

# TERMS OF REFERENCE FOR THE REVIEW OF PART 6A THE EMPLOYMENT RELATIONS ACT 2000

## Objectives

- 1 To prepare a report for the Minister of Labour on:
  - a whether the operation of Part 6A of the Employment Relations Act 2000 (Part 6A) has met its objectives, and
  - b if not, whether any amendments to Part 6A are necessary or desirable to meet those objectives.
- 2 To consider the relevance and desirability of the current policy of providing special protections for a defined set of workers (as set out in subpart 1 of Part 6A).
- 3 To enable well informed decisions on how to improve Part 6A both in its operation and objectives.

## Background

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

Part 6A has been in force since December 2004 following the enactment of the Employment Relations Amendment Act (No 2) 2004. Amendments to address gaps in Part 6A came into force in September 2006 following the enactment of the Employment Relations Amendment Act 2006.

Part 6A provides a framework for continuity of employment where an employer's business undergoes restructuring<sup>1</sup> and the employee(s)' work is assigned to a new employer. In these situations:

- a Subpart 1 of Part 6A provides a higher level of protection to the categories of employees specified in Schedule 1A of the Employment Relations Act 2000 (the Act). These employees have the right to elect to transfer to the new employer on their current terms and conditions of employment.
- b Subpart 2 of Part 6A provides for the disclosure of employee transfer costs, from the outgoing employer to the new employer, where subpart 1 applies.
- c Subpart 3 of Part 6A provides that all other employees must have employee protection provisions in their employment agreements that set out the processes the employer must follow when restructuring.

### ***Statutory review of the operation of Part 6A after three years***

Subpart 4 of Part 6A (Section 69OL of the Act) requires the Minister of Labour, as soon as practicable after 13 September 2009, to require a report to be prepared

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<sup>1</sup> 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.

on whether the operation of Part 6A has met the objectives specified in sections 69A and 69OH and, if not, whether any amendments are necessary or desirable.

The Minister must also ensure that the persons and organisations (including representatives of employees and employers), that the Minister thinks appropriate, are consulted in the preparation of the report.

The report will be presented to the House of Representatives.

### **Objectives of Part 6A**

The object of Subpart 1 of Part 6A, as set out in section 69A, 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."

*The specified categories of employees are those listed in Schedule 1A. These employees have experienced a high level of restructuring and related undermining of their employment security and terms and conditions. They comprise employees that provide or undertake:*

- cleaning or food catering services in any workplace
- laundry work for hospitals, rest homes or educational institutions
- orderly work for hospitals and rest homes
- caretaking work for educational institutions.

The object of Subpart 2 of Part 6A, as set out in section 69OA 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.*

The object of Subpart 3 of Part 6A, as set out in section 69OH, 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.”

## **The scope of the review**

### ***In scope***

The review of Part 6A will:

- a Consider the policy of providing special protections for a defined set of workers as set out in subparts 1 and 2 of Part 6A. In particular, it will consider whether this policy is still relevant and desirable.
- b Consider whether the objectives of Part 6A are being achieved through the application of Part 6A in practice. Legislation requires that the review consider the objectives set out in section 69A (subpart 1 of Part 6A) of the Act, on protections for specified groups of workers and section 69OH (subpart 3 of Part 6A) of the Act on protections for all other workers.

The objectives set out in section 69OA (subpart 2 of Part 6A) of the Act, which relates to the disclosure of employee transfer costs information, are necessary to achieve the smooth operation of subpart 1 and therefore will also fall within the scope of the review.

- c Identify issues with the operation of Part 6A that impact on the effectiveness of the legislation in achieving its objectives.
- d Consider whether the legislatively prescribed framework for adding, removing or changing the categories of employees listed in Schedule 1A, as provided in section 237A of the Act, is appropriate and effective.
- e Identify options for addressing any established issues and make recommendations about an ongoing process for implementing these options. The options for addressing issues may include:
  - i improving awareness of, and compliance with, the current provisions: through, for example, developing guidance notes or codes of practice
  - ii improving the application of the legislation through, for example, clarifying policy intent and/or amending provisions
  - iii repealing all or parts of Part 6A.

### ***Out of scope***

The review of Part 6A will not canvass the wider set of regulation and employment policy related to restructuring and redundancy for all workers.

### **Methods and process**

The review will be led by the Department of Labour with advice from a sector advisory group.

The sector advisory group will meet with Department of Labour officials working on the review, on two occasions. It will also provide feedback and comment on material as required.

The Department in consultation with the sector advisory group will:

- (a) collect relevant information from Department databases and other existing sources (including about international approaches to similar matters)
- (b) identify key stakeholders for consultation
- (c) prepare a discussion document for public consultation. The discussion document will outline:
  - i. background about Part 6A
  - ii. discussion around the continued relevance of subparts 1 and 2 of Part 6A
  - iii. early identification of possible issues with the operation of Part 6A
  - iv. schematic options for addressing these issues
  - v. key questions about the operation of part 6A in practice, continued relevance of subparts 1 of Part 6A and options for improving Part 6A
- (d) seek submissions from identified key stakeholders both directly and through publicly publishing the discussion document online
- (e) analyse the submissions and information collected, define the problems and assess options for addressing these problems
- (f) develop a report to the Minister of Labour that provides options for addressing the issues identified, for submission to the House of Representatives.

### **Consultation**

Consultation will be carried out with stakeholders directly impacted by Part 6A in practice and others who are otherwise interested in its application.

The most significant impact of Part 6A is in the building service (e.g. cleaning) and food service contracting sectors. Part 6A was designed to contain sufficient flexibility to enable these sectors to evolve their business practices towards a more sustainable, higher quality and fairer mode of operation. The review will need to consider these effects through relatively close engagement with representatives of these sectors.

The sector advisory group of key stakeholders will be convened by the Department of Labour, with the agreement of the Minister of Labour, and will include representatives from:

- (a) Business New Zealand
- (b) the New Zealand Council of Trade Unions
- (c) the Service and Food Workers Union
- (d) the Building Service Contractors of New Zealand Inc.
- (e) the Property Council of New Zealand
- (f) the New Zealand Law Society (including both the 'Employment Law Committee' and 'Commercial and Business Law' Committee)
- (g) the State Services Commission
- (h) Maori and Pacific Peoples

In addition to members of the sector Advisory Group, key stakeholders to be targeted for consultation include:

- (a) the Small Business Advisory Group
- (b) unions representing employees who provide the services listed in Schedule 1A of the Act (including seeking various ethnic groups' perspectives)
- (c) businesses in the public and private sectors who require services that are listed in Schedule 1A of the Act
- (d) businesses who contract to perform services listed in Schedule 1A of the Act
- (e) any other organisation or person the sector advisory group considers to be a stakeholder or to have relevant expertise in the area
- (f) any organisation or person the Minister of labour considers should be consulted.

The review will be publicly notified and the discussion paper will be publicly available.

## **Deliverables**

The report of the review will identify:

- (a) key stakeholders and the impact of Part 6A in their respective sectors, including the degree to which the objectives of Part 6A have been achieved
- (b) issues with the operation of Part 6A and related matters, such as the process for adding, removing or changing the categories of employees listed in Schedule 1A of the Act; or when a compliant employee protection provision cannot be agreed
- (c) options for addressing any identified issues and likely implications of implementing the various options (costs, benefits and risks)
- (d) whether the provisions of special protections for specified workers are still relevant and desirable
- (e) if necessary, recommendations for improving Part 6A taking into consideration the Government's broader social and economic objectives and international trends.

## Time frames

December 2009	<ul style="list-style-type: none"><li>• announcement of the review and associated timeframes</li><li>• the sector advisory group will be convened</li></ul>
February 2010	<ul style="list-style-type: none"><li>• a discussion document as a basis for consultation will be provided to Cabinet for approval</li></ul>
March 2010	<ul style="list-style-type: none"><li>• the discussion document distributed and submissions sought</li></ul>
May 2010	<ul style="list-style-type: none"><li>• submissions will close</li><li>• a draft report of the review will be provided to the Minister of Labour</li></ul>
July 2010	<ul style="list-style-type: none"><li>• the final report of the review will be submitted to the House of Representatives</li></ul>

## Resources

All costs for this review will be met within the Department of Labour's baseline funding. It will draw on the knowledge resources and expertise contained within the Department and members of the sector advisory group.

The Department will meet the sector advisory group's expenses in travelling to and attending meetings with Department of Labour officials.