

---

**Employment Relations Act 2000**

**Review of Part 6A:  
Continuity of Employment**



**A DISCUSSION DOCUMENT SEEKING SUBMISSIONS ON  
PART 6A OF THE EMPLOYMENT RELATIONS ACT 2000.**

---

Published by the Department of Labour

PO Box 3705

Wellington

New Zealand

**[www.dol.govt.nz](http://www.dol.govt.nz)**

Issued October 2009

---

## **Making Submissions**

Email submissions are encouraged as this greatly enhances our analysis process.

An electronic version of this discussion document is available on the Department of Labour website:

**[www.dol.govt.nz/consultation](http://www.dol.govt.nz/consultation)**

To make a submission, please fill out the review response form on page 14 and respond to the following questions outlined in the form. Please email your submission to:

**[ERconsultation@dol.govt.nz](mailto:ERconsultation@dol.govt.nz)**

or, alternatively, send it to:

**Review of Part 6A  
Workplace Policy Group  
Department of Labour  
PO Box 3705  
Wellington**

*Submissions close on 12 March 2010.*

A document providing an overview of submissions will be posted on the Department of Labour website with details of how the government intends to proceed with the review.

Please note that any submissions that you make may be the subject of a request under the Official Information Act 1982. To assist the Department of Labour with the processing of any such requests, please indicate at the beginning of your submission whether or not you would like its contents made a matter of public record.

---

## Foreword

I want to ensure New Zealand's employment law is fair and flexible for all. This is because good employment law should maintain and encourage a growth-friendly business environment, while ensuring fairness in the employment relationship. The statutory Review of Part 6A of the Employment Relations Act 2000 (Part 6A) will contribute to the work of our Government to improve our employment law.



As part of this review I am keen to hear both employers' and employees' perspectives in two areas. Firstly, I am interested in your views on whether the operation of Part 6A has been achieving its stated objectives. Secondly, I am also want your thoughts about whether the policy of providing continuity of employment protections for specified categories of workers is relevant and desirable. I will take these perspectives into account when I consider the overall findings of the review and when I consider whether this policy is appropriately fair and flexible.

This discussion document provides an overview of issues brought to the attention of both myself and the Department of Labour since Part 6A was enacted in 2004. The discussion document is not intended to be comprehensive or to present proposals for change. Rather the discussion document aims to gather submissions from employers, both small and large, and employees who are affected by the Part 6A provisions. I want to thoroughly understand your concerns about Part 6A prior to making any decisions about what needs to change. I am concerned to hear about the impact and implications of Part 6A from the employers' and the employees' point of view, including your views and experience of:

- levels of awareness about the Part 6A
- the transfer of accrued entitlements at the time of restructuring
- the disclosure of information about employee costs and any related concerns about confidentiality or commercial sensitivity
- partial transfer of employees
- transfer of employees in a poorly performing service
- Schedule 1A applications
- employment protection provisions for all other employees not specified in Schedule 1A.

I am also very interested in receiving your ideas about how to improve the operation of the legislation. If there is a need for improvement then I am happy to look at suitable amendments.

I look forward to hearing your views and reading the review's findings. The Government aims to put employment relationships on sound and solid footings so that New Zealand can focus on building more productive businesses and higher wages and I will be considering the findings of the review with this wider goal in mind.

A handwritten signature in black ink that reads "Kate Wilkinson". The signature is written in a cursive, flowing style.

Hon Kate Wilkinson  
Minister of Labour

---

## Table of Contents

Introduction .....	5
Summary of Part 6A of the Employment Relations Act 2000 .....	6
Part One: The Operation of Part 6A.....	7
1. Level of Awareness amongst affected employers and employees .....	7
2. Transference of accrued entitlements .....	7
3. Employee transfer costs information .....	8
4. Partial transfer of employment .....	9
5. Transfer of employees in a poorly performing service .....	10
6. Schedule 1A applications .....	10
7. Protection for employees not specified in Schedule 1A (subpart 3 of Part 6A) .....	11
8. Other issues .....	12
Part Two: The policy of providing special protections for some employees (subpart 1 of Part 6A) .....	13
1. Background to the development of Part 6A .....	13
2. Employees and employers impacted by Part 6A subpart 1 .....	13
3. Issues to consider .....	14
Review Response Form: Review of Part 6A: Continuity of Employment .....	15
Appendix 1     Part 6A Continuity of employment if employees' work affected by restructuring (provisions referred to in this discussion paper) .....	24

## Introduction

The Department of Labour is conducting a review of Part 6A of the Employment Relations Act 2000 (Part 6A) *Continuity of employment if employees' work affected by restructuring*.

The review consists of two separate parts.

**Part One** is required by law and will consider:

whether the operation of Part 6A has met its objectives, and if not, whether any amendments to Part 6A are necessary or desirable to meet those objectives.

---

**Part Two** involves additional consideration of subpart 1 of Part 6A which provides for special protections for specified groups of employees listed in Schedule 1A of the Employment Relations Act 2000. This component of the review will consider:

the relevance and desirability of the policy of providing special protections for a defined set of workers.

---

The final report of the review will help to enable well-informed decisions on how to improve Part 6A's objectives and operations. A copy of the Terms of Reference for the review is available on the Department of Labour website: [www.dol.govt.nz/consultation](http://www.dol.govt.nz/consultation).

To inform the review we are seeking your comments on this legislation, including any experiences or concerns you have with its implementation. This discussion paper is designed to be a catalyst for these discussions about the implementation of Part 6A and to elicit submissions on your views.

### Structure of the discussion paper

The following four sections of this discussion paper include:

- a. A summary of Part 6A supplemented by excerpts from the legislation in Appendix 1.
- b. An overview of issues to be canvassed in Part One of the review, which is the statutory review of the operation of Part 6A. These issues are mainly based on anecdotal evidence drawn from Employment Relations Authority determinations and matters raised with the Department of Labour by stakeholders.
- c. An overview of issues to be considered in Part Two of the review which is the non-statutory aspect of the review and focuses on the policy behind providing special protections for some defined groups of workers during restructuring.
- d. A review response form to serve as a guide to your submission. This includes all the questions specified in earlier sections of this discussion document.

Submissions close on 15 March 2010 and it is intended that a final report will be presented to Parliament in July 2010.

If you have any queries please contact: Tessa Thompson at 04 915 4714 or [tessa.thompson@dol.govt.nz](mailto:tessa.thompson@dol.govt.nz)

## Summary of Part 6A of the Employment Relations Act 2000

Listed below are the key provisions in Part 6A<sup>1</sup> *Continuity of employment if employees' work affected by restructuring*<sup>2</sup>.

### **Subpart one and two:**

- 1 The object of subpart 1 of part 6A is to provide protection to specified categories of employees if their work is to be performed by another person as a result of restructuring, including rights to transfer their employment and rights to redundancy entitlements (s69A).
- 2 Specified categories of employees (identified in Schedule 1A of the Employment Relations Act 2000) may elect to transfer to a new employer on the same terms and conditions as applied immediately prior to the transfer, including service-related provisions (s69I).
- 3 Employees are provided with sufficient information and opportunity to make an informed decision on whether to elect to transfer to a new employer (s69G).
- 4 The employee is free to bargain an alternative arrangement with their employer (for example to remain with their current employer) following the provision of information. This must then be recorded in writing (s69H).
- 5 The employee has the right to negotiate redundancy arrangements should the new employer propose to make the employee redundant. In the event that negotiation for redundancy fails, the employee may apply to the Employment Relations Authority for an investigation and determination (s69N).
- 6 An outgoing employer must disclose the employer transfer costs to a new (potential) employer in sufficient time for the information to be taken into account, including the number of employees, wages and salaries, hours worked and service-related entitlements (s69OB).

### **Subpart three:**

- 7 All other employees are covered by Subpart 3. The object of this provision is to provide protection for employees not covered by Subpart 1, if, as a result of restructuring, their work is to be performed by another person. Employment agreements are required to contain employee protection provisions relating to negotiations between the employer and the other person about the transfer of affected employees (s69OJ).

### **Schedule 1A:**

- 8 Schedule 1A identifies the employees who are covered by the special protections of Part 6A outlined in subpart 1, which includes employees that provide cleaning, food catering, caretaking, orderly and laundry services in specified places of work.
- 9 There is a specified process by which the Minister of Labour can add to, or omit from, or vary, the categories set out in Schedule 1A through Order in Council. The criteria for inclusion are that the business frequently restructures, the restructuring tends to undermine the employees' terms and conditions of employment, and the employees have little bargaining power (s237A).

---

<sup>1</sup> Excerpts from the Employment Relations Act 2000 are attached in Appendix 1 of this document.

<sup>2</sup> Please note the concept of restructuring has two meanings in Part 6A. The provisions of subpart 1 apply to contracting out, contracting in, subsequent contracting, or sale/transfer situations. However, subpart 3 only applies to contracting out or sale/transfer situations.

## Part One: The Operation of Part 6A

This section addresses the first part of the review relating to the requirement in law to assess whether the operation of Part 6A has met its objectives, and if not, whether any amendments to Part 6A are necessary or desirable to meet those objectives. This section presents seven areas, related to the operation of Part 6A, where issues have been brought to the attention of the Department of Labour. This section may not capture all the issues associated with the operation of Part 6A. We welcome your comment on additional matters, as well as on the areas of focus presented here.

### 1. Level of Awareness amongst affected employers and employees

Awareness of the provisions of Part 6A is important for the effectiveness of this law. Lack of awareness can expose employers and employees to disadvantage during a restructuring event. Incoming employers who do not request or receive information may face hidden labour costs, such as unpaid holiday pay, annual holidays, wages and other entitlements. Pressure on labour costs for employers can affect employees with potential cuts to hours and jobs.

Failure to comply with the law is often as much about a lack of awareness as the lack of willingness or ability to comply. The consequences are significant for the competitiveness of commercial enterprises and for the protection of employees against disadvantage. This may apply to the legislation in general or to specific aspects of the law, such as disclosure of employee entitlement information. Information disclosure supports potential employers by ensuring a level playing field in the tender process and it supports employees by ensuring they are able to make an informed choice regarding the transfer their employment.

The range of responses that Government could consider to improve the level of awareness of Part 6A requirements includes:

- expanding the distribution methods and content of information available
- developing guidance notes for parties to restructuring
- producing a code of practice under Part 8A of the Employment Relations Act 2000.

**Part 1 Question 1:** What is the extent of your knowledge about the provisions in subpart 1 and 2 of Part 6A of the Employment Relations Act 2000?

**Part 1 Question 2:** What is the extent of your knowledge about the provisions in subpart 3 of Part 6A of the Employment Relations Act 2000?

**Part 1 Question 3:** How would you describe the knowledge of Part 6A among parties who are/may be affected by it, including employers and principal enterprises, employees and representatives?

**Part 1 Question 4:** What approach would you consider most effective in building the awareness of provisions in Part 6A?

### 2. Transference of accrued entitlements

There is a statutory obligation on the current employer to provide employee transfer cost information to the incoming employer but the law does not require the transfer of funds to the new employer to meet the costs of employees' accrued entitlements, such as holiday pay, annual holidays and sick leave.

Holiday pay cannot be paid out to employees prior to the transfer, so the incoming employer is dependent upon the proactive transfer of funds by the outgoing employer. When Part 6A was enacted it was intended that the transfer of accrued entitlements would be considered during the commercial negotiations, as this allows for a greater degree of flexibility for the parties involved than would be the case if there was a prescribed obligation to transfer accrued entitlements.

Anecdotal evidence indicates that the current flexible approach may create confusion and disadvantage for both employees and employers in some situations. Some employers note that this is the biggest issue they have with Part 6A. The failure to transfer accrued entitlements has the potential to impose financial costs on employees and employers; to generate employment relationship problems that impact on the smooth transfer of the contract for service; and, to impact on the productivity and profitability of the business. Employees covered by Schedule 1A tend to be on employment agreements providing for wages marginally above the minimum wage and the non-payment, or stalled payment, of entitlements can impact on their ability to meet personal financial commitments.

Alternatively there is also anecdotal evidence that in some cases, especially amongst larger firms, a business practice has evolved which takes the accrued entitlements properly into consideration and in these circumstances the transfers are working well.

The range of responses that Government could consider to improve the transfer of accrued entitlements includes:

- raising awareness of the requirement to transfer entitlements so that they are properly considered and viable in practice during the commercial negotiations
- amending the legislation to require outgoing employers to resolve liabilities at the point of transfer, including the possibility of having employees paid out and therefore losing entitlements (for example entitlements to annual holidays) but otherwise retaining continuity of employment
- amending the legislation to create an obligation on the outgoing employer to transfer the liabilities to the incoming employer.

**Part 1 Question 5:** What problems are you aware of, for any of the parties involved, around the transfer of accrued entitlements?

**Part 1 Question 6:** What approach would you consider most effective to ensure the transfer of funds to the new employer to meet the costs of an employee's accrued entitlements?

**Part 1 Question 7:** Should there be a choice about whether accrued entitlements are transferred or paid out by the outgoing employer at the point of transfer?

**Part 1 Question 8:** Discuss any issues that might arise for any of the parties by establishing an obligation in the Act to transfer funds.

### 3. Employee transfer costs information

Part 6A provides for the disclosure of information about employees and their entitlements for the purposes of entering into, or terminating, a service delivery agreement. This information is provided in aggregate form rather than as individual employee details. Issues relating to timeframes and the provision of information in aggregate form are outlined below.

#### ***a. Disclosure timeframe***

Information about employees and their entitlements must be disclosed *in sufficient time* for the person making the request to use the information before a transfer occurs. The phrase "sufficient time" allows for flexibility around the different circumstances that might arise, such as the speed of the transfer or the number of employees involved. However, the flexibility may also result in disruptions in the transfer process if information is not timely and therefore useful for employers and if employees do not receive information early enough to make an informed election to transfer. Efficient and transparent information transfer eases the process of tendering for a contract, while delays are inefficient and increase risks of businesses making ill-informed tenders. At the same time the preference of parties may be to absorb the risks in order to retain flexibility around timeframes.

### ***b. Aggregate information***

The legislation requires that the information is provided in an aggregate form and in such a way that the privacy of individuals is protected. Consequently, the new employer may not access details about the inherited terms and conditions of employees until the transfer has taken place. A lack of liaison between the outgoing and incoming employers can result in the new employer relying on the employees themselves to provide accurate details of entitlements.

Such informality can lead to misunderstanding and complications that generate disputes and uncertainty for those concerned. More detailed and individualised information provided to the incoming employer could avoid this problem. Similarly it may be useful to also transfer any information that has been collected about an individual employee's performance.

The range of responses that Government could consider to improve the provision of employee transfer costs information includes:

- amending the legislation to provide timeframes in relation to the date of the request, and/or the date of the transfer
- amending the legislation to require timely provision of written information about costs relating to particular employees
- repealing the transfer costs information provision.

**Part 1 Question 9:** What issues are you aware of in relation to the timeframes for the employee transfer cost information?

**Part 1 Question 10:** What additional information would improve the smooth transfer of a contract for service?

**Part 1 Question 11:** What administrative and/or financial implications are you aware of in relation to providing the required information?

### ***c. Commercial sensitivity***

Public companies have a responsibility of disclosure to the New Zealand Stock Exchange when changes in a public company's position affect its competitiveness. The continuity of employment provisions, as provided for by Part 6A, can trigger these disclosure requirements and so consideration should be given to the overall impact of this on commercial sensitivity.

**Part 1 Question 12:** What issues are you aware of in relation to commercial sensitivity and requirements to disclose employee cost information?

## **4. Partial transfer of employment**

Schedule 1A of the Act defines the categories of employees given higher protection under Part 6A Subpart 1. Situations may arise where part of an employee's work falls within Schedule 1A and part does not or where an employee's role is split between two employers following the restructuring.

Example 1: Restructuring occurs in a company that provides both catering and entertainment services and the employee is only eligible for continuous employment protection for the catering part of their job. The entertainment position is either redundant or retained by the principal enterprise.

Example 2: A company terminates a contract to provide catering services with one contractor and enters into new arrangements with two new contractors, one providing staff takeaway services and the other providing kitchen services. Employees working on a single roster across both services will transfer to two separate employers with two different operating systems.

The partial transfer may result in complex arrangements for the transfer of entitlements at the point of transfer for the new employer/s. It may also be costly for employers who retain an employee for a limited set of tasks and for employees, who may be subject to greater tax obligations by holding two jobs.

**Part 1 Question 13:** What is your experience with partial transfer situations?

**Part 1 Question 14:** What changes or improvements do you suggest to ensure a smooth and efficient transfer in partial transfer situations?

## 5. Transfer of employees in a poorly performing service

A change in service provider is sometimes motivated by perceptions of poor quality service. Part 6A does not enable the performance of employees to be a factor in a tender process because employees can exercise their right to transfer to the new employer. In effect, the question of service quality becomes the responsibility of the business as a whole and not of any particular individual employee. This reflects the policy intent that the contracting process was not a vehicle to address employee performance issues, for which other avenues and legal supports exist. The result of continuity of employment is that the responsibility for managing poor performance rests with the employer and the principal enterprise cannot determine the makeup of the workforce that the contractor inherits.

**Part 1 Question 15:** Describe your experience of transfers involving poorly performing services and the impact on you, your organisation, or your business?

**Part 1 Question 16:** What are your views on the impact of Part 6A on tendering processes?

## 6. Schedule 1A

### *a. Defining the employees for whom subpart 1 of Part 6A applies*

Schedule 1A identifies which categories of employees are affected by subpart 1 of Part 6A. It does this by specifying particular services (cleaning, caretaking, laundry, orderly and food catering) and particular sectors, facilities or places of work where the relevant services are carried out. These identified workers are commonly known as 'vulnerable workers,' although this term is not present in the legislation.

**Part 1 Question 17:** What is your understanding of the meaning and extent of the phrase "vulnerable worker"?

**Part 1 Question 18:** What issues are you aware of, if any, in relation to the definitions provided in Schedule 1A?

### *b. Applications to amend Schedule 1A*

Section 237A of the Employment Relations Act 2000 sets out a process by which the Minister of Labour can add to, or omit from, or vary, the categories set out in Schedule 1A. To make an amendment the Minister must have:

- received a request for an amendment to Schedule 1A
- received a report from the Department of Labour that assesses this request
- consulted on the Departmental assessment of the request
- be satisfied certain criteria is met (as outlined below).

To approve an addition to Schedule 1A the Minister must be satisfied that the proposed new categories of employees work in a sector where restructuring occurs frequently, where the

restructuring tends to undermine terms and conditions of employment, and where employees have little bargaining power. A rigorous assessment of whether an applicant meets these criteria can require an onerous level of information, complex judgements and there is no clarity on the outcome of any assessment process. This could result in a lengthy process and resources being expended by the applicant, consulted parties, government agencies and Government, with no gain.

Another difficulty with this process arises because, while the policy did not anticipate that applications would be made for small and regional groups of workers to be added to Schedule 1A, the legislation does not clearly exclude this from occurring. The inclusion of a small localised group in Schedule 1A may result in inconsistencies and inequities for other similar employees outside of the geographic scope of the application. Furthermore, granting such an application could create a precedent for numerous small scale applications which may not be an efficient use of resources.

The range of responses that Government may wish to consider to improve the process for amending Schedule 1A could include:

- more specificity in the legislation around which sectors are eligible, and more clarity around the outcome of an application
- repeal section 237A so that any proposed amendments to Schedule 1A would need to be part of a parliamentary process.

**Part 1 Question 19:** What parameters and process could help to ensure fair and consistent outcomes for proposals to amend Schedule 1A?

## 7. Protection for employees not specified in Schedule 1A (subpart 3 of Part 6A)

Subpart 3 of Part 6A requires that all other employment agreements (where subpart 1 of Part 6A does not apply) include employment protection provisions relating to negotiations between an outgoing employer and a new employer about the transfer of affected employees to the new employer. The object of this subpart is to provide protections to employees involved in restructuring and impacts on most New Zealand workers.

Issues related to employee protection provisions (EPP) were recently before the Employment Court in a challenge to a determination by the Employment Relations Authority (*Norske Skog Tasman Ltd v Manufacturing & Construction Workers Union Inc and Anor* (Colgan CJ, Travis J, Couch J, 9 December 2009, AC 49/09).

The Court considered whether they should constrain an employer from restructuring, in the case where the employer and employees had not negotiated an EPP, until the parties have agreed on an EPP. The Court decided that it is not empowered to make a compliance order in this case and therefore could not restrain the employer from restructuring. This case raises a question as to whether there is an issue with enforcing subpart 3 of Part 6A.

**Part 1 Question 20:** To what extent do you believe provisions in employment agreements for all other employees have achieved the objective of providing protection for employees in the event of restructuring?

**Part 1 Question 21:** Are there some employment circumstances where subpart 3 of Part 6A should not apply, for example employment in small and medium sized enterprises?

**Part 1 Question 22:** How do you suggest compliance with the employee protection provisions should be achieved?

**Part 1 Question 23:** What issues are you aware of in relation to employment protection provisions?

## 8. Other issues

We are interested in any other issues that you may be aware of that have not been addressed in this discussion paper in relation to the operation of Part 6A. In particular you might want to consider the following questions:

**Part 1 Question 24:** What specific costs and benefits have you encountered in your experiences of part 6A?

**Part 1 Question 25:** What, if any, do you believe are unintended consequences resulting from the application and interpretation of part 6A?

**Part 1 Question 26:** What are your views on whether Part 6A is fair to affected employers?

**Part 1 Question 27:** What are your views on whether Part 6A is fair to affected employees?

**Part 1 Question 28:** What suggestions do you have to improve the application and workability of Part 6A?

**Part 1 Question 29:** What changes to the current employment relations legislation would make the most difference to productivity

## **Part Two: The policy of providing special protections for some employees (subpart 1 of Part 6A)**

This section provides background for the second part of the review which addresses the policy to provide special protections for specified groups of employees listed in Schedule 1A of the Employment Relations Act 2000. The review will be considering whether this policy is relevant and desirable in 2009 and we are seeking your views on this matter.

### **1. Background to the development of Part 6A**

Special protections for some groups of employees involved in restructuring were introduced in 2004. The policy intended to manage the potential for disadvantage to employees arising from the renewal of employment agreements during restructuring through the sale, transfer or contracting out of a business, while at the same time retaining the viability and efficiency of the market.

These policy developments followed a review of minimum standards in 2001<sup>1</sup> that reported that some employees were disadvantaged by the process of contracting out. In particular, the review found evidence that some employees with limited bargaining power were susceptible to having their terms and conditions of employment undermined at a time of restructuring as employment agreements were terminated at the end of each contract for service and new agreements entered into.

Special protections for workers during the transfer of a business are part of many other countries legal frameworks. Following a rise in business transfers in the 1970s, the European Community developed a policy instrument called the Acquired Rights Directive 77/187/EEC that guaranteed the transfer of employees' rights in the event that a business transfer took place. The Directive was implemented in the United Kingdom through the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) which by 2006 evolved to cover service transfers, a requirement to provide employee information at transfer and clarification around transfer-related dismissals and changes to terms and conditions. In 2001, it was estimated that protective legislation covered some 360 million people worldwide.

The New Zealand legislation drew on the experience of Europe, the United Kingdom and our major trading partners, where transfer provisions were already in place. However, the approach to specifying the category of workers for which the right to transfer applies, as opposed to regulating all business transfers, was different and intended to prevent a problem found in other jurisdictions, where the major cost to business of a transfer scheme has been determining when and how the scheme applies, encouraging avoidance behaviour and litigation.

### **2. Employees and employers impacted by Part 6A subpart 1**

The employees covered by the special protections are those who provide services involving cleaning, food catering, caretaking, or laundry services for the education, health, residential care, public service or local government, airport facility or aviation sectors, or cleaning or food catering services in relation to any other place of work.

It is not possible to ascertain exact numbers of employees and employers affected by Schedule 1A of Part 6A. However, 2009 statistics provide an estimate of numbers by sector and a significant proportion of these are likely to be covered by Part 6A.

**Employers:** It is estimated that 5,479 employers could be affected by the provisions, including 688 in catering services, 3185 in building and other industrial cleaning services, 112

---

<sup>1</sup> Ministerial Advisory Group 2001 report, the *Minimum Employment Standards Review: Report of the Advisory Group on Contracting Out and Sale and Transfer of Business* to the Minister of Labour

hospital employers, and 485 in Other Health Care Services, 396 in Other Repair and Maintenance, and 613 in Laundry and Dry-Cleaning Services. Please note this data may include some employers not affected (Statistics New Zealand's Business Statistics 2009).

**Employees:** Labour Market Statistics for 2008 provide numbers of employees engaged by occupational group although this is not complete and includes independent contractors who are not covered by part 6A. These statistics report there were 30,126 Commercial Cleaners, 2,283 Laundry Workers, 795 Hospital Orderly Workers, and 3,681 Caretakers (Statistics New Zealand's Labour Market Statistics 2008). It is not possible to distinguish catering workers in the education and health sectors from other workers so this data is not included.

**Gender:** The 2006 census indicates that amongst specific occupational classes such as cleaners and laundry workers (41,142 employees) and food preparation assistants (9,543 employees) women formed the majority, 68% and 64% of the respective total workforces.

**Ethnicity:** There is some ethnicity data available for specific occupational groups. From this we can determine that of an estimated 36,882 employees who might be affected by Schedule 1A of the Act, approximately 22,926 are of New Zealand European origin, 6,552 are Māori, 3,231 are Pacific, 3,474 are Asian, and 3,780 fall into other categories (Middle Eastern/Latin American/African, and other ethnicity).

### 3. Issues to consider

To consider the relevance and desirability of the policy of providing special protections to a defined group of workers it is necessary to examine some or all of the following matters:

**Part 2 Question 1:** Are the issues that led to the introduction of Part 6A still valid? In particular, does the specified group of workers experience a disadvantage during restructuring through the sale, transfer or contracting out of a business that warrants special protections?

**Part 2 Question 2:** What categories of employees, if any, should have more protection for continuity of employment than other employees?

**Part 2 Question 3:** Does the policy meet its objectives of providing protection to the specified group of workers, while at the same time retaining the viability and efficiency of the market?

**Part 2 Question 4:** Does the policy have any detrimental effects on the employers, employees or the wider community and economy? In particular, how equitable and/or efficient is this policy?

**Part 2 Question 5:** Are there other ways of addressing the issues of disadvantage that would better meet the objectives and/or which would reduce any detrimental effects?

The range of responses that Government could consider in relation to these special protections include:

- retaining the current provisions
- improving the practical operation of Part 6A, as discussed in the previous section, through amending parts of the legislation and/or raising the level of awareness of the subpart 1 and 2 of Part 6A provisions
- expanding or narrowing the coverage of the special protections
- repealing all, or parts, of subpart 1 and 2 of Part 6A.

**Part 2 Question 6:** Please provide any other information or views you have about the relevance and desirability of providing special protections for a defined group of workers.

# Review Response Form

## Review of Part 6A: Continuity of Employment

Please ensure you complete this form identifying you or your organisation and return it by email or post no later than 5pm, 15 March 2010.

Please either email your completed response to [ERconsultation@dol.govt.nz](mailto:ERconsultation@dol.govt.nz) (preferred) or post it to:

Review of Part 6A  
Workplace Policy Group  
Department of Labour  
PO Box 3705  
Wellington

Please see <http://www.dol.govt.nz/consultation> for further information

If you are completing the response electronically, please feel free to expand the length of the spaces provided for your answers and to attach any supporting documents. If you are completing it on paper, please feel free to add other pages but make clear which question your answer refers to. Specific examples of what you think is working well, or could be improved would be welcome.

### Personal/ organisational information

1. Your full name*	
2. Name of your business or organisation ( <i>if applicable</i> )	
3. Postal address	
4. Email address	
5. Telephone number(s)	
6. Relevant activities you or your business/organisation are involved with	
7. Size of business/organisation and/or any relevant details related to membership	
8. Are you, your organisation or your members affected by subpart 1 and 2 of Part 6A?	
9. Are you comfortable with the contents of your submission being a matter of public record?	

\* Please note that your name and contact information will remain confidential to the Department of Labour to the extent that the law allows. The Department of Labour is the intended recipient and holder of the

information and can be contacted at PO Box 3705, Wellington, New Zealand. In accordance with Privacy Principle 7, you have the right to access and correct any personal information you provide.

## Part One: The Operation of Part 6A: Questions

### Level of Awareness amongst affected employers and employees

Part 1 Question 1: What is the extent of your knowledge about the provisions in subpart 1 and 2 of Part 6A of the Employment Relations Act 2000?

--

--

Part 1 Question 2: What is the extent of your knowledge about the provisions in subpart 3 of Part 6A of the Employment Relations Act 2000?

--

--

Part 1 Question 3: How would you describe the knowledge of Part 6A among parties who are/may be affected by it, including employers and principal enterprises, employees and representatives?

--

--

Part 1 Question 4: What approach would you consider most effective in building the awareness of provisions in Part 6A?

--

--

### Transference of accrued entitlements

Part 1 Question 5: What problems are you aware of, for any of the parties involved, around the transfer of accrued entitlements?

--

--

Part 1 Question 6: What approach would you consider most effective to ensure the transfer of funds to the new employer to meet the costs of an employee's accrued entitlements?

--

Part 1 Question 7: Should there be a choice about whether accrued entitlements are transferred or paid out by the outgoing employer at the point of transfer.
Part 1 Question 8: Discuss any issues that might arise for any of the parties by establishing an obligation in the Act to transfer funds.
<b>Employee transfer costs information</b>
Part 1 Question 9: What issues are you aware of in relation to the timeframes for the employee transfer cost information?
Part 1 Question 10: What additional information would improve the smooth transfer of a contract for service?
Part 1 Question 11: What administrative and/or financial implications are you aware of in relation to providing the required information?
Part 1 Question 12: What issues are you aware of in relation to commercial sensitivity and requirements to disclose employee cost information?

<b>Partial transfer of employment</b>
Part 1 Question 13: What is your experience with partial transfer situations?
Part 1 Question 14: What changes or improvements do you suggest to ensure a smooth and efficient transfer in partial transfer situations?
<b>Transfer of employees in a poorly performing service</b>
Part 1 Question 15: Describe your experience of transfers involving poorly performing services and the impact on you, your organisation, or your business?
Part 1 Question 16: What are your views of the appropriateness of the impact of Part 6A on tendering processes?
<b>Schedule 1A</b>
Part 1 Question 17: What is your understanding of the meaning and extent of the phrase "vulnerable worker"?
Part 1 Question 18: What issues are you aware of, if any, in relation to the definitions provided in Schedule 1A?

Part 1 Question 19: What parameters and process could help to ensure fair and consistent outcomes for proposals to amend Schedule 1A?
<b>Protection for employees not specified in Schedule 1A (subpart 3 of Part 6A)</b>
Part 1 Question 20: To what extent do you believe provisions in employment agreements for all other employees have achieved the objective of providing protection for employees in the event of restructuring?
Part 2 Question 21: Are there some employment circumstances where subpart 3 of Part 6A should not apply, for example employment in small and medium sized enterprises?
Part 1 Question 22: How do you suggest compliance with the employee protection provisions should be achieved?
Part 1 Question 23: What issues are you aware of in relation to employment protection provisions?

<b>Other issues</b>
Part 1 Question 24: What specific costs and benefits have you encountered in your experiences of part 6A?
Part 1 Question 25: What, if any, do you believe are unintended consequences resulting from the application and interpretation of part 6A?
Part 1 Question 26: What are your views on whether Part 6A is fair to affected employers?
Part 1 Question 27: What are your views on whether Part 6A is fair to affected employees?
Part 1 Question 28: What suggestions do you have to improve the application and workability of Part 6A?

Part 1 Question 29: What changes to the current employment relations legislation would make the most difference to productivity in your workplace? Why?

**Part Two: The policy of providing special protections for some employees (subpart 1 of Part 6A): Questions**

Part 2 Question 1: Are the issues that led to the introduction of Part 6A still valid? In particular, does the specified group of workers experience a disadvantage during restructuring through the sale, transfer or contracting out of a business that warrants special protections?

Part 2 Question 2: What categories of employees, if any, should have more protection for continuity of employment than other employees?

Part 2 Question 3: Does the policy meet its objectives of providing protection to the specified group of workers, while at the same time retaining the viability and efficiency of the market?


Part 2 Question 4: Does the policy have any detrimental effects on the employers, employees or the wider community and economy? In particular, how equitable and/or efficient is this policy?


Part 2 Question 5: Are there other ways of addressing the issues of disadvantage that would better meet the objectives and/or which would reduce any detrimental effects?


Part 2 Question 6: Please provide any other information or views you have about the relevance and desirability of providing special protections for a defined group of workers.


## **Appendix 1      Part 6A Continuity of employment if employees' work affected by restructuring (provisions referred to in this discussion paper)**

### **Subpart 1**

#### **Specified categories of employees**

##### **69A Object of this subpart**

The object of this subpart is to provide protection to specified categories of employees if, as a result of a proposed restructuring, their work is to be performed by another person and, to this end, to give—

- (a) the employees a right to elect to transfer to the other person as employees on the same terms and conditions of employment; and
- (b) the employees who have transferred a right,—
  - (i) subject to their employment agreements, to bargain for redundancy entitlements from the other person if made redundant by the other person for reasons relating to the transfer of the employees or to the circumstances arising from the transfer of the employees; and
  - (ii) if redundancy entitlements cannot be agreed with the other person, to have the redundancy entitlements determined by the Authority.

##### **69F Application of this subpart**

- (1) This subpart applies to an employee if—
  - (a) Schedule 1A applies to the employee; and
  - (b) as a result of a proposed restructuring,—
    - (i) the employee will no longer be required by his or her employer to perform the work performed by the employee; and
    - (ii) the work performed by the employee (or work that is substantially similar) is to be performed by or on behalf of another person.
- (2) To avoid doubt, this subpart applies even though the performance of the work by or on behalf of the other person does not begin immediately after an employee ceases to perform the work for his or her employer.

##### **69G Notice of right to make election**

- (1) Before a restructuring takes effect, the employer of the employees who will be affected by the restructuring must provide the employees affected with—
  - (a) a reasonable opportunity to exercise the right to make an election under section 69I(1); and
  - (b) the date by which the right to make an election must be exercised; and
  - (c) information sufficient for the employees to make an informed decision about whether to exercise the right to make an election.
- (2) Without limiting subsection (1)(c), the information provided under that provision must include—
  - (a) the name of the new employer;
  - (b) the nature and scope of the restructuring;
  - (c) the date on which the restructuring is to take effect;
  - (d) how to make an election, the person to whom an election is to be sent, and the form in which the election is to be sent (for example by post, fax, or email).

- (3) If the restructuring is a contracting in or a subsequent contracting, person A in the definition that applies must give the employer sufficient notice of, and information about, the restructuring to enable the employer to comply with subsection (1).
- (4) An employer or other person who fails to comply with this section is liable to a penalty imposed by the Authority.

#### **69H Employee bargaining for alternative arrangements**

- (1) To avoid doubt, an employee may, after his or her employer has complied with section 69G and before deciding whether to elect to transfer to the new employer, bargain with his or her employer for alternative arrangements.
- (2) If the employee and employer agree on alternative arrangements,—
  - (a) the alternative arrangements must be recorded in writing; and
  - (b) if paragraph (a) is complied with, the employee may not subsequently elect to transfer to the new employer.

#### **69I Employee may elect to transfer to new employer**

- (1) An employee to whom this subpart applies may, before the date provided to the employee under section 69G(1)(b), elect to transfer to the new employer.
- (2) If an employee elects to transfer to the new employer, then to the extent that the employee's work is to be performed by the new employer, the employee—
  - (a) becomes an employee of the new employer on and from the specified date; and
  - (b) is employed on the same terms and conditions by the new employer as applied to the employee immediately before the specified date, including terms and conditions relating to whether the employee is employed full-time or part-time; and
  - (c) is not entitled to any redundancy entitlements under those terms and conditions of employment from his or her previous employer because of the transfer.
- (3) To avoid doubt,—
  - (a) the election of an employee to transfer to a new employer may result in the employee being employed by more than 1 employer if—
    - (i) only part of the employee's work is affected by the restructuring; or
    - (ii) the work performed by the employee will be performed by or on behalf of more than one new employer; and
  - (b) a person becomes the new employer of an employee who elects to transfer to the new employer whether or not the new employer—
    - (i) has, or intends to have, employees performing the type of work (or work that is substantially similar) to the work performed by the employee who has elected to transfer to the new employer; or
    - (ii) was an employer before the employee transferred to the new employer.
  - (c) this section does not affect the employment agreement of an employee who elects not to transfer to the new employer.
- (4) In this section, **specified date** means the date on which the restructuring takes effect.

#### **69J Employment of employee who elects to transfer to new employer treated as continuous**

- (1) The employment of an employee who elects to transfer to a new employer is to be treated as continuous, including for the purpose of service-related entitlements whether legislative or otherwise.

- (2) To avoid doubt, and without limiting subsection (1),—
- (a) in relation to an employee's entitlements under the Holidays Act 2003,—
- (i) the period of employment of an employee with the employer that ends with the transfer must be treated as a period of employment with the new employer for the purpose of determining the employee's entitlement to annual holidays, sick leave, and bereavement leave; and
- (ii) the employer must not pay the employee for annual holidays not taken before the date of transfer; and
- (iii) the new employer must recognise the employee's entitlement to—
- (A) any sick leave, including any sick leave carried over under section 66 of that Act, not taken before the date of transfer; and
- (B) any annual holidays not taken before the date of transfer; and
- (C) any alternative holidays not taken or exchanged for payment under section 61 of that Act before the date of transfer:
- (b) for the purposes of determining an employee's rights and benefits to parental leave and parental leave payments under the Parental Leave and Employment Protection Act 1987,—
- (i) the period of employment of an employee with the employer that ends with the transfer must be treated as a period of employment with the new employer; and
- (ii) the new employer must treat any notice given to or by the employer under the Act as if it had been given to or by the new employer.

#### **69N Employee who transfers may bargain for redundancy entitlements with new employer**

- (1) This section applies to an employee if—
- (a) the employee elects, under section 69I(1), to transfer to a new employer; and
- (b) the new employer proposes to make the employee redundant for reasons relating to the transfer of the employees or to the circumstances arising from the transfer of the employees; and
- (c) the employee's employment agreement—
- (i) does not provide for redundancy entitlements for those reasons or in those circumstances; or
- (ii) does not expressly exclude redundancy entitlements for those reasons or in those circumstances.
- (2) The employee is entitled to redundancy entitlements from his or her new employer.
- (3) If an employee seeks redundancy entitlements from his or her new employer, the employee and new employer must bargain with a view to reaching agreement on appropriate redundancy entitlements.

#### **69O Authority may investigate bargaining and determine redundancy entitlements**

- (1) If an employee and his or her new employer fail to agree on redundancy entitlements under section 69N(3), the employee or new employer may apply to the Authority to investigate the bargaining relating to the matter.
- (2) After concluding the investigation, the Authority must determine—
- (a) if, in the Authority's view, it is possible for the bargaining to continue, how further bargaining should occur; or
- (b) if, in the Authority's view, further bargaining is not warranted, the redundancy entitlements due to an employee.

## Subpart 2:

### Disclosure of costs relating to transfer of employees under proposed restructuring

#### 690A Object of this subpart

The object of this subpart is to provide for the disclosure of employee transfer costs information if—

- (a) disclosure is sought for the purpose of—
  - (i) deciding whether to terminate an agreement or let it expire; or
  - (ii) negotiating an agreement; or
  - (iii) deciding whether to enter into an agreement; or
  - (iv) tendering for an agreement; and
- (b) a restructuring would result if the agreement were to be—
  - (i) terminated or to expire; or
  - (ii) concluded; or
  - (iii) entered into; or
  - (iv) awarded.

#### 690B Interpretation

- (1) In this subpart, **employee transfer costs information**, in relation to a proposed restructuring,—
  - (a) means information about the employment-related entitlements of the employees who would be eligible to elect, under section 69I, to transfer to a new employer if the proposed restructuring were to proceed; and
  - (b) includes—
    - (i) the number of employees who would be eligible to elect to do so; and
    - (ii) the wages or salary payable in a stated period (for example, a week, fortnight, or month) to the employees for performing the work that would be subject to the proposed restructuring; and
    - (iii) the total number of hours the employees spend in a stated period (for example, a week, fortnight, or month) performing the work that would be subject to the proposed restructuring; and
    - (iv) the cost of service-related entitlements of the employees whether legislative or otherwise; and
    - (v) the cost of any other entitlements of the employees in their capacity as employees, including any entitlements already agreed but not due until a future date or time.
- (2) Any term or expression defined in subpart 1 and used but not defined in this subpart has the same meaning as in subpart 1.

#### 690C Disclosure of employee transfer costs information

- (1) A request for the disclosure of employee transfer costs information may be made if—
  - (a) disclosure is sought for the purpose of—
    - (i) deciding whether to terminate an agreement or let it expire; or
    - (ii) negotiating an agreement; or
    - (iii) deciding whether to enter into an agreement; or
    - (iv) tendering for an agreement; and
  - (b) a restructuring would result if the agreement were to be—

- (i) terminated or to expire; or
  - (ii) concluded; or
  - (iii) entered into; or
  - (iv) awarded.
- (2) The persons who may make the request are the persons who would, if the restructuring were to proceed and they were parties to the restructuring, be—
- (a) person A in the definition of contracting in:
  - (b) person B in the definition of contracting out:
  - (c) person C in the definition of subsequent contracting:
  - (d) the person to whom an employer's business (or part of it) is sold or transferred.
- (3) The persons to whom a request may be made are the persons who would, if the restructuring were to proceed and they were parties to the restructuring, be—
- (a) person B in the definition of contracting in:
  - (b) person A in the definition of contracting out:
  - (c) person A in the definition of subsequent contracting:
  - (d) the seller or transferor in the case of the sale or transfer of an employer's business (or part of it).
- (4) A person to whom a request is made under subsection (3) must provide to the person who made the request under subsection (2) employee transfer costs information that relates to the proposed restructuring.
- (5) A person must provide the employee transfer costs information in sufficient time for the person who made the request to take the information into account for the purpose for which it was requested.
- (6) Employee transfer costs information provided under this section must be provided—
- (a) in aggregate form; and
  - (b) to the extent practicable, in a form that protects the privacy of the employees concerned.

#### **69OD Provision of employee transfer costs information by other persons**

- (1) Subsection (2) applies to a person who receives a request for employee transfer costs information under section 69OC(3)(a).
- (2) If the request relates (whether wholly or in part) to work that has been subcontracted and the person receiving the request does not have some or all of the information requested, the person must immediately require the subcontractor to provide the information.
- (3) Subsection (4) applies to a person who receives a request for employee transfer costs information under section 69OC(3)(c).
- (4) If the person does not have some or all of the information requested, the person must immediately require the person who performs the work to which the request relates to provide the information.
- (5) If the person who performs the work has subcontracted some or all of the work and does not have some or all of the information requested, the person must immediately require the subcontractor to provide the information.
- (6) A person required to provide information—
  - (a) under subsection (2) or (4) must provide the information—
    - (i) to the person who received the request; and

- (ii) in time for that person to comply with section 69OC(5):
- (b) under subsection (5) must provide the information—
  - (i) to the person who required the information; and
  - (ii) in time for the person who received the request to comply with section 69OC(5).
- (7) However, if the subcontractor who is required to provide the information under subsection (2) or (5) does not have some or all of the information requested because the work has been further subcontracted, the subcontractor must immediately provide to the person who required the information any details the subcontractor has about who the other subcontractor is and how to contact the other subcontractor, and (to avoid doubt) subsection (2) or (5) (as the case may require) applies accordingly.
- (8) Employee transfer costs information provided under this section must be provided—
  - (a) in aggregate form; and
  - (b) to the extent practicable, in a form that protects the privacy of the employees concerned.

### **69OE Updating disclosure of employee transfer costs information**

- (1) This section applies if—
  - (a) employee transfer costs information has been provided under section 69OC or 69OD; and
  - (b) after the provision of the information, there is a change in the employment-related entitlements or circumstances that the information relates to; and
  - (c) the change makes the information provided out of date.
- (2) The person who provided the employee transfer costs information must, immediately after the change in the employment-related entitlements or circumstances, provide to the person who was originally provided with the information details specifying—
  - (a) the information that is out of date; and
  - (b) what the up-to-date information is.
- (3) If the person who is provided with the up-to-date employee transfer costs information is not the person who made the request for the original information under section 69OC,—
  - (a) the person must, immediately after receiving the up-to-date information, provide it to the person who received the request for the original information; and
  - (b) that person must, immediately after receiving the up-to-date information, provide it to the person who made the request for the original information.
- (4) A person is not required to provide up-to-date information if, at the time of the change in the employment-related entitlements or circumstances, a request could not have been made for the information under section 69OC.

## **Subpart 3: Other employees**

### **69OH Object of this subpart**

The object of this subpart is to provide protection to employees to whom subpart 1 does not apply if, as a result of a restructuring, their work is to be performed by or on behalf of another person and, to this end, to require their employment agreements to contain employee protection provisions relating to negotiations between the employer and the other person about the transfer of affected employees to the other person.

## 690I Interpretation

- (1) In this subpart, unless the context otherwise requires,—employee means an employee to whom Schedule 1A does not apply

**employee protection provision** means a provision—

- (a) the purpose of which is to provide protection for the employment of employees affected by a restructuring; and
- (b) that includes—
  - (i) a process that the employer must follow in negotiating with a new employer about the restructuring to the extent that it relates to affected employees; and
  - (ii) the matters relating to the affected employees' employment that the employer will negotiate with the new employer, including whether the affected employees will transfer to the new employer on the same terms and conditions of employment; and
  - (iii) the process to be followed at the time of the restructuring to determine what entitlements, if any, are available for employees who do not transfer to the new employer

**new employer**, in relation to a restructuring, means,—

- (a) in the case of a contracting out, person B in the definition of that term; or
- (b) in the case of a sale or transfer of a business, the person to whom the business is sold or transferred

**restructuring**—

- (a) means—
    - (i) contracting out; or
    - (ii) selling or transferring the employer's business (or part of it) to another person; but
  - (b) to avoid doubt, does not include—
    - (i) contracting in; or
    - (ii) subsequent contracting; or
    - (iii) in the case of an employer that is a company, the sale or transfer of any or all of the shares in the company; or
    - (iv) any contract, arrangement, sale, or transfer entered into, made, or concluded while the employer is adjudged bankrupt or in receivership or liquidation.
- (2) For the purposes of this subpart, an employee is an **affected employee** if,—
- (a) as a result of a restructuring, the employee is, or will be, no longer required by his or her employer to perform the work performed by the employee; and
  - (b) the type of work performed by the employee (or work that is substantially similar) is, or is to be, performed by or on behalf of another person.
- (3) Any term or expression defined in subpart 1 and used but not defined in this subpart has the same meaning as in subpart 1.

## 690J Collective agreements and individual employment agreements must contain employee protection provision

Every collective agreement and every individual employment agreement must contain an employee protection provision to the extent that the agreement binds employees to whom this subpart applies.

### **69OK Affected employee may choose whether to transfer to new employer**

If an employer, in relation to a restructuring, arranges for an affected employee to transfer to the new employer, the affected employee may—

- (a) choose to transfer to the new employer; or
- (b) choose not to transfer to the new employer.

## **Section 237A**

### **Amendments to Schedule 1A**

- (1) The Governor-General may, by Order in Council, amend Schedule 1A to add to, omit from, or vary the categories of employees.
- (2) An Order in Council must not be made under subsection (1) unless made on the recommendation of the Minister.
- (3) The Minister must not make a recommendation under subsection (2) unless the Minister—
  - (a) has received from any person or organisation a request to amend Schedule 1A that specifies the grounds on which it is believed that the criteria in subsection (4) are met; and
  - (b) has received a report from the department that assesses the request; and
  - (c) has provided the department's assessment to, and has consulted, such employers, employees, the representatives of such employers and employees, and such other persons and organisations, as the Minister considers appropriate; and
  - (d) is satisfied that the criteria in subsection (4) are met.
- (4) The criteria are—
  - (a) whether the employees concerned are employed in a sector in which the restructuring of an employer's business occurs frequently;
  - (b) whether the restructuring of employers' businesses in the sector concerned has tended to undermine the employees' terms and conditions of employment;
  - (c) whether the employees concerned have little bargaining power.
- (5) In this section, restructuring has the same meaning as in subpart 1 of Part 6A.

## **Schedule 1A:**

### **Employees to whom subpart 1 of Part 6A applies**

Employees who provide the following services in the specified sectors, facilities, or places of work:

- (a) cleaning services, food catering services, caretaking, or laundry services for the education sector (being the public and private pre-school, primary, secondary, and tertiary educational institutions):
- (b) cleaning services, food catering services, orderly services, or laundry services for the health sector (being any hospital, as defined by the Hospitals Act 1957 and any hospital within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992):
- (c) cleaning services, food catering services, orderly services, or laundry services in the age-related residential care sector:
- (d) cleaning services or food catering services in the public service (as defined in Schedule 1 of the State Sector Act 1988) or local government sector:
- (e) cleaning services or food catering services in relation to any airport facility or for the aviation sector:
- (f) cleaning services or food catering services in relation to any other place of work (within the meaning of the Health and Safety in Employment Act 1992).