minister's preferred option in the Cabinet paper

### Costs (Core information)

Outline the key monetised and non-monetised costs, where those costs fall (e.g. what people or organisations, or environments), and the nature of those impacts (e.g. direct or indirect)

Minor increase in the risk that some current employment models may be captured by the gateway test, with workers losing access to the full section 6 test (from the Employment Relations Act 2000). However, we don't anticipate that the impact will be significant, so we consider the impact rating stays at '*medium*'.

Businesses will have to meet costs of providing written agreements. There will be less compliance costs for businesses whose written agreements currently specify the worker is not an employee.

### **Benefits (Core information)**

**Outline the key monetised and non-monetised benefits, where those benefits fall (e.g. what people or organisations, or environments), and the nature of those impacts (e.g. direct or indirect)**

Slight increase in business models that meet the gateway test, which will provide businesses with these models slightly more confidence of a contractor's status. However, we don't anticipate that the impact will be significant, so we consider the impact rating stays at '*medium*'.

### **Balance of benefits and costs (Core information)**

**Does the RIS indicate that the benefits of the Minister's preferred option are likely to outweigh the costs?**

Based on the qualitative evidence available, for the Minister's preferred approach, the marginal benefits for businesses that use contracting arrangements are expected to outweigh the minor incremental risks of worker misclassification and exploitation. We expect that the overall impacts of the Minister's preferred option will be marginal compared to the status quo.

### **Implementation**

**How will the proposal be implemented, who will implement it, and what are the risks?**

The changes will need to be implemented during the select committee stage of the Bill. They will be noted in the Bill's Departmental Report and incorporated into the Revised-Track version of the Bill, which will be reported back by the Committee by 24 December 2025.

MBIE is responsible for administering the Act and providing information and guidance for businesses, unions and employees through its website, contact centre and other customer services on an ongoing basis. Information provision and updates to website content would be undertaken within MBIE's existing baseline funding.

### **Limitations and Constraints on Analysis**

**Outline all significant limitations and constraints e.g. lack of data, other forms of evidence, constraint on the range of options considered, lack of time or freedom to consult**

The analysis here was constrained by the following factors:

- *Data limitations* - There is very limited data available about contractors in New Zealand. The primary data source is the '*Survey of working life*' conducted by StatsNZ between October and December 2018<sup>3</sup>, which indicated that approximately five percent of New Zealand workers are independent contractors. This assumption was used in the original RIS and in this updated RIS.

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<sup>3</sup> [One in 20 employed New Zealanders are contractors](#); Survey of working life StatsNZ, 1 July 2019, conducted between October and December 2018.

- *Timeframe for analysis* – Due to limited time to support Cabinet decisions before the Bill’s Departmental Report is due to the Committee, this updated RIS has not been able to explore how to overcome the constraints (e.g. data) that were present in the original RIS.
- *Options considered in the original RIS* – The options analysed in this RIS cover potential amendments to the existing criteria of the gateway test. These options do not go so far as to introduce new criteria or remove existing criteria, to ensure that it sits within the spectrum of options analysed in the original RIS.
- *Ministerial commissioning* – The Minister agreed to only consider options to amend the gateway test criteria that would increase the scope of arrangements covered, while mitigating the risk of undermining the effectiveness of the test as a marker of clear-cut contracting arrangements. Options that would be clearly inconsistent with the intent of these criteria were not included.

**I have read the Regulatory Impact Statement and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the preferred option.**

**Responsible Manager(s) signature:**



**Beth Goodwin**  
**Manager, Employment Relations Policy**  
**1 October 2025**

### Quality Assurance Statement

**Reviewing Agency:** Ministry of Business, Innovation and Employment

**QA rating:** Partially meets

**Panel Comment:**

A quality assurance panel from MBIE reviewed the Regulatory Impact Statement (RIS) prepared by MBIE’s Employment Relations Policy team, titled ‘*Providing greater certainty for contracting parties*’, on 25 September 2025.

The Panel considers that the information and impact analysis summarised in the RIS partially meets the Quality Assurance criteria. The Panel considers that the RIS partially meets the requirements for completeness due to a lack of an evidence base underpinning the policy proposals. This limitation was signalled in the previous RIS assessment, and we consider the information sufficient to enable decisions on the current proposals

## Section 1: Diagnosing the policy problem

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### What is the context behind the policy problem and how is the status quo expected to develop?

The Government is legislating an exclusion from the definition of “employee”, to better clarify the distinction between an employee and a contractor

1. On 28 August 2024, the Cabinet Economic Policy Committee (ECO) agreed to implement a 'gateway' test that introduces an exclusion from the definition of "employee" in section 6 of the *Employment Relations Act 2000* (the Act) [ECO-24-MIN-0179 refers]. This change was agreed as part of the ACT – National Coalition Agreement, to give greater weight to the intention of contracting parties to an agreement.
2. The gateway test, alongside several other changes, has been included in the *Employment Relations Amendment Bill* (the Bill).<sup>4</sup> The Bill intends to improve labour market flexibility and reduce compliance cost for businesses. The gateway test is a critical part for achieving these aims. The Bill was introduced to Parliament on 17 June 2025 and is currently under consideration by Select Committee, with a report-back scheduled for 24 December.

The gateway test intends to provide clarity for a subset of clear-cut contracting relationships

3. The gateway test excludes a ‘specified contractor’ from the test of employment, if the arrangement meets the specified criteria.
4. The intent of the gateway test is to provide increased certainty for employers using contracting arrangements, by giving greater weight to the intention of contracting parties via a straightforward test that applies to a subset of clear-cut contracting arrangements. Relationships between workers and businesses that meet the gateway test will not be considered to be an employment relationship. It is intended that the gateway test will support greater organisational productivity by enabling businesses to use their resources more efficiently, including by innovating and experimenting with new business models involving contractors.
5. All the criteria for the gateway test must be met for a worker (person A) to be classified as a ‘specified contractor’ when engaged in a contract for service with the hiring business (person B). These criteria are set out below:

*A specified contractor means a natural person (person A) who has entered into an arrangement to perform work for another person (person B), and*

- a. **[Intention criterion]** – the arrangement includes a written agreement that specifies that person A is an independent contractor; and
- b. **[Restriction criterion]** - person A is not restricted from performing work for any other person, except while performing work for person B; and
- c. either:

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<sup>4</sup> <https://www.legislation.govt.nz/bill/government/2025/0175/latest/whole.html>

- i. **[Availability criterion]** - person A is not required to perform, or be available to perform, work for person B at a specified time or on a specified day or for a minimum period; or
- or
- ii. **[Subcontracting criterion]** - person A is allowed to sub-contract the work for person B to another person (who may be required to undergo vetting by person B to ensure compliance with any relevant statutory requirements before being sub-contracted by person A); and
- d. **[Termination criterion]** - the arrangement does not terminate if person A declines any work offered to them by person B that is additional to the work that person A agreed to perform under the arrangement; and
- e. **[Process requirement]** - person A had a reasonable opportunity to seek independent advice before entering into the arrangement.

MBIE recommended not implementing the gateway test and retaining the status quo

6. MBIE provided the Regulatory Impact Statement (RIS) titled '*Regulatory Impact Statement: Contractors – Providing greater certainty for contracting parties*' (the original RIS) to support Cabinet's above decision on the gateway test.
7. The original RIS addressed the uncertainty faced by businesses when hiring contractors, who can challenge their employment status (via the existing '*real nature of relationship*' test in section 6 of the Act) through the Employment Relations Authority (The Authority) or the Employment Court (the Court). This ability is intended to allow workers, who may have been misclassified as contractors, to challenge their employment status. However, this creates legal and financial uncertainty for hiring businesses that use genuine contracting arrangements as part of their business model.
8. The original RIS evaluated six options (against the status quo) to increase certainty by giving greater weight to the intent of contracting parties but ultimately recommended retaining the status quo (i.e. no gateway test or exclusion from the section 6 employee test). It concluded that the risks of misclassification and reduced worker protections, particularly for casual employees, outweighed the potential benefits of increased certainty for employers.

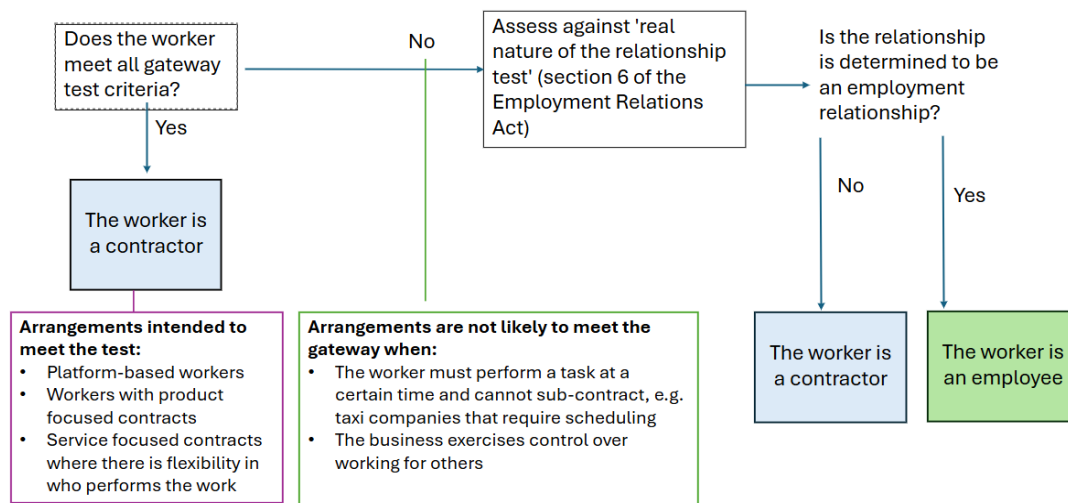
How we expect the regulatory landscape to evolve with the gateway test

9. It is expected that arrangements such as platform-based models, product-focused contracts (i.e. the worker must provide a product by a specified date but has flexibility in when they do work), and some service-focused contracts that have flexibility in who performs the work, will meet the gateway test (noting that this will be case specific).
10. For the businesses that have contracting arrangements that reflect the gateway test criteria, which are simpler than to the section 6 test factors, this provides the business more certainty that if a worker were to challenge their status, the intent for the worker to be a contractor would be upheld. Over time, some businesses may amend their arrangements to comply with the gateway test to benefit from this increased certainty.
11. For other business models involving contractual arrangements, the current section 6 test will continue to determine whether their arrangement is an employment relationship or



not. Figure one below demonstrates how the gateway test criteria will operate alongside the current section 6 test.

**Figure one - How the gateway test would work with the current section 6 employee test**



MBIE is providing updated analysis to support additional changes to the gateway test to improve certainty for employers

12. For the Bill's select committee hearings, the Minister for Workplace Relations and Safety (the Minister) specifically sought views on whether the gateway test criteria were workable and covered a variety of genuine contracting relationships.<sup>5</sup>
13. Following submitter feedback on the gateway test, the Minister wished to explore whether the gateway test criteria could be amended to ensure it covered a variety of genuine contracting relationships without undermining its ability to prevent workers being exploited.

### What consultation has been undertaken?

14. Public consultation on the gateway test was conducted through select committee submissions on the Bill, receiving approximately 3,647 responses.<sup>6</sup> Of these, around 624 submitters commented the gateway test. 31 submitters (5 percent), consisting primarily of employers and employer representatives, expressed general support for the gateway test. The remaining 593 submitters (95 percent), consisting mainly of individuals, unions, legal organisations, and not-for-profit organisations, were opposed to the gateway test.

### Reasons for support and opposition

15. Submitters who opposed the gateway test did so because they believed it lacked adequate worker protections (488 submitters, approximate) and some also believed that would not provide the promised certainty (113 submitters, approximate). They also feared it could enable worker misclassification, increased exploitation, and a loss of entitlements. Concerns were also raised about potential promotion of insecure work, especially affecting vulnerable groups such as Māori, Pacific women, disabled people,

<sup>5</sup> [Employment Relations Amendment Bill passes first reading | Beehive.govt.nz](https://www.beehive.govt.nz/news/employment-relations-amendment-bill-passes-first-reading)

<sup>6</sup> In total there were 3,680 submissions on the Bill; 35 of these were duplicates, blank, or unrelated to the Bill. These figures are pending final confirmation from the Select Committee.



migrant and platform workers, and neurodivergent individuals. Additional objections included worries that the test could undermine existing legal tests and restrict the Court's ability to assess employment relationships accurately.

16. Among those who broadly supported the gateway test, the main reason was increased certainty in classifying arrangements (15 submitters, approximate), followed by greater flexibility for modern business models (14 submitters, approximate).

#### Suggested changes to clarify and/or broaden the gateway test criteria

17. 11 submitters who were broadly supportive of the gateway test suggested amending it to ensure it covered a wider range of contracting arrangements (i.e. said the gateway test was '*too narrow – needs changes*'). Some suggestions noted that the drafting of the gateway test would not provide sufficient certainty that modern contracting arrangements would be covered (particularly platform work) or cover contracting work that involved scheduling (e.g. *taxi companies from the Small Passenger Association were concerned that the gateway test prevented scheduling of contractors during peak hours*). Others outlined how 'traditional' contracting arrangements included practices that would not meet the gateway test. Submitters proposed a range of changes to address these concerns, some of which are considered below.

### What is the policy problem or opportunity?

#### Rationale and objectives for the gateway test

18. Currently, hiring businesses face uncertainty and potential unforeseen costs when engaging contractors, due to the ability of workers to challenge their employment status under section 6 of the Act. This uncertainty can deter businesses from offering contract work, providing better terms to contractors, or pursuing certain business models.
19. The gateway test was proposed to provide greater certainty for businesses to pursue innovative business models involving contractual arrangements. As set out in the original RIS, the policy opportunity that the gateway test addressed was to provide greater certainty to hiring businesses who hire workers as contractors<sup>7</sup> while *not increasing the risk that workers are misclassified*.<sup>8</sup>

#### There is an opportunity to ensure that the gateway test is fit-for-purpose

20. As noted above, some submitters argued that the current gateway test criteria were too rigid and could inadvertently exclude legitimate contractor relationships, highlighting contracting models which were not platform-based (e.g. courier and taxi work).
21. The changes explored in this updated RIS aim to provide improved clarity of what the criteria require, and explore to what extent the gateway test could be expanded to include new arrangements without increasing the risk that workers are misclassified.

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<sup>7</sup> This objective is intended to reduce the 'grey area' between an employee and contractor; address situations where contractors are incentivised to challenge their status (e.g. to access dispute resolution mechanisms and/or minimum entitlements, which are only available to employees); and prevent contractual relationships shifting over time to something more akin to an employment relationship.

<sup>8</sup> This objective is intended to minimise the risk of businesses misclassifying workers in relationships with employment-like features as contractors, to reduce business costs and risks.

### What objectives are sought in relation to the policy problem?

22. The objectives for the policy problem remain the same as those outlined in the original RIS. The options examined here are designed to further support the gateway test in addressing its primary objective, which is “to ensure parties to a contract for services have their original intentions upheld, while minimising risks of exploitation.”

## Section 2: Assessing options to address the policy problem

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### What criteria will be used to compare options to the status quo?

23. As with the objective, the criteria used to assess the options to change the gateway test criteria are consistent with those used in the original RIS. These are:
- a. effectiveness of ensuring parties to a contract for services have their original intentions upheld by placing greater weight on intention;
  - b. effectiveness of minimising risks of exploitation;
  - c. workability, implementation, cost or other considerations; and
  - d. consistency with international obligations.

### What scope will options be considered within?

24. The option scope has been constrained by the following factors:
- a. **Only considering variations of options considered in the original RIS** – The options cover potential amendments *to the existing criteria* of the gateway test which increase the scope of arrangements covered by it. These options do not go so far as to introducing new criteria or removing the existing criteria, therefore sit within the spectrum of options analysed in the original RIS.
  - b. **Ministerial commissioning** – The Minister agreed to only consider options to amend the gateway test criteria that increase the scope of arrangements covered by the criteria, while also mitigating the risk of undermining the effectiveness of the criteria to be markers of clear-cut contracting arrangements. Options that would be clearly inconsistent with the intent of these criteria were not included. This includes options that aligned with submitter suggestions to narrow the gateway test criteria and/or add additional worker protections.

### What options are being considered?

25. Due to the above constraints, all the options considered are variations of option 5 from the original RIS. They can be considered as variations rather than stand-alone since they all retain the subcontracting and availability criteria, which were the defining feature of the ‘option 5’ gateway test criteria.
26. For logical coherence, and to effectively demonstrate the choices and impacts around the options we have presented the choices as two option sets, each containing amendments to multiple criteria, which achieve different outcomes.

## Status quo/Option Five from the existing RIS – No substantive amendments to the current gateway test criteria

27. Under this option, the gateway test will progress as currently drafted with technical amendments that do not expand the current criteria.<sup>9</sup>

## Option 5A – Targeted amendments to improve the certainty of the gateway test

28. This option consists of the following three changes to the intention, restriction, and subcontracting criteria, which are intended to improve the certainty of the gateway test while only marginally increasing amount arrangements that could access the test:

Option 5A		
Intention criterion (change 1)	Restriction criterion (change 1)	Subcontracting criterion (change 1)
Amend to require a written agreement that specifies that the worker is an either independent contractor <u>or is not an employee</u> (rather than requiring it to specify the worker is an independent contractor).	Amend to specify that contracting someone to work the equivalent of full-time hours does not in itself constitute a restriction on working for others.	Amend to allow the hiring business to require: <ul style="list-style-type: none"> <li>A vet of a subcontractor to ensure that they have particular qualifications, where it is reasonable to require those qualifications given the nature of the work; and/or</li> <li>A criminal record check, to ensure the subcontractor does not have any relevant convictions, where justified by the nature of the role.</li> </ul>

## Option 5B – Substantive amendments to increase access to the gateway test

29. This option includes all the changes from Option 5A plus the following three changes to the restriction, availability and subcontracting criteria, which are designed to increase the scope of contracting arrangements that can access the gateway test:

Option 5B		
Availability criterion (change 1)	Restriction criterion (change 2)	Subcontracting criterion (change 2)
Amend to allow scheduling if it is necessary for the delivery of the work and is reasonably expected to cover less than a quarter of the work performed by the independent contractor.	Amend to allow a restriction on working for others where there is a genuine reason, based on reasonable grounds, that it is necessary to protect commercially sensitive information or intellectual property rights, or to prevent a conflict of interest.	Amend to allow the business to vet a subcontractor to ensure they meet any requirements to which the primary contractor is subject, where these are necessary. This could include vetting to require the sub-contractor to have a specified amount of experience or particular skills (that are not covered by a qualification).

<sup>9</sup> These will be identified as part of the development of the Departmental Report. We are already aware that at least one technical change is required to the drafting to ensure that platform arrangements are covered in the gateway test criteria, which was intended in the policy intent and current drafting.

How do the options compare to the status quo/counterfactual?

Decision criteria	Status quo	Option 5A – Targeted amendments to improve the certainty of the gateway test	Option 5B – Substantive amendments to increase access to the gateway test
<b>Effectiveness of ensuring parties to a contract for services have their original intentions upheld by placing greater weight on intention</b>	0 Clear emphasis on intent as the current criteria are simple and place few limitations on the freedom of contract from perspective of contractor.	<div>+</div> Provides the ability for contracting arrangements that do not characterise the worker as an ‘independent contractor’ to be able to comply with the intention criterion (by being able to specify that the worker is ‘not an employee’ instead).  Makes the restriction criterion more certain as it removes the risk that contracts containing full time equivalent work do not meet the restriction criteria.  Slightly expands the hiring business’s right of veto over a contractor’s choice of subcontractor, for limited reasons (i.e. for equivalent non-statutory qualifications and criminal record checks) where these are justified.	<div>+ +</div> Allows for a broader range of arrangements to meet the gateway test, particularly due to the availability criterion allowing for some scheduling of work. This may include taxis/shuttles/couriers with scheduled periods and other work where some scheduling is required for project delivery or business needs (if they are not above the upper limit).  It would also capture arrangements where businesses impose constraints on contractors for working for others (e.g. for protecting IP, confidentiality and conflicts of interest).
<b>Effectiveness of minimising risks of exploitation</b> <i>(due to risk of workers currently considered employees being shifted to contracts without adequate compensation for associated costs/risks)<sup>10</sup></i>	0 <u>Casual employees</u> – expected to be at risk of misclassification, as key characteristics of their work meet the gateway criteria  0 <u>Other employees</u> - some risk of misclassification due concerns regarding the effectiveness of subcontracting criterion.  0 <u>Workers with unequal bargaining power</u> – some risk, particularly for those with unscheduled and/or easily substitutional work <sup>11</sup>	0 <u>Casual employees</u> – same as Option 5/status quo. No change to protection risks.  0 to - <u>Other employees</u> – minor incremental exploitation risks (e.g. <i>full-time work creates practical restrictions on working for others, vetting of qualifications where not a statutory requirement could create an additional barrier to subcontracting</i> ).  0 to - <u>Workers with unequal bargaining power</u> - minor incremental exploitation risks, largely due to the possibility of the full-time work element creating a practical restriction for the worker.	0 <u>Casual employees</u> – same as Option 5/status quo. No change to protection risks  -- <u>Other employees</u> – significant additional exploitation risks. Allows for arrangements with notable employment-like features to meet the gateway test. Reduces ability for contractors to choose when they can work and increases business veto over subcontracted work. Increases the ability of businesses to restrict working for others.  -- <u>Workers with unequal bargaining power</u> – as above, significant additional exploitation risks. The availability criterion change could incentivise employers with scheduling needs to hire workers as contractors rather than employees, to reduce costs and risks.
<b>Workability, implementation, cost, or other considerations</b>	0 Some anticipated challenges in relation to judicial interpretation. Some businesses may need to change contracts or change business models to meet the gateway test.	0 to +  The restriction and intention criterion changes, which clarifies that working full-time hours and being deemed ‘not employee’ meets the criteria, may reduce litigation on these points. There may be some increase in litigation on whether vetting requirements are justified.  The ability to specify the worker is ‘not an employee’ may reduce compliance costs for business whose agreements currently use this language.	-  Moderate additional implementation difficulties which will largely come down to judicial interpretation. For restriction criterion, it will be difficult to define which restrictions are “reasonable”. For the availability criterion, it could be challenging to determine what “less than one quarter” of a contractor’s work is without knowing what the “expected” full amount of time worked is, and over which period.
<b>Consistency with international obligations</b>	Legal professional privilege		
<b>Overall assessment</b>	0 Broadly fit for purpose.	0 to +  Marginally improves current gateway test by providing additional certainty benefits to businesses while trading-off a minimal increase in worker exploitation risks.	--  Does not align with current purpose of gateway test. Significantly expands the test to capture employment-like features, largely due to the availability criterion change, increasing the risk of employee misclassification and exploitation.

<sup>10</sup> Note that the ratings in this row have been averaged before combining with the ratings in the other rows for a particular option.

<sup>11</sup> For example, Māori, Pacific peoples, women and people with disabilities are overrepresented in lower paid work in New Zealand , including work where labour is easily substitutional (e.g. labour hire firms, non-differentiated services etc).

**What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?**

30. Overall, we consider that the current gateway test is largely fit for purpose, but some targeted amendments could be beneficial. We did not recommend the introduction of the gateway test in the original RIS, as the risks of misclassification and reduced worker protections outweighed the potential certainty benefits to employers. However, given that Cabinet has agreed to progress the gateway test, this shifts our focus to exploring options that maximise the certainty benefits of the gateway test (i.e. upholding parties' original intentions) while minimising any incremental risks to worker protections/exploitation.
31. Our views on trade-offs on the certainty benefits compared to incremental worker protection risks on Option 5A and 5B are as follows.

**Option 5A**

32. This option set slightly increases the arrangements that can access the gateway test and provides the following benefits for businesses:
- a. **Intention criterion change 1** – This allows business to specify in contract that the worker is “not an employee”, rather than only allowing them to specify the worker is an independent contractor. This addresses concern that some arrangements are not conceptualised as ‘contractor-employer’ relationships but are nevertheless still not employment relationships (e.g. where the business is an agent connecting the worker to work opportunities). We consider this change to be practical and aligns with the policy intent of the intention criterion, which is to ensure that both parties understand that their relationship is not an employment relationship.
  - b. **Restriction criterion change 1** – This adjustment enhances clarity regarding compliance with the gateway test for contracts that specify full-time equivalent hours or days of work. While full-time hours might be construed as limiting a worker’s contractual freedom<sup>12</sup>, this is not the intended purpose of the restriction criterion. Rather, the criterion is designed to ensure workers retain the autonomy to seek additional work beyond or outside the scope of full-time equivalent hours, should they choose to do so.
  - c. **Subcontracting criterion change 1** – This allows businesses to have more oversight on the qualifications of subcontractors, where this necessary for the completion of work, or a criminal record check, where it’s justified by the nature of the role. We consider this option retains flexibility in who performs the work (as intended by the criterion, as an alternative to the availability criterion), while allowing for situations where there’s a justifiable expectation for the business to ensure that a person with a particular set of qualifications, or a clean criminal record, completes the work.
33. We consider the marginal risks of Option 5A to worker exploitation would be minimal relative to the status quo, as the situations when exceptions are allowed for the criteria are quite specific and targeted.

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<sup>12</sup> The Law Society’s submissions referred to two cases (in the courier and building sectors) where, as part of the determination, the Court considered that because the worker worked full-time, the number of hours in effect prevented them from working for others.

## Option 5B

34. This option set goes further than 5A. It addresses a range of concerns raised by submitters who use contracting arrangements around the gateway criteria being too rigid. These additional changes (on top of the Option 5A changes) are expected to create the following implications for businesses and workers:
- a. **Availability criterion 1** – This will allow hiring businesses to schedule a portion of a contractor’s work, provided such scheduling is essential for service delivery and constitutes less than one quarter of the total expected work. This departs from the availability criterion’s intent, which is to safeguard the worker’s autonomy to determine their availability. The “*less than one quarter*” limit is an attempt to mostly maintain the worker’s discretion over their work timing, but for work-types that may satisfy this threshold, businesses will be likely incentivised to use contractors rather than use casual or part-time employees, to reduce risk and costs to the business.
  - b. **Restriction criterion change 2** – This could result in arrangements with more restrictions that impede on contractors’ freedom to decide who they perform work for meeting the gateway test. It can protect the interests of hiring businesses, but there will be uncertainty around the scope of the restriction (*e.g. what constitutes “reasonable grounds” and “necessary” to protect commercially sensitive information or intellectual property rights*), which will need judicial interpretation to become certain.
  - c. **Subcontracting criterion change 2** – This amendment would allow businesses to vet a subcontractor to ensure they meet *any* justifiable requirements which could include performance or experience-related requirements.). “Requirements” could cover a wide range of things, and whether they are “justified” would be open to judicial interpretation. Therefore, this amendment could increase the circumstances in which vetting is allowed and reduce the certainty around what situations comply with the criterion.

## MBIE’s preferred option

35. While the gateway test was not originally recommended, given that it’s proceeding, MBIE considers the marginal benefits of Option 5A, in terms of increased business certainty, outweighs the minor additional worker exploitation risks. While Option 5A does not substantially increase the scope of arrangements (as desired by several submitters) that fall within the gateway test, we consider these changes to be consistent with the intent of the criteria as markers of clear-cut contracting arrangements, and could help businesses decide whether their arrangements meet the gateway test.
36. For Option 5B, we consider that the increased risks of worker exploitation, misclassification, **international relations** outweigh the marginal increase in certainty for businesses resulting from expanded access to the gateway test. We consider this option introduces features that are characteristic of employment relationships (particularly regarding scheduling within the availability criterion), so would reduce the effectiveness of the gateway test criteria as markers of clear-cut contracting arrangements.

## International obligations

37. International relations

38. Legal professional privilege

39. International relations

40.

### Is the Minister's preferred option in the Cabinet paper the same as the agency's preferred option in the RIS?

41. The Minister's preferred approach is to progress the amendments contained in Option 5A. MBIE's preferred option, as per the existing RIS, is not to introduce the gateway test, as the risks of misclassification and reduced worker protections outweighed the potential certainty benefits for employers. However, given that the gateway test is being progressed, MBIE considers that further amendments could be made to enhance the certainty benefits of the test without incurring significant additional worker protection risks. In this regard, the Minister's preferred option to amend the gateway test matches MBIE's recommendation.

### What are the marginal costs and benefits of the preferred option in the Cabinet paper?

42. For the marginal costs and benefits of the Minister's proposed changes (*i.e. Option 5A*), these are compared below against option 5 of the original RIS (*i.e. the status quo*) below.

#### ***Option 5A compared to the current gateway test (option 5 in existing RIS)***

Affected groups	Comment	Impact	Evidence Certainty <i>High, medium, or low</i>
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International relations



**Additional costs of the preferred Option 5A compared to current gateway test in Bill**

Regulated groups – Businesses that hire workers as contractors	Businesses will have to meet costs of providing written agreements. There will be less compliance costs for businesses whose written agreements currently specify the worker is not an employee. Several submitters did allude to difficult trade-offs that could be made for a business to access the gateway test (e.g. <i>no longer providing any scheduled guaranteed hours to meet availability criterion</i> ). This would only occur, however, if it was seen as a benefit overall.	Slight decrease, still low	Low We don't know the proportion of businesses currently have contracts that currently state the worker is 'not an employee' (rather than stating they are an independent contractor). We don't know what proportion of businesses would decide to change their contracting arrangements to meet the gateway test criteria.
Regulated groups – Workers on contracts for services	Slight reduction in workers' ability to challenge whether the gateway test criteria are met (e.g. <i>cannot challenge full-time hours as a restriction</i> ).	No change, still low	Low We don't know the proportion of businesses that would be able to comply with the amended criteria compared to the existing criteria, but is only likely to be a slight increase (e.g. <i>ones that require criminal record checks or where the contract could equate to full-time work</i> ).
Workers currently hired as employees	Minor increase in the risk that some current employment models may be captured by the gateway test, with workers losing access to the full section 6 test. Where there is unequal bargaining power, this could be associated with reduction in terms and conditions. No additional impact on casual employees.	Slight increase, still medium	Low It is not possible to accurately predict how businesses will respond to the gateway test.
Businesses that hire workers as employees	No substantive change	No change, still low to medium	Low It is not possible to accurately predict how businesses will respond to the creation of the gateway test.
Regulators – Employment Services	No substantive change. MBIE's employment disputes resolution services may come under increased pressure in the	No change, still low	Low It is not possible to accurately predict how businesses and workers will

	short-term during the transition to the gateway test.		respond to the creation of the gateway test.
IRD	No substantive change	No change, still low	Low  It is not possible to accurately predict how businesses and workers will respond to the creation of the gateway test.
Consumers	No additional costs expected	No change, still low	Low
Others (e.g. wider govt, etc.)	No additional costs expected	No change, still low	Low
<b>Total monetised costs</b>	N/A	N/A	N/A
<b>Non-monetised costs</b>	Uncertain (as per assessment of option 5)	No change, still Low	Low
<b>Additional benefits of Option 5A compared to current gateway test in Bill</b>			
Regulated groups – Businesses that hire workers as contractors	Slight increase in business models that meet the gateway test, which will provide these businesses slightly more confidence of a worker’s status. The additional clarifications ( <i>e.g. full-time work not amounting to a restriction</i> ) could over time help reduce employment status challenges under the full section 6 test. Also, the ability to specify the worker is ‘not an employee’ may reduce compliance costs.	Slight increase, still medium	Medium  The number of businesses that might meet the existing gateway test criteria, or the amended criteria, or change their models to do so, is not known.
Regulated groups – Workers on contracts for services	No change, as no substantive benefits to workers arising from any additional certainty	No change, still low	Low  It is not possible to accurately predict how businesses and workers will respond to the creation of the gateway test
Workers currently hired as employees	No change, as no substantive benefits expected	No change, still low	

Businesses that hire workers as employees	No change, as no substantive benefits expected	No change, Low	
Regulators – Employment Services	<p>MBIE’s employment dispute resolution services may benefit in the medium to longer term if the gateway test slightly reduces challenges to employment status for some workers.</p> <p>As the changes could slightly increase the types of arrangements covered by the gateway, it could increase the impact on potential challenges.</p> <p>The restriction and intention criterion changes may reduce litigation on these criteria, while the amendments to the sub-contracting criteria may increase litigation on whether vetting requirements are justified.</p>	Slight increase, still low	<p>Low</p> <p>It is not possible to accurately predict how businesses and workers will respond to the creation of the gateway test.</p>
IRD	No substantive benefits expected	Low	<p>Low</p> <p>It is not possible to accurately predict how businesses and workers will respond to the creation of the gateway test.</p>
Consumers	No additional benefits expected	Low	Low
Others (eg, wider govt, etc.)	No additional benefits expected	Low	Low
<b>Total monetised benefits</b>	N/A	N/A	N/A
<b>Non-monetised benefits</b>	Uncertain (as per assessment of option 5)	Low	Low

## Section 3: Delivering an option

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### How will the proposal be implemented?

43. As outlined in the original RIS, the changes need to be implemented through amendments to the Act, which, in this instance, must be done during the Select Committee stage of the Bill. These changes will be outlined in the Bill’s Departmental

Report and the Revised-Track version of the Bill, to be reported back on by the Committee.

44. MBIE is responsible for administering the Act and provides information for businesses, unions and employees through its website, contact centre and other customer services on an ongoing basis. Information provision and updates to website content would be undertaken within MBIE's existing baseline funding.
45. Before the gateway test is enacted, MBIE's Employment Services will update guidance on the Employment New Zealand website, undertake internal training updates, and inform stakeholders. MBIE will complete the necessary updates and information provision by commencement of the amendment.

### **How will the proposal be monitored, evaluated, and reviewed?**

46. The mechanisms by which MBIE will monitor and evaluate this regulatory change are the same as described in the original RIS. Namely, MBIE will
  - a. Monitor implementation of the policy through media reports, research, statistics published periodically by StatsNZ and others; and
  - b. analyse information from its call centre and dispute resolution services to gauge how businesses and workers respond to the gateway test; and
  - c. Explore whether new or existing sources of information, such as surveys, could include questions on contractors to contribute to monitoring, evaluation and reviewing the status of contractors (note that without additional funding, options will be limited); and
  - d. monitor determinations of the Authority and the Court in this area to gather information about the types of business models and workers that meet the gateway test, and those that do not.
47. Regarding Authority and Court determinations, it is possible that litigation increases in the shorter-term as the provisions are tested, but may taper off in the longer-term if the gateway test and the legal precedent results in increased certainty about the types of arrangements that are covered by the test.