

Regulatory Impact Statement

Amendments to Part 6A of the Employment Relations Act 2000

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by the Ministry of Business, Innovation and Employment (the Ministry).

It summarises the Ministry's analysis of options for reform of Part 6A of the Employment Relations Act 2000 (the Act).

Part 6A of the Act (Part 6A) provides employment protection for employees when an employer's business undergoes restructuring and the employee(s)' work is assigned to a new employer.

The objective 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 elect to transfer their employment on their existing terms and conditions of employment, and rights to possible redundancy entitlements.

Schedule 1A of the Act sets out the employees to whom Subpart 1 applies, who are therefore covered by the special protections, including employees that provide cleaning, food catering, caretaking, orderly and laundry services in specified places of work. The Act allows the Minister of Labour to vary the categories covered through Order in Council, provided certain criteria are met.

Subpart 2 of Part 6A provides the right to certain persons to request aggregated employee cost information, and have it provided in "sufficient time" for it to be taken into account, prior to the requestor making decisions about whether to be involved in the restructuring e.g. prior to the requestor deciding to tender for a contract.

Subpart 3 of Part 6A aims to provide protection for other employees, not covered by Subpart 1, by requiring employment agreements to contain employee protection provisions relating to negotiations between the employer and the other person about the transfer of affected employees in a restructuring situation that involves contracting out the work or the sale or transfer of the business.

Subpart 4 of Part 6A requires the Minister of Labour, as soon as practicable after 13 September 2009, to prepare a report on whether the operation of Part 6A has met its objectives and, if not, whether any amendments are necessary or desirable.

The regulatory impact analysis is divided into two parts: 1) whether the policy of providing special continuity of employment protections to the specified workers is still relevant and desirable, and 2) assuming the policy is retained, how the operation of Part 6A could be improved to reduce its costs to employers, while still protecting the core benefits it provides to employees.

The overarching objective for reform of Part 6A is to achieve the appropriate balance between ensuring continuity of employment protection for workers (and the benefits to employees that flow from this) and business performance and productivity in the

affected sectors. The Ministry's preferred options are those the Ministry considers best balance, relative to the status quo, the following criteria:

- **Net impact on employees** - how well the option contributes to the objective of providing appropriate protections to workers potentially disadvantaged by frequent restructuring
- **Net impact on employers** - the costs and benefits to employers of the option, including those relating to compliance costs, flexibility (e.g. employers' ability to structure their business as they see fit from the commencement of a contract), certainty (e.g. in employer liabilities attached to transferring employees), impacts on firm productivity, and impacts on economic efficiency in the affected sectors

Caveats and constraints

There is uncertainty over the precise magnitude of the costs and benefits of each option.

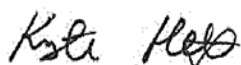
The Ministry's analysis draws on both qualitative evidence (in the form of public submissions and key stakeholder interviews) and quantitative evidence from available statistical datasets to inform assessment of the nature and dimensions of the problems with Part 6A and the impacts of the various options.

Quantitative modelling of the benefits and costs of Subparts 1 and 2 has not been easy. A relative lack of data means the results of the cost-benefit analysis need to be treated with a significant degree of caution. In particular, it has been difficult to effectively model the benefits to employees.

While operating Part 6A imposes additional obligations on employers, neither the initial 2009/10 review undertaken by the former Department of Labour (the former Department), nor subsequent further work, including the external cost-benefit analysis, has found clear evidence supporting the repeal of Subpart 1 (and therefore of Subpart 2).

Although Subparts 1 and 2 impose costs on, and reduce flexibility for, some employers, on balance the Ministry considers that the benefits of having special continuity of employment protections for the specified workers are likely to outweigh these costs.

The Ministry's Regulatory Impact Analysis Panel has considered the analysis of this RIS and considers it meets the quality assurance criteria.



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Summary Table of Options

Issue	Status quo	Ministry's preferred option	Other options considered
Policy Review of Subpart 1 of Part 6A	Retain Subpart 1 in its current form.	Retain Subpart 1 with improvements to its operation	<ul style="list-style-type: none"> • Retain Subpart 1 with improvements and provide for an SME exemption. • Repeal Subpart 1.
Transfer of employees' accrued entitlements	No statutory requirement about how costs of employee entitlements are apportioned between employers. However recent case law shows that incoming employers may recover costs of accrued entitlements from outgoing employers.	Allow employers to agree on the apportionment of costs of employee entitlements. If agreement cannot be reached a default apportionment formula will apply.	<ul style="list-style-type: none"> • Paying out employees their accrued entitlements at the point of transfer. • Flexibility where employers or employees can choose whether to receive payment for their entitlements or to allow them to transfer.
Provision of employee transfer costs information under Subpart 2	Process for requesting employee transfer costs information and requires it to be provided in "sufficient time"	Retain Subpart 2 and extend the right to request employee transfer costs information to subcontractors. Additionally require the outgoing employer provides the incoming employer with employment records on the transferring employees.	<ul style="list-style-type: none"> • Repeal the right to request information. • Require specific information (such as employment agreements and total hours worked) provided before the tender process. • Provide for the contract principal to request employee transfer costs information and provide it to those who have submitted preliminary tenders.
Outgoing employer warranty to reduce "poison chalice" situations	The outgoing employer may unreasonably increase employee entitlements prior to transfer or transfer poor performing employees to do the work, so that the new employer has to employ the employees	Provide an implied warranty from outgoing employers that they have not changed the work or the terms and conditions of the transferring employees without good reason. Breaches of this warranty may be pursued as damages in the District Court.	N/A
Timeframe for election to transfer	The Act does not currently provide a fixed time limit on how long the employee has to elect to transfer to the incoming employer, nor specify how that election is to be made.	Require employees to notify their current employer within five working days of their intention to transfer. The current employer then notifies the incoming employer as soon as practicably possible but no later than five working days (or longer if both employers agree).	N/A

<p>Clarity in Schedule 1A and the amendment process</p>	<p>Current list of employees highly prescriptive yet lacks some clarity. Meeting the criteria for the amendment process is complex and difficult to make an objective assessment.</p>	<p>Repeal section 237A which allows Schedule 1A to be amended by Order in Council provided certain criteria are met.</p>	<ul style="list-style-type: none"> • Including a wage criterion so that employees earning over a certain amount are not included in Schedule 1A • Removing “any other place of work” as noted in Schedule 1A with respect to food catering and cleaning employees.
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Problem definition

- 1 The purpose of contracting out is to improve productivity and economic efficiency through a change of ownership and/or management (allowing resources to flow to those who can make better use of those resources). However, the result has often been the undermining of the terms and conditions of the affected employees. This is partly attributable to the nature of the industries (particularly cleaning and catering), where employee costs make up a significant proportion of the overall operating costs and where highly competitive businesses are subject to regular tendering processes.
- 2 Part 6A was introduced to ensure continuity of employment for “vulnerable” employees - employees in industries where restructuring is especially prevalent, tends to undermine the employee’s terms and conditions of employment, and where those employees have little bargaining power. However, Subpart 1 of Part 6A does impose compliance costs, reduces flexibility and, by excluding wages and conditions from the contest for contracts, can work against efforts to improve business performance and economic efficiency. If the goal of protecting specified groups of workers is socially desirable, it is prudent to balance it against costs to business.
- 3 This RIS assesses whether the policy of providing special continuity of employment protections to the specified workers is still relevant and desirable in the current business and policy context, and, if so, whether the current legislative and policy settings are the best way of providing these protections at the least cost to businesses in the affected sectors.

Status quo

- 4 Part 6A provides employment protection for employees when an employer’s business undergoes restructuring and the employee(s)’ work is assigned to a new employer.
- 5 *Subpart 1* - The objective 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 restructuring¹, including rights to transfer their employment on the same terms and conditions as under their old employer, and rights to possible redundancy entitlements.
- 6 *Schedule 1A* sets out the employees who are covered by the special protections, including employees that provide cleaning, food catering, caretaking, orderly and laundry services in specified places of work. The Act allows the Minister of Labour to vary the categories covered through Order in Council, provided certain criteria are met.
- 7 *Subpart 2* provides the right to certain persons to request aggregated employee cost information, and have it provided in “sufficient time” for it to be taken into

¹ Part 6A involves the following restructuring situations: contracting out, contracting in, subsequent contracting or the sale or transfer of the business.

account, prior to the requestor making decisions about whether to be involved in the restructuring e.g. prior to the requestor deciding to tender for a contract.

- 8 *Subpart 3* aims to provide protection for other employees, not covered by Subpart 1, by requiring employment agreements to contain employee protection provisions relating to negotiations between the employer and the other person about the transfer of affected employees in a restructuring situation that involves contracting out the work or the sale or transfer of the business.
- 9 *Subpart 4* requires the Minister of Labour, as soon as practicable after 13 September 2009, to prepare a report on whether the operation of Part 6A has met its objectives and, if not, whether any amendments are necessary or desirable.

Population groups most affected by the special protections

- 10 It is not possible to ascertain precise numbers of employees and employers affected by Subparts 1 and 2. The Ministry's estimates draw on a range of data sources.

Employers

- 11 It is estimated that 4,313 employers could be affected by the provisions, including 3,600 in building and other industrial cleaning services and 713 in catering services. These two sectors are captured by the reference to cleaning services or food catering services in relation to "any other place of work" in Schedule 1A and are affected by Subpart 1. This data may include some employers not affected.² It is difficult to accurately identify the proportion of employers affected in other sectors, therefore they are not included in these numbers.

Employees

- 12 It is estimated that there are 26,099-28,710 employees who could be affected by Subpart 1, comprising 19,340-21,275 in the cleaning sector, 3,681-4,049 in caretaking, 795-875 in orderly, and 2,283-2,511 in laundry.³

Gender

- 13 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 per cent and 64 per cent of the respective total workforces.

² Statistics New Zealand's *Business Demography Statistics 2012*

³ In arriving at an estimate of the numbers of employees potentially affected by Subparts 1 and 2 of Part 6A, the Ministry used Business Demography (BD) employee count data from Statistics New Zealand for the year ended 2011, and Linked Employer-Employee Database (LEED) data for the total number of jobs in the Building Cleaning, Gardening and Pest Control Services category.

Objectives

- 14 The Government's objectives for the wider employment relations framework are to increase flexibility and choice for employers and employees, ensure that the balance of fairness is appropriate for both groups, and increase workplace productivity.
- 15 To that end, the desired outcome for any reform of Part 6A is to achieve the right balance between ensuring appropriate continuity of employment protections for employees, particularly the workers potentially disadvantaged by frequent restructuring, and improving business performance and productivity in the affected sectors by allowing changes in ownership to those who believe they can derive greater value from a business. The preferred options are those that best balance, relative to the status quo, the following criteria:
 - a **Net impact on employees** - how well the option contributes to the objective of providing appropriate protections to workers potentially disadvantaged by frequent restructuring, including any benefits and detriments.
 - b **Net impact on employers** – the benefits and detriments for employers of the option, including those relating to compliance costs, flexibility (e.g. employers' ability to structure their business as they see fit from the commencement of a contract, certainty (e.g. in employer liabilities attached to transferring employees), and the impacts on firm productivity and economic efficiency.
- 16 The Ministry considers that these criteria are in line with the Government's wider productivity and efficiency goals.
- 17 For the purposes of this analysis, the above criteria have equal weighting.

Regulatory Impact Analysis

- 18 The Regulatory Impact Analysis is organised as follows:
 - a Part A: Whether Part 6A should be retained, and if so in what form
 - b Part B: Options to improve the operation of Part 6A and lower its costs.

Part A: Whether Part 6A should be retained, and if so in what form

Assessment of the costs and benefits of Subparts 1 and 2

- 19 This section deals with the key question of whether Subparts 1 and 2 should be retained.
- 20 The Ministry's analysis drew on qualitative evidence from public submissions to the initial 2009/10 review, key stakeholder interviews undertaken as part of the external cost-benefit analysis and quantitative evidence from available statistical datasets.⁴

⁴ These datasets included Statistics NZ's *Household Labour Force Survey*, *Linked Employer-Employee Database*, *Quarterly Employment Survey*, and *Labour Cost Index*.

Initial 2009/10 review

- 21 In the initial 2009/10 review, the former Department of Labour (the former Department) found that:
- a while Part 6A may appear overly complex and imposes costs on, and reduces flexibility for, some employers, on balance the benefits outweigh the costs
 - b Part 6A achieves an appropriate balance between ensuring continuity of employment protection for the defined set of employees and business performance and productivity in the affected sectors
 - c despite the concern of some employers, the relevant industries had remained highly competitive
 - d there were, however, significant operational issues impacting on the operation of the affected businesses. The issues were largely concerned with the transfer of individualised employee information and accrued entitlements at the time of transfer, and problems with the disclosure of employee transfer costs information prior to restructuring decisions.

External cost-benefit analysis

- 22 The former Department subsequently commissioned an external cost-benefit analysis to further test these conclusions - in particular, by attempting to quantify the costs and benefits to employees and employers of Subparts 1 and 2. The former Department sought to test whether and to what extent the findings from the 2009/10 review were consistent with a more quantitative analysis.
- 23 In order to ascertain whether Subparts 1 and 2 are imposing a net benefit or net cost, the cost-benefit analysis attempted to quantify:
- a The consequential value employees are likely to receive from the protection of employment, wages, leave entitlements and hours at the time of contract transfer and rights to possible redundancy afterwards, minus the cost of these to employers
 - b The administration and transaction benefits and costs associated with the transfer process minus what would have been incurred in the absence of the provisions
 - c The uncertainty around the transfer process and costs for employers
 - d Longer term efficiency costs created by perverse incentives when employers and employees do not face the full cost of their decisions and employers have less flexibility in their hiring practices.

Overall result of the cost-benefit analysis

- 24 The analysis found that both the benefits and costs of Subparts 1 and 2 are small in a national economic sense, and that the overall cost-benefit result is highly uncertain. The following table sets out estimates of the benefit-cost ratios under high, medium, and low scenarios - with the high (optimistic) scenario assuming high benefits and low costs and the low scenario the opposite.

Summary results	Scenario		
	High	Medium	Low
Total benefits	\$2.420m	\$1.253m	\$0.533m
Total costs	\$2.378m	\$2.695m	\$3.171m
Net benefits	\$0.042m	- \$1.442m	- \$2.638m
Benefit-cost ratio	1.02	0.46	0.17

25 Key assumptions used in the analysis were that the project timeframe is seven years, the discount rate applied is eight per cent real, and no cost escalation or inflation is used.

Comment

26 The costs of complying with Part 6A can be disproportionate for small businesses. To reduce the detrimental impact of Part 6A it is reasonable to consider exempting small to medium enterprises (SMEs) from certain parts of Part 6A.

27 Although Subparts 1 and 2 impose costs on, and reduce flexibility for, some employers, the Ministry considers that overall the benefits of having special continuity of employment protections for the specified workers are likely to outweigh these costs. Moreover, there is evidence - from the 2009/10 review and the cost-benefit analysis - that these costs could be reduced (and irritants to employers reduced), while protecting core benefits to affected employees.

28 The table below summarises the assessment of the options against the objectives of net impact on employers and employees, outlined above.

Options for the retention or repeal of Part 6A

Option	Net impact on employers	Net impact on employees
A. Status quo - retaining Subpart 1 in its current form.	<p><u>Mixed</u></p> <p><i>Detriments</i></p> <p>Subpart 1 of Part 6A has a negative impact on balance to businesses in the affected sectors. It imposes compliance costs, adds uncertainty in the transfer process (for example by not explicitly stating the timeframe employees have to elect to transfer) reduces flexibility (e.g. the ability to structure a business and determine terms and conditions from the beginning of a contract, the ability to tailor price and quality of services to the needs of particular clients), and, by</p>	<p><u>No change</u></p> <p>Broad benefits achieved through improving the job security and workplace stability of potentially disadvantaged workers (who are vulnerable to unemployment and related negative outcomes), and helping to prevent the undermining of their terms and conditions of employment.</p>

	<p>excluding wages and conditions from the contest for contracts, can work against efforts to improve business performance and economic efficiency.</p> <p><i>Benefits</i> This option <i>may</i> provide some offsetting economic benefits to employers (the evidence is not clear):</p> <ul style="list-style-type: none"> • Industries with low-skilled and low-paid employees may benefit to some extent when wages and conditions are excluded from the contest for contracts, and competition is instead focused on management, technical innovation and investment. • Continuity of employment protection in labour intensive industries with high employee turnover may improve workplace stability and productivity as skills are retained. This in turn can save the need to train new staff. 	
B. Changing the coverage of the special protections by amending Schedule 1A (and making improvements to the operation of Part 6A).	<p><u>Mixed</u> May impact on more or fewer businesses, but within these industries the detriments and benefits associated with Option A pertain.</p>	<p><u>Mixed</u> While the overall approach is maintained, the net impact on employees depends on the resulting coverage.</p>
C. Changing the coverage of the special protections through providing a descriptive rather than prescriptive outline of categories of employees who will be covered by special protections.	<p><u>Negative</u></p> <p><i>Detriments</i> Likely to result in more litigation and lack of certainty across businesses, decreasing overall competition and innovation and increasing avoidance behaviours.</p> <p><i>Benefits</i> May be off-set by improved practices and employment continuity in some sectors.</p>	<p><u>Positive</u></p> <p><i>Benefits</i> Likely to result in more targeted protections.</p>
D. Repealing Subparts 1 and 2 of Part 6A and extending Subpart 3 to all employees.	<p><u>Positive</u></p> <p><i>Benefits</i> Will reduce compliance costs, increase flexibility, certainty, and business performance and likely to improve overall economic efficiency in the affected sectors.</p>	<p><u>Negative</u></p> <p><i>Detriments</i> Although there would be consistent treatment across industries (i.e. no special protections for any specific group), the impact on potentially disadvantaged groups (i.e. those covered by Schedule 1A) would be</p>

	There will be greater freedom for the incoming employer to structure the business as they see fit from the commencement of a contract. This is likely to encourage additional competition and encourage more players to join the market. However, this may be offset to some extent by decreases in sector stability and related decreases in workplace productivity.	negative. Likely to erode terms and conditions of employees, and may also affect their health and wellbeing.
<p>Preferred option of the Ministry</p> <p>E. Retain Subpart 1, but with changes in relation to apportionment of costs of employee entitlements, timeframes for employees to elect to transfer, requiring the provision of detailed employee information to the incoming employer, and provisions for damages when outgoing employers engage in certain detrimental behaviours.</p>	<p><u>Positive</u></p> <p>Similar benefits and detriments to Option A, with additional benefit of improving the operation of Part 6A by addressing problem areas identified in the review.</p>	<p><u>Mixed</u></p> <p><i>Benefits</i> The apportionment process should help reduce disputes by ensuring that employees' entitlements are met by the incoming employer.</p> <p><i>Detriments</i> A fixed timeframe to elect to transfer may be considered to be too restrictive.</p> <p>The transfer of personnel information between employers raises privacy issues.</p>
<p>F. Retain the status quo, with the changes outlined in Option E, with exemption for Small to Medium Enterprises (SMEs) from certain parts of Part 6A. SMEs are businesses that employ 19 or fewer employees.</p>	<p><u>Positive</u></p> <p><i>Detriments</i> Potential increase in disputes over an employer's SME status.</p> <p><i>Benefits</i> Compliance costs for SMEs will be reduced as they do not have to comply with certain parts of Part 6A. As affected employees will not have any right to transfer to a new employer who is an SME.</p> <p>Costs would be reduced for contract principals, as exempt SMEs are able to provide lower cost services by not taking on affected employees on existing terms and conditions.</p>	<p><u>Negative</u></p> <p><i>Detriments</i> The number of employees protected by Subpart 1 would be reduced, producing potential negative social outcomes.</p> <p>Gradual reduction in overall level of employee entitlements, as work shifts from a non-SME to a SME who is able to reduce entitlements, then to a non-SME who upholds the reduction.</p>

The Ministry's preferred option: Option E

- 29 The Ministry's preferred option is Option E as it retains protections for employees and improves the operation of Part 6A as per the findings of the review.
- 30 The Ministry notes that Sapere considered exempting SMEs from certain parts of Part 6A in its cost-benefit analysis. However, Sapere commented that:

“...from what we heard from interviews and found with our subsequent analysis, it seems likely that restricting the special protections to only large employers would be counter-productive and lead to even more perverse outcomes than the current arrangements. This is because it would result in transfer situations where one party had to be compliant and the other did not, leading in all likelihood to a breakdown in the exercising of the provisions at all.”⁵

31 The Ministry concurs with this analysis, and considers that changes to managing accrued entitlements and the transfer of employees would provide more scope for improvement of Part 6A. Applying Part 6A of the Act to all businesses would ensure that all contractors were competing on an equal footing during a restructuring situation.

Part B: Options to improve the operation of Part 6A and reduce its costs

32 The review of Part 6A identified issues with the operation of Part 6A. These issues are described in the Status Quo below. Options to address these issues are discussed below.

1. The transfer of employees’ accrued entitlements

33 The legislation provides for a transfer of employee accrued entitlements, but there is no corresponding obligation on outgoing employers to transfer funds for specified categories of employees to incoming employers to cover these accrued entitlements. This has caused uncertainty, confusion and considerable dissatisfaction amongst employers. It can also create liquidity problems for incoming employers.

Options - assessment of costs and benefits

Options	Net impact on employers	Net impact on employees
<i>Full transfer of accrued entitlements</i>		
A. No statutory requirement about how costs of employee entitlements are apportioned between employers. However recent case law shows that incoming employers may recover costs of accrued entitlements from outgoing	<u>No change</u> Trade-off between flexibility in commercial negotiations and clarity and fairness for business. Confusion and failure to transfer or take entitlements into account is costly, complicates transfers and impacts on the profitability of businesses.	<u>No change</u> May generate employment relationship problems that impact on the transfer and result in poor outcomes for employees.

⁵ Sapere, 2012, Cost Benefit Analysis of Subpart 1 of Part 6A of the Employment Relations Act 2000, page 53.

Options	Net impact on employers	Net impact on employees
<p>employers.</p> <p>B. Pay out the value of accrued annual holidays and alternative holidays to employees at the end of employment and transfer accrued sick leave and bereavement leave to the incoming employer (and provide access to compliance orders and penalties imposed by the Employment Relations Authority for non-compliance: not exceeding \$10,000 in the case of an individual, not exceeding \$20,000 for a company or other corporation).</p>	<p><u>Positive</u></p> <p><i>Benefits</i></p> <p>Lowers administration costs for businesses exiting a contract for service and reduces the risk of disputes with an incoming employer over inaccurate or unpaid entitlements.</p> <p>Increases certainty.</p>	<p><u>Negative</u></p> <p><i>Detriments</i></p> <p>Diminishes minimum standard of continuous employment by removing access to accrued paid leave. The consequences of non-compliance by employers fall on employees.</p>
<p><i>Preferred option of the Ministry</i></p> <p>C. Employers negotiate an agreement on the apportionment of liabilities for transferring employees' service-related entitlements, if employers fail to agree, a default apportionment formula provided in the Act applies.</p> <p>If there are disputes about apportionment the Employment Relations Authority will be able to determine the apportionment of liabilities.</p>	<p><u>Positive</u></p> <p><i>Benefits</i></p> <p>Provides flexibility in commercial negotiations and improves clarity around the obligations of each employer.</p> <p>Some employers may benefit from using the default formula as guidance.</p> <p>Provides greater clarity with regard to which employer is responsible for the accrued entitlements of transferring employees.</p> <p><i>Detriments</i></p> <p>Compliance costs associated with the apportionment process may apply (such as meetings, negotiations, drafting of agreements etc.).</p>	<p><u>Positive</u></p> <p><i>Benefits</i></p> <p>Reinforces employee rights to entitlements and to have service recognised in accordance with the objectives of Part 6A. Also improves fairness across employers by providing a more level playing field for competition with clearer obligations of parties to a transfer.</p> <p>Provides clarity in legislation for employees in regards to who is responsible for their entitlements.</p> <p>Removes potential delays with employees accessing their entitlements.</p>

Options	Net impact on employers	Net impact on employees
<p>D. Either the employer or employee can choose to either transfer or cash up accrued entitlements at the conclusion of a contract.</p>	<p><u>Mixed</u></p> <p><i>Detriments</i> However, if employee chooses, it will likely make contract negotiations more complex. Employers would be unclear about how liabilities will be managed.</p> <p><i>Benefits</i> If employer chooses, it allows flexibility for how accrued entitlements are managed between employers.</p>	<p><u>Mixed</u></p> <p><i>Detriments</i> Even if employee chooses, it may be seen to be inconsistent with objectives of Part 6A of providing continuity of employment. If employer chooses, it could cause uncertainty and confusion for employees.</p> <p><i>Benefits</i> However, flexibility for employees could be beneficial if accompanied by written agreement.</p>
<p>E. Removing the right to continuity of employment in situations of a partial transfer.</p>	<p><u>Negative</u></p> <p><i>Benefits</i> Eliminate risks to business.</p> <p><i>Detriments</i> Creates perverse incentives to create 'partial transfer' situations.</p>	<p><u>Negative</u></p> <p><i>Detriments</i> Would arbitrarily remove many workers from coverage. Also part-time work in this sector is common.</p>
<p>Preferred option of the Ministry</p> <p>F. Providing that, in situations of partial transfer, employers negotiate the apportionment of liabilities for transferring employees' service-related entitlements, if employers fail to agree, a default apportionment formula provided in the Act applies. If there are disputes about apportionment the Employment Relations Authority will be able to determine the apportionment of liabilities.</p>	<p><u>Positive</u></p> <p><i>Benefits</i> Retains flexibility and provides clarity about how to manage these situations. Also provides consistency with a default formula for guidance when agreement cannot be met.</p>	<p><u>Positive</u></p> <p><i>Benefits</i> Clarifies current situation and provides consistency.</p>

The Ministry's preferred options: Options C and F

- 34 There was a shared interest amongst employee and employer submitters to the review in 2009/10, in ensuring that the ownership of all liabilities is clearer and enforceable. This includes providing more clarity in situations of partial transfer, where only part of an employees work transfers to a new employer.
- 35 The Ministry's preferred options ensure a balance between flexibility in contract negotiations, and providing assurance about what will happen to the liability for employee entitlements in the transfer process. This approach would also mean that costs of employee entitlements will be more clearly and fairly be taken into account in tenders and contract negotiations.

2. The provision of employee information

- 36 Subpart 2 provides the right to certain persons to request aggregated employee transfer cost information, and have it provided in "sufficient time" for it to be taken into account, prior to the requestor making decisions about whether to be involved in restructuring e.g. prior to the requestor deciding to tender for a contract.
- 37 Submissions to the review suggest Subpart 2 is a source of concern for many employers. It is currently under utilised because it is perceived by some employers to require divulging commercially sensitive information, and imposes compliance costs in the form of the costs of compiling the information. The Ministry has considered whether Subpart 2 is still appropriate, particularly given the proposals for change around the transfer of individualised employee information and the management of accrued entitlements (as outlined in the section above).

Options - assessment of costs and benefits

Options	Net impact on employers	Net impact on employees
A. Status quo: process for requesting employee transfer costs information and requires it be provided in "sufficient time"	<p><u>No change</u></p> <p>Retain compliance costs, but reduces risks of employers tendering blind without good information on the costs and liabilities they will be taking on.</p>	<p><u>No change</u></p> <p>Reduces risk of businesses tendering blind, and therefore risks that transferring employees being made redundant because the incoming employer is unable to meet the higher-than-expected costs associated with these employees within the price negotiated for the work.</p>
B. Repeal the right to request, and receive, employee transfer costs information, prior to submitting a tender alongside amendments requiring disclosure of individualised employee information and addressing the management of	<p><u>Negative</u></p> <p><i>Detriments</i></p> <p>Increases risks to businesses and transferring employees of tendering blind.</p>	<p><u>Negative</u></p> <p><i>Detriments</i></p> <p>Increased risks to employees from businesses tendering blind.</p>

Options	Net impact on employers	Net impact on employees
accrued entitlements.		
C. Require specific information for tender processes, e.g. employment agreements and total hours worked, while protecting privacy of the individuals.	<p><u>Unclear</u></p> <p><i>Benefits</i> May assist informed bidding and prevent unexpected costs protecting efficiency and equity.</p> <p><i>Detriments</i> Would not be consistent with quick tender processes</p>	<p><u>N/A</u></p>
D. Establishing a right and obligation for the contract principal to request employee transfer costs information from an incumbent employer and to provide it to prospective businesses who have submitted preliminary tenders for a contract and requested the information and prescribe timeframes for this aggregate information to be requested and provided	<p><u>Unclear</u></p> <p><i>Detriments</i> Minimises the potential for disputes and supports new businesses to operate with accurate information. However, would significantly impact on the flexibility of tendering processes and related commercial negotiations.</p>	<p><u>Positive</u></p> <p><i>Benefits</i> Helps provide certainty to employees about their entitlements.</p>
<p><i>Preferred option of the Ministry</i></p> <p>E. Retain Subpart 2 and additionally require the outgoing employer to provide the incoming employer with individual information on transferring employees, including the employees' personnel file. Failure to provide this information should also be subject to a</p>	<p><u>Positive</u></p> <p><i>Benefits</i> Enhances the smooth transfer of employees and allocation of entitlements. Assists incoming employers in gaining knowledge about their staff.</p> <p><i>Detriments</i> Imposes slightly increased compliance costs on outgoing employers. The information to be transferred is required to be kept by employers anyway - the additional costs pertain only to the costs of transferring this information.</p>	<p><u>Positive</u></p> <p><i>Benefits</i> Enhances the smooth transfer of employees and allocation of entitlements. Allows employees to view the information provided and request any required changes.</p>

Options	Net impact on employers	Net impact on employees
<p>compliance order and/or penalty by the Employment Relations Authority or the Employment Court.</p> <p>Additionally, allow subcontractors to make information requests under Subpart 2 for employee transfer costs information.</p>		

The Ministry's preferred option: Option E

- 38 While Subpart 2 is a concern to many employers, it does help reduce the risks to businesses, and transferring employees, in businesses “tendering blind” without good information on the costs and liabilities they will be taking on. This can include the risk of transferring employees being made redundant, or at least of reducing their terms and conditions after the point of transfer, because the incoming employer is unable to meet the higher-than-expected costs associated with these employees within the price negotiated for the work.
- 39 The timely provision of employee transfer costs information to inform tender processes and related commercial negotiations is important. It allows costs over which incoming employers have little control (i.e. those relating to the terms and conditions of transferring employees) to be properly considered in tender processes and commercial negotiations.
- 40 The current provisions of Subpart 2 do not allow subcontractors to make requests for employee transfer costs information. This can result in a subcontractor being required to employ transferring staff without prior knowledge of how many employees they could be required to take on or the level of entitlements that they would have to meet. This option would allow subcontractors to make requests under Subpart 2 of Part 6A.
- 41 Part 6A is currently silent on the need for the outgoing employer to provide information about transferring employees to the incoming employer. This results in the incoming employer being faced with genuine practical difficulties in establishing the terms and conditions that should apply and in gaps in personnel information needed to provide for true continuity of employment and the management of performance. This was a problem area identified in the review and this option is a response to that problem.

3. Outgoing employer warranty

- 42 There are concerns over the behaviours of some outgoing employers who provide unscheduled increases in employee entitlements immediately prior to transfer so the new employer is required to provide for them, or reorganise work so that poor performing staff do the work that is subject to restructuring and the incoming employer is then obliged to take them on.

Options - assessment of costs and benefits

Options	Net impact on employers	Net impact on employees
Status quo	<u>No change</u>	<u>No change</u>
<p>Preferred option of the Ministry</p> <p>A. Provide an implied warranty from outgoing employers that they have not changed the work or the terms and conditions of the transferring employees without good reason. Breaches of this warranty may be pursued as damages in the District Court.</p>	<p><u>Positive</u></p> <p><i>Benefits</i></p> <p>Provides incoming employers with some assurance that they are not entering a 'poison chalice' situation.</p> <p><i>Detriments</i></p> <p>Employers may be hesitant to change terms and conditions, even where justified, to prevent accusations of breaching the implied warranty.</p>	<u>Unclear</u>

The Ministry's preferred option: Option A

43 The preferred Option A reduces the risks of these 'poison chalice' situations. The preferred option will ensure that employers do not inflate terms and conditions of employment for employees who are transferring to an incoming employer and will provide means of redress for the incoming employer if they find themselves in such a situation.

4. Timeframe for election to transfer

44 The provisions of Part 6A do not currently provide a fixed timeframe for employees to elect to transfer to the new employer. Part A of this regulatory impact analysis has identified this lack of prescribed timeframes as adding uncertainty in the transfer process. Employers require timely decisions from employees regarding their preference to elect to transfer, to assist in a smoother transfer process.

Options - assessment of costs and benefits

Options	Net impact on employers	Net impact on employees
A. Status quo.	<p><u>No change</u></p> <p>The Act does not currently provide any guidance on how long the employee has to elect to transfer or provide for the employee to sign the election to transfer.</p> <p>There are no provisions that prevent employers from adjusting the arrangements of work to adversely affect the business of an incoming employer.</p>	<u>No change</u>

Options	Net impact on employers	Net impact on employees
<p><i>Preferred option of the Ministry</i></p> <p>B. Require employees affected by the restructuring to notify their current employer of their decision to transfer within five working days of being advised they have the right to elect to transfer, or whatever longer timeframe is agreed between the two employers.</p>	<p><u>Positive</u></p> <p><i>Benefits</i></p> <p>Provides a timely signal to both employers as to whether employees are electing to transfer and to begin transferring personnel files.</p>	<p><u>Unclear</u></p> <p>The timeframe provides employees with a clear requirement for how long they have to transfer, but may be seen as restrictive.</p>

The Ministry's preferred option: Option B

45 This option provides a greater degree of certainty for the incoming employer about which employees elect to transfer to the incoming employer and specifies a timeframe in which elections must be made. This option would help to ensure situations where the incoming employer is unclear about which employees elect to transfer or where employees take an unreasonably long time to elect to transfer, do not occur in the future.

5. Clarity in Schedule 1A and the amendment process

46 Schedule 1A of the Act identifies the employees who are covered by the special protections provided for in Subpart 1 of Part 6A. Section 237A of the Act allows the Minister of Labour to, by Order in Council, add or remove categories of employees that are covered by the special protections. Section 237A also sets out the criteria that the Minister of Labour must consider in making a recommendation that a group be added, or removed, from Schedule 1A:

- a whether the employees are in a sector in which the restructuring of an employer's business occurs frequently
- b whether the restructuring of the employer's businesses in the sector concerned has tended to undermine the employees' terms and conditions of employment
- c whether the employees have little bargaining power.

47 Meeting the prerequisite criteria for amending Schedule 1A is complex. The criteria for considering adding categories of workers to Schedule 1A are difficult to objectively measure. Also, any amendment to Schedule 1A by Order in Council could substantively change the coverage of Part 6A in a way that might not have been anticipated by Parliament.

48 There was also concern expressed in the review that clarity was necessary to ensure that some "non-vulnerable workers" were not inadvertently covered by the legislation.

Options - assessment of costs and benefits

Options	Net impact on employers	Net impact on employees
<p>A. Status quo: current list of employees highly prescriptive but some minor lack of clarity and possibility that inappropriate employees are covered. Process for meeting the criteria for amendment complex.</p>	<p><u>No change</u></p> <p>Relatively clear who is covered, aiding certainty for businesses.</p> <p>Relatively complex process for amending the schedule, requiring assessment against criteria that are difficult to objectively measure.</p> <p>Amendment by Order in Council can potentially substantively change the coverage of Part 6A without a Parliamentary process being undertaken.</p>	<p><u>No change</u></p> <p><i>Benefits</i></p> <p>Tight targeting provides confidence in who is covered</p>
<p>B. Including a wage criterion so that employees earning above, for example, average wage are not included in Schedule 1A.</p>	<p><u>Positive</u></p> <p><i>Benefits</i></p> <p>Does not impact effectiveness or costs to business but may reduce disputes as compared to the status quo</p>	<p><u>Mixed</u></p> <p><i>Benefits</i></p> <p>Benefits more targeted on the intended “vulnerable” employees. Would reduce situations where management or executive positions are captured in Schedule 1A.</p> <p><i>Detriments</i></p> <p>If the wage criterion threshold is set too low, then some groups of employees (who may in fact be considered “vulnerable” employees) would lose continuity of employment protection, compared to the status quo.</p>
<p>C. Removing “any other place of work” as noted in Schedule 1A (f).</p>	<p><u>Positive (slight)</u></p> <p><i>Benefits</i></p> <p>Aids certainty about some business decisions where it was less clear</p>	<p><u>Negative</u></p> <p><i>Detriments</i></p> <p>Narrows the scope of employees covered many of whom would have been appropriate</p>
<p>Preferred option of the Ministry</p> <p>D. Repealing Section 237A which provides a process for amending the schedule. Future amendments to Schedule 1A would be by an Act of</p>	<p><u>Positive</u></p> <p>Prevents wasting resources on applications to amend. More security (and certainty of application) as less easy to amend.</p>	<p><u>Positive</u></p> <p>Prevents wasting resources on applications to amend. More security (and certainty of application) as less easy to amend.</p>

Parliament.		
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The Ministry's preferred option: Options D

49 The Ministry considers that the process for amending Schedule 1A is relatively complex. The criteria for considering adding categories to Schedule 1A are difficult to objectively measure. Also, any amendment to Schedule 1A by Order in Council could substantively change the coverage of Part 6A and thereby significantly alter the achievement of objectives agreed by Parliament, in a way that might not have been anticipated by Parliament.

Consultation

50 The former Department sought advice from a Sector Advisory Group on the terms of reference for the initial 2009/10 review, the content of the public discussion paper, the consultation process and the analysis and findings of the review. The Sector Advisory Group included representatives from: Business New Zealand, the New Zealand Council of Trade Unions, the Service and Food Workers Union, the Building Service Contractors of New Zealand Inc, the Property Council of New Zealand, the New Zealand Law Society (including both the Employment Law Committee and the Commercial and Business Law Committee), the State Services Commission and Māori.

51 The former Department also sought submissions on the review of Part 6A from employers, employees, and their representative organisations; interested members of the public; and government agencies, including former Department staff with experience of Part 6A in operation.

52 On 15 February 2010, the former Department released a discussion paper to the public which set out key questions for the review of Part 6A and provided a consultation form to guide submissions.

53 One hundred and forty six submissions were received including eight employee representative bodies, 94 employees (mainly those directly effected by Subpart 1 of Part 6A), 12 employer representative bodies, 18 individual employers (including 10 large enterprises and four small enterprises), seven legal services groups (including law firms and community law centres), and seven other types of groups (including healthcare providers, franchise owners, non-profit associations, National Advisory Council on the Employment of Women and contract principals).

54 There was overlap across all submissions on specific areas of concern and related areas for improvement, such as lack of awareness of Part 6A by small businesses and non-compliance with transfer of entitlements. The key feedback received during the review has been described in the preceding sections.

55 The initial review was completed in April 2010.

56 In the course of the external cost-benefit analysis (in the second stage of the review), interviews with a range of key stakeholders was undertaken. This included interviews with several employees, affected unions, a range of employers - both small and large, three relevant industry associations, and two users of the services— one small and one large.

- 57 The Ministry has consulted on this RIS with the Treasury, Department of Prime Minister and Cabinet, State Services Commission, Ministry of Justice, Te Puni Kōkiri, Ministry of Pacific Island Affairs, Ministry of Health, Ministry of Education, Ministry of Women's Affairs, and the Office of the Privacy Commissioner.
- 58 All comments received have been considered and, as far as possible, incorporated into this RIS and the Cabinet paper.

Conclusions and recommendations

- 59 The options presented seek to remedy problems with:
- a provision of employee information
 - b transfer of entitlements
 - c the mechanism for changing Schedule 1A.
- 60 The options were developed with a view to achieving the appropriate balance between ensuring continuity of employment protection for the specified employees and business viability in the affected sectors. The Ministry's conclusions are summarised in the sections above. The implementation of the preferred options will help ensure the smoother operation of Part 6A in the future.

Implementation

- 61 The proposed changes to Part 6A would require amendments to the Employment Relations Act 2000.
- 62 This Regulatory Impact Statement will be published on the Ministry's website, subject to any appropriate withholding of information that may be permitted under the Official Information Act 1982.
- 63 Before any changes to the Act come into force, the Ministry will undertake a targeted awareness raising campaign targeting relevant employers and employees. The aim of the campaign will be to inform employers and employees of the changes and how they may be affected and to prompt employers and employees to be prepared before the changes come into effect.
- 64 The awareness raising campaign and ongoing information provision will be undertaken within the Ministry's existing baseline funding.

Monitoring, evaluation and review

- 65 The Ministry will provide the Minister of Labour with advice on the monitoring and evaluation of the impact of any changes to Part 6A. The Ministry will also undertake informal monitoring of Part 6A through media reports, research and contacts with the Ministry's contact centre and Labour Inspectors.