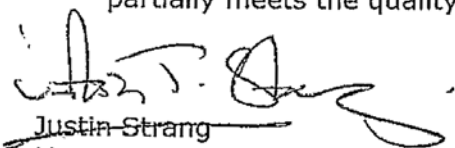


Regulatory Impact Statement

Disclosure of information and the Duty of Good Faith

Agency Disclosure Statement

- 1 This Regulatory Impact Statement has been prepared by the Ministry of Business, Innovation and Employment (the Ministry). It provides an analysis of options to amend the good faith requirements of the Employment Relations Act 2000 (the ER Act).
- 2 The decision of the Employment Court (the Court) in *Massey v Wrigley* has created uncertainty for employers regarding their competing obligations under the Privacy Act 1993 (the Privacy Act) and the ER Act. The case highlights a disconnect between information that can be withheld under the provisions of the Privacy Act and information that the Court determined must be released under the good faith requirements of the ER Act.
- 3 Briefly, the Court found that it was appropriate for unsuccessful job candidates in a restructuring situation to have access to relevant confidential information about themselves and other candidates as part of good faith obligations under the ER Act. The Court took a broad approach to the scope of an employer's good faith obligations to provide employees with access to relevant information and gave less weight to the competing privacy interests in the case.
- 4 The decision is not consistent with widespread desirable and accepted employers' practices around the protection of privacy interests.
- 5 The Ministry has investigated the options for striking a balance between employees having access to relevant information to allow informed comment on a situation affecting their employment and an individual's right to have their personal information kept private. The analysis of the options has been constrained by a lack of empirical evidence on the direct and indirect economic costs on individuals, business and Government of current settings.
- 6 The recommended option involves better aligning the ER Act with the principles and withholding grounds in the Privacy Act and the Official Information Act 1982 (OIA) by clarifying that an employer is not required to provide confidential information about another person.
- 7 Officials are still working through the detailed design of how the recommended option, as described in this RIS, will be given effect to. The Ministry is recommending Cabinet approval for the Minister of Labour to make any further policy decisions that are consistent with Cabinet's decisions, before Cabinet Legislation Committee considers the proposal.
- 8 The consultation of this Regulatory Impact Statement has been limited due to time constraints relating to the legislative programme, to ensure a legislative amendment is to be passed in 2012.
- 9 The Ministry has reviewed this Regulatory Impact Statement and considers that it partially meets the quality assurance criteria.



Justin Strang
Manager - Employment Relations Policy
Ministry of Labour
18 A/2012

Summary of options

Option	Benefits	Detriments	Risks
1. Status quo	<ul style="list-style-type: none"> Time to monitor the impacts of the decision and see how employer practices develop. 	<ul style="list-style-type: none"> The Court's decision highlights that the legislative requirements relating to information provision are ambiguous and the conclusion that the Court had arrived at is inconsistent with the original policy intent. 	<ul style="list-style-type: none"> The status quo significantly departs from commonly understood principles of information provision to employees, particularly during restructuring and redundancy situations. The status quo has removed a large degree of certainty for employers with regard to what information they have to provide to employees. The post-<i>Massey</i> status quo is beginning to create compliance costs and risks of litigation for employers, as employees and unions cite the decision in requests for information.
2. Amend the ER Act to exclude "evaluative material" about other employees from having to be provided	<ul style="list-style-type: none"> Addresses specific concerns about the release of information about other people or evaluative material by interview panels. 	<ul style="list-style-type: none"> Will limit access to information relevant to employee's continued employment. Is inconsistent with the Privacy Act 1993 	<ul style="list-style-type: none"> Change is likely to have limited effect as it does not address all privacy concerns and all situations where information may be requested/required to be

	<ul style="list-style-type: none"> Partially provides certainty on what information does need to be provided. Consistent with the objectives of the ER Act. Unlikely to create additional costs. 	<ul style="list-style-type: none"> Only addresses concerns about access to evaluative material; there may be other personal information not covered by this option. Does not address uncertainty in cases not related to restructuring situations. 	<p>given.</p>
<p>3. Amend the ER Act to align the good faith requirements more closely with the privacy principles and withholding grounds in the Privacy Act and Official Information Act 1982 by expanding on the 'good reason' to 'maintain the privacy of natural persons'</p>	<ul style="list-style-type: none"> Will ensure consistency between the ER, Privacy and OI Acts. Provides employers with some certainty about what information they must provide. Consistent with the objectives of the ER Act. 	<ul style="list-style-type: none"> Will limit access to information to a greater degree than options 1 and 2, however an employer may still choose to provide relevant information. Unlikely to reduce administrative costs for employers. 	<ul style="list-style-type: none"> Potential to have unintended consequences as privacy principles are considered in the context of good faith.
<p>4. Amend the ER Act to align the good faith requirements more closely with the privacy principles and withholding grounds in the Privacy Act and Official Information Act 1982 by clarifying that an employer is not required to provide confidential information about another person and evaluative material about the employee</p>	<ul style="list-style-type: none"> Will ensure consistency between the ER, Privacy and OI Acts. Provides employers with more certainty about what information they must provide. Reduces some administrative costs for employers. Appears to be consistent with the objectives of the ER Act. 	<ul style="list-style-type: none"> Will limit access to information to a greater degree than options 1 and 2. Similar effect to option 3 but more emphasis on protecting the confidentiality of other persons. However an employer may still choose to provide relevant information. Is consistent with the Privacy Act 1993 with regard to evaluative material about the 	<ul style="list-style-type: none"> Officials are still working through the detailed policy design.

		requesting individual.	
5. Amend the ER Act to provide that employers do not need to provide confidential information	<ul style="list-style-type: none"> • Will simplify the disclosure requirements on providing confidential information. • Will reduce administrative costs. • Employers are able to provide information if they wish to provided they do not breach the Privacy Act. 	<ul style="list-style-type: none"> • Places the greatest limits on access to information of the options considered. • Removes existing rights to access information. • Potential for unequal treatment of employees. 	<ul style="list-style-type: none"> • Will reduce natural justice if an employer relies on incorrect information for making a decision, and an employee does not have the opportunity to correct it. • Increased personal grievances and other employment relationship problems.

Status quo and problem definition

- 9 The ER Act includes the good faith obligation to provide an employee with access to information relevant to the continuation of their employment in situations where an employer is proposing to make a decision that will, or is likely to, have an adverse effect of the continuation of that employment (section 4(1A)(c) of the ER Act). This includes confidential information if there is not a "good reason" for withholding it.
- 10 In determining whether there is good reason for withholding information, the ER Act requires the employer to consider if disclosing the information would breach an individual's right to privacy. A balancing exercise is required between the employer's good faith obligation to provide employees with access to relevant information (that allows informed comment on a situation affecting their employment) and protecting privacy interests.
- 11 It was intended that relevant considerations under both the Privacy Act and the OIA would apply so that employers could withhold information in a manner consistent with both Acts. For example, in a recruitment process an employer could withhold confidential information about candidates consistent *with* the "evaluative material" exceptions in both the Privacy Act and the OIA. This approach would ensure that employers did not have competing obligations under different statutory schemes.

Problem

- 12 The decision of the Court in *Massey v Wrigley*¹ highlights a disconnect between information that can be withheld under the provisions of the Privacy Act and information that the Court determined must be released under the good faith requirements of the ER Act.
- 13 Briefly, the Court found that it was appropriate for unsuccessful job candidates to access and evaluate information about themselves and other candidates as part of good faith obligations under the ER Act. The Court took a broad approach to the scope of an employer's good faith obligations to provide employees with access to relevant information and gave less weight to the competing privacy interests in the case. A summary of the decision is provided in Appendix two.
- 14 In reaching its decision the Court considered that the principles developed and applied under the Privacy Act and the OIA can only be of limited value in interpreting and applying the good faith provisions of the ER Act.
- 15 The judgment is not consistent with widespread desirable and accepted employer practices in restructuring and redundancy situations particularly around balancing the disclosure of selection information and the protection of privacy interests.
- 16 The impacts of the judgment are not only limited to situations of restructuring or redundancy and could likely apply to any situation where an employer is proposing to make a decision that could have an adverse effect on the continuation of employment for one or more employees. For example this judgment may place additional requirements on state sector agencies during restructuring or redundancy situations or on an employer considering dismissing an employee for serious misconduct.
- 17 More broadly, job candidates, referees, and interview panellists have a general expectation that the personal information they provide during the recruitment process will be kept confidential. Interview panellist or job referees may not be completely frank with information they provide about candidates if they believe that information may be given to the person who is the subject of it. Prospective job

¹*Vice-Chancellor of Massey University v Wrigley* [2010] NZEmpC 37.

candidates may not be as forthcoming with information about themselves if they believe it could be supplied to an unsuccessful candidate. This hinders an employer's ability to employ the best staff and manage their business in the most efficient way.

Scale of the problem

- 18 There is limited information on the scale of the problem. Evidence about the extent of the problem is based on media commentary and feedback from the Office of the Privacy Commissioner and Universities New Zealand. However, the Court did not limit the extent of the judgment to the tertiary education sector and it would conceivably apply to any employer.

Media commentary

- 19 The decision has given rise to commentary about the weight given to privacy considerations and access to information regarding a person's continued employment in a redundancy situation.
- 20 There are varied views on the implications of the decision. Much of the legal commentary interpreted the Court's decision to mean:
- a employers will need to approach restructuring and redundancy processes in the expectation that all assessment material may need to be disclosed
 - b employees will need to understand that when they apply for a job their application and the employer's assessment of their application can be disclosed to other applicants
 - c employers will need to take special care in both the design and implementation of their restructuring processes to ensure that they comply with the requirement to provide access to relevant information
 - d The decision has broader implications beyond redundancies. It could have an effect on dismissals and other employment issues including misconduct, incapacity and poor performance.

Objectives

- 21 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.
- 22 To that end, the desired outcome of any legislative reform to the good faith requirements of the ER Act is to:
- achieve greater consistency with the Privacy Act and the Official Information Act; and
 - ensure a balance of fairness for all parties (employers, employees, potential employees and third parties)
- 23 The criteria we have used to assess the options are:
- improving certainty for all parties
 - maintaining public confidence in the security and appropriate use of personal information
 - consistency with the objectives of the ER Act; and
 - not imposing undue administrative costs or increasing the costs of problem resolution for employers.

Regulatory Impact Analysis

- 24 There is a lack of data to fully quantify the potential impacts of the policy options considered in the time available. The Ministry's assessment is based on what is known to it, which includes anecdotal evidence.
- 25 The Ministry has considered and discounted amendments to the Privacy Act. This is because the Court gave less weight to privacy considerations in the ER Act and more weight to an employer's good faith obligations. Changes to the Privacy Act will not address this issue.
- 26 To this end, the Ministry has considered a comprehensive set of options to amend the ER Act to ensure a clearer balance of privacy and good faith interests.

Option 1: Status quo

- 27 The Ministry has considered the implications of the status quo (not making any changes to the ER Act). Benefits of the status quo include time to monitor the impacts of the decision and see how employer practices develop.
- 28 The Ministry considers that the Court's decision highlights that the legislative requirements relating to information provision are ambiguous and the conclusion that the Court had arrived at is inconsistent with the original policy intent. These requirements differ significantly from commonly understood principles of information provision to employees, particularly during restructuring and redundancy situations. This has removed a large degree of certainty for employers with regard to what information they have to provide to employees. The post-*Massey* status quo is beginning to create compliance costs and risks of litigation for employers, as employees and unions cite the decision in requests for information.
- 29 For these reasons the Ministry does not consider the status quo to be a viable option and recommends legislative change.

Option 2: change the good faith requirements by excluding 'evaluative material' about other employees from the information that has to be provided to an employee

- 30 Under this option the good faith requirements could be changed so that a 'good reason' not to provide access to confidential information to an employee would be that the information is evaluative material about other employees or potential employees.
- 31 The employee would be entitled to receive evaluative material about themselves, but would not be entitled to receive evaluative material about other candidates. The employee could potentially be entitled to receive information about other employees that is not evaluative material.

Benefits

- 32 This option would address the specific issue raised in the case around access to evaluative information about other employees. However, it would not align the ER Act with the Privacy Act as the latter Act only provides a discretion not to disclose evaluative material about the person who requested the information.
- 33 It would go some way towards reducing uncertainty about the type of confidential information that does not need to be provided and increasing public confidence in the use and the security of confidential information. It appears to be consistent with the objectives of Act and is unlikely to impose additional costs on employers as it is in line with current employer practices in restructuring situations.

Detriments

- 34 This option would limit an employee's access to information relevant to their continued employment.

- 35 Under this option an employer's good faith obligation to an employee would include providing access to evaluative materials about themselves. Therefore this option would be inconsistent with the Privacy Act which provides that an employer may refuse to disclose evaluative material to the requestor even if the requestor is the subject of the evaluation.²
- 36 This option fails to fully address privacy concerns about access to personal information about other employees that is not evaluative material.

Conclusion

- 37 Overall, option 2 would have a limited effect. It would reduce uncertainty for employers in restructuring situations but is unlikely to address uncertainty in other cases in which employment is at risk including serious disciplinary cases. It would go some way towards reducing compliance costs and is consistent with the objectives of the ER Act. However, the option is unlikely to maintain public confidence in the security and appropriate use of personal information as it does not address all of the privacy issues raised by the case.

Option 3: align the good faith requirements more closely with the privacy principles and withholding grounds in the Privacy Act and Official Information Act 1982 by expanding on the 'good reason' to 'maintain the privacy of natural persons'

- 38 Under this option the ER Act would be amended to more closely align good faith requirements with the privacy principles and withholding grounds in the Privacy Act and the Official Information Act 1982 (the OIA). This would be achieved by clarifying that the good reason to maintain the confidentiality of information of 'protecting the privacy of natural persons' in section 4(1C)(b) of the ER Act is aligned with section 29(1)(a) of the Privacy Act and section 9(2)(a) of the OIA. This approach would expand on what is meant by the 'privacy of natural persons' by using some of the wording from the relevant section of the Privacy Act and the OIA.

Benefits

- 39 This option provides more certainty and clarity for employers by indicating that the same general principles and approaches used in privacy law are relevant when determining whether good reason exists to maintain confidentiality under section 4(1C)(b) of the Act.
- 40 Employers should already be aware of the requirements of privacy law and so will be familiar with and already have processes in place for determining whether personal information should be released.

Detriments

- 41 This option would limit an employee's access to information relevant to their continued employment to a greater degree than options 1 and 2 but to a lesser degree than options 4 and 5.
- 42 This option is unlikely to reduce administrative costs for employers. This is because employers would need to consider the likely effects of giving access to the information alongside those of maintaining confidentiality. Employers would also need to consider whether there are any means of sharing the information while reducing possible adverse effects. There will also still be a tension between the good faith obligation to provide all relevant information to an employee and the privacy interest of other individuals.

² There has to be an express or implied promise that the evaluative material would be kept confidential.

- 43 This option has the potential to result in unintended consequences. In the time available we have not been able to consider if there are some withholding grounds under the relevant Acts that should not be aligned with the ER Act.

Conclusion

- 44 This option represents a “middle ground” that also addresses the main areas of concern. It increases certainty for employers and is consistent with the ER Act’s objectives. Ensuring consistency of outcome between all of the relevant Acts is likely also to maintain public confidence in the security and appropriate use of personal information. This option would also reduce undue administrative costs and the costs of problem resolution for employers.

Option 4: align the good faith requirements more closely with the privacy principles and withholding grounds in the Privacy Act and Official Information Act 1982 by clarifying that an employer is not required to provide confidential information about another person and evaluative material about the employee

- 45 To more closely align the good faith requirements of the ER Act with the privacy principles and withholding grounds in the Privacy Act and the OIA, this option would clarify that the duty of good faith requirement to provide access to relevant confidential information does not extend to personal information about another person or to evaluative material about the employee.
- 46 The effect of this option, with respect to evaluative material, is to clarify that an employer would not be required to provide the employee with evaluative material about themselves. This is to ensure consistency with the Privacy Act, which provides that in general, evaluative material about the requestor is not required to be provided to the requestor.
- 47 The overall effect of this option is that an employer would not be required by the ER Act to provide information which they would not have to provide under the Privacy Act or the OIA (if applicable) due to privacy reasons, however an employer would still have to comply with their existing obligations under the Privacy Act and the OIA.
- 48 If the relevant confidential information is “mixed” information then the employer would still be under an obligation to provide access to the part of the information which is not about other individuals (unless another “good reason” exists), and is not evaluative material about the employee. This obligation could be met by providing access to a version where information about other individuals has been redacted or providing a summary of information.
- 49 This is the Ministry’s preferred option because it would ensure more consistency between all the relevant Acts and better consistency of outcomes regardless of who was seeking the information and which Act it was sought under.

Benefits

- 50 This option seeks to more closely align the three statutory regimes under the ER Act, the Privacy Act and the OIA. This should avoid a situation where under the duty of good faith an employer may be required to provide access to information which they may have grounds to withhold in order to protect the privacy of another person under the Privacy Act and the OIA.
- 51 By allowing employers to not provide evaluative material about the requesting employee, this option should address the issue of a potential “chilling effect” whereby skilled and qualified individuals choose not take part or not provide their free and frank opinions in activities such as interviews, selection panels etc. because they would be concerned about their comments becoming public. This is necessary to ensure quality, consistency and integrity of such decision making and to provide certainty and confidence for employers that their human resource processes have been carried out to their highest standard. This option effectively

adopts the same approach in relation to dealing with evaluative material as the Privacy Act currently does.

- 52 This option does not place any additional requirements on employers. The requirements under this option are effectively the existing requirements under privacy law and are consistent with, what the Ministry understands, is common industry practice. This option therefore should reduce administrative costs for employers, as compared to the status quo by clarifying the nature and scope of information that they have to provide to affected employees under the duty of good faith.
- 53 This is because employers are already aware of their rights and obligations under the Privacy Act. Public sector employers will already be aware of their rights and obligations under the OIA. This means employers should already be familiar with how to determine whether an individual should be given access to information or whether the information can be legitimately withheld. Employers may already have processes and policies in place to deal with these requests. Therefore this option will help provide certainty and clarity for employers with regard to what confidential information they are required to provide to affected employees. The option also appears to be consistent with the objectives of ER Act.

Detriments

- 54 This option would limit an employee's access to information relevant to their continued employment to a greater degree than options 1 and 2 but to a lesser degree than option 5. This is because this option effectively "carves out" personal information about another individual from the relevant information that an employee would be entitled to have access to as the part of the duty of good faith, and is therefore likely to result in employees receiving less access to relevant information than currently. This is mitigated by the employer being able to provide access to confidential information should they so choose (subject to the requirements of privacy legislation such as the Privacy Act), as this proposed option is not prohibitive.
- 55 This option prevents an employee receiving evaluative material about themselves, and does not provide an employee with the opportunity to make informed comment on decisions affecting their continued employment. This is however necessary to ensure consistency, certainty, quality and integrity of an employer's decision making processes, and to align the duty of good faith with the general principles of the Privacy Act concerning evaluative material.

Conclusion

- 56 Option 4 is the Ministry's preferred option as it represents a balance between protecting confidentiality and providing an employee with necessary information relevant to their continued employment. It increases certainty for employers and it appears to be consistent with the ER Act's objectives. This option also reduces undue administrative costs and the costs of problem resolution for employers.
- 57 Officials are still working through the detailed design of how the recommended option, as described in this RIS, will be given effect to. The Ministry is recommending Cabinet approval for the Minister of Labour to make any decisions on additional matters that are necessary for drafting this option, and that are consistent with Cabinet's decisions, before Cabinet Legislation Committee considers this option.

Option 5: change the good faith requirements by excluding all confidential information from the information that has to be provided to an employee

- 58 Under this option an employer would not be required to provide the employee with information relevant to their continued employment if it is confidential information. Additionally, the employee would not be provided with any information that was deemed to be confidential by the employer, including information about themselves.

Benefits

- 59 This option simplifies the disclosure requirement by removing uncertainty around what constitutes a 'good reason' not to provide confidential information. It reduces administrative costs for employers as information does not need to be provided, but an employer could provide the information if they wished to and provided they did not breach the Privacy Act.

Detriments

- 60 This option puts the most limits on the information available to employees and is inconsistent with the duty of good faith. It is a high risk option because it removes employees' existing rights to access confidential information in situations where decisions are being made regarding their continued employment. It has significant natural justice implications because it could lead to situations where employers rely on information adverse to an employee without making that information available to the employee for comment (or amendment if the information is incorrect).
- 61 It is likely to increase the incidence of grievances and other employment problems arising in the workplace thus increasing overall costs for employers. An employee is less likely to raise concerns about decisions affecting their employment if they have knowledge and understanding of the relevant issues and an opportunity to express their thoughts about those issues.
- 62 There is the potential for unequal treatment if an employer considers that information is confidential in respect of one employee but not another.
- 63 It is likely to cause inconsistency of outcomes with the Privacy Act as an employee may be able to access the same information by making a complaint to the Privacy Commissioner.

Conclusion

- 64 Overall, the costs of option 5 far outweigh the benefit of reducing administrative costs. This option takes away an existing right and is likely to increase problem resolution costs for employers. It is inconsistent with the objectives of ER Act and is likely to reduce public confidence in the maintenance and appropriate use of personal information.

Implementation and review

- 65 The legislative proposals need to be implemented through amendments to the Employment Relations Act 2000 and the Employment Court Regulations 2000 (the Regulations).
- 66 For all options consideration needs to be given to amending the Regulations to provide that confidentiality and/or privacy matters must also be considered at discovery. Without amendment the discovery process has the potential to make redundant any substantive proceedings about access to confidential information. Consideration of changes to the Regulations will occur as a separate process. The timeframes for the process of updating the Regulations are yet to be determined.
- 67 To monitor the impact of the preferred option, the Ministry will undertake monitoring of the Act through media reports, research and use of mediation services and the Employment Relations Authority. The Ministry will also monitor the case law in this area to observe the impact of the preferred option on future cases.

Consultation

- 68 The consultation has been limited to the following state sector agencies: Treasury, Department of Prime Minister and Cabinet, Te Puni Kokiri, State Services Commission, Ministry of Health, Office of the Privacy Commissioner, Ministry of Social Development, Ministry of Economic Development (Ministry of Business, Innovation and Employment – Economic Development Group) and Ministry of Education. Consultation with the social partners, Council of Trade Unions and

Business New Zealand has not been possible due to time constraints relating to the legislative programme, to ensure a legislative amendment is to be passed in 2012.

Summary of Stakeholder Views³

Organisation	Views	Response
Office of the Privacy Commissioner (OPC)	<ul style="list-style-type: none"> • The Office of the Privacy Commissioner (OPC) considers that the "good faith" provision in the ER Act should be amended to achieve consistency with the Privacy Act. OPC believes that confidentiality in employment or appointment processes should be protected, and that the legislative environment should provide certainty about participants' rights and obligations. They consider that the effect of the decision will not be limited to similar fact situations and that the Court did not fully consider the impact of the decision on a situation where there were external applicants (in this instance, there were only internal applicants in the Massey case). In particular, they consider the Court gave insufficient weight to the need to protect the privacy of natural persons. • The judgment has created uncertainty for employers, employees, and those asked to be on recruitment panels. Employers may be uncertain in terms of the process to follow to provide access to information and how to protect candidates' privacy. Candidates may be uncertain about who will be able to access personal information which they disclose in an interview. • OPC has received enquiries from lawyers about how the judgment should be interpreted in light of Privacy Act obligations. Some 	<ul style="list-style-type: none"> • Feedback has been incorporated into RIS where appropriate.

³ These agency comments are based on an earlier draft RIS that was circulated to agencies, while the current options as they appear in this RIS are broadly similar to the high level options that were consulted on, further work has been done to refine them (particularly in relation to the preferred Option 4). Due to time constraints it has not been possible to consult with agencies again on the options as they appear in this RIS.

	<p>lawyers perceive a conflict between privacy obligations under the ER Act and Privacy Act following the Employment Court's decision, and are unsure how to advise their clients.</p>	
Te Puni Kokiri (TPK)	<ul style="list-style-type: none"> • In principle, TPK supports policy initiatives to enhance New Zealand's employment relations objectives that promote transparency, fairness, dignity and good faith. To this end, TPK is supportive of the government's outcome and assessment criteria for the options as stated in the RIS. • TPK considers that further work is needed to identify risks and benefits of the preferred option (Option 4). TPK would like to see clearer discussion of the potential for unintended consequences particularly the potential direct impacts on employees, including Maori and other vulnerable workers. 	<ul style="list-style-type: none"> • Feedback has been incorporated into RIS where appropriate. • The proposed options affect all employees where an employer is proposing to make a decision that will or is likely to have an adverse effect on the continuation of employment of 1 or more employees. The Ministry does not consider that the options will impact certain groups of employees, such as Maori or vulnerable workers more than any other groups of employees.
The Treasury	<ul style="list-style-type: none"> • Could the stakeholder views section be broadened to include a wider range of views? I.e. are there any stakeholders that would disagree with making changes? 	<ul style="list-style-type: none"> • Due to time constraints, it has not been possible to seek the views of stakeholders wider than government agencies.
Ministry of Health (MoH)	<ul style="list-style-type: none"> • MoH supports the cabinet paper's proposal to amend section 4 of the ER Act to align the requirements to maintain confidentiality of information in the ER Act to the Privacy Act and the OIA. • This amendment should have the effect of reducing the amount of confidential information required to be released by employers to employees during restructuring processes and any other potentially affected employment processes. • This amendment should also provide a higher degree of certainty to both 	<ul style="list-style-type: none"> • Feedback has been incorporated into RIS where appropriate. • It is the intention of the preferred option to reduce the amount of confidential information employers have to provide to affected employees

	<p>employers and employees about what information employees are entitled to during restructuring and other potentially affected employment processes.</p>	<p>and to provide a higher degree of certainty to both employers and employees.</p>
<p>State Services Commission (SSC)</p>	<ul style="list-style-type: none"> • Overall, SSC supports the direction of the change indicated in the paper, that is, closer alignment of the requirements around information provision under good faith obligations of the Employment Relations Act with the Privacy and Official Information Acts frameworks (option 2). As noted the detail of the recommendations has not been included in the draft, so SSC is unable to comment more specifically. • SSC agrees that the intended changes would provide greater clarity for employers in dealing with information on individual employees, including evaluative information, and will better recognise employee's privacy interests in respect of information relating to them that is held by their employer, viz the status quo (post <i>Massey</i>). • SSC is a little unclear, given the discussion in the RIS document, as to the basis of the Ministry's preference of option 2 over option 3. 	<ul style="list-style-type: none"> • Feedback has been incorporated into RIS where appropriate. • Option 4 has now been explicitly labelled as the preferred option.
<p>Ministry of Education</p>	<ul style="list-style-type: none"> • No reply 	
<p>The following organisations' views are known to the Ministry but have not been specifically consulted with as part of this RIS.</p>		
<p>Employer representative organisations</p>	<ul style="list-style-type: none"> • Concerns have been raised by employer representative organisations, in the media, that the decision creates uncertainty for employers when undertaking restructuring and that restructuring will be drawn out by demands for disclosure of all relevant information which may sometimes include a large volume of material. The lack of certainty around how much information 	

	should be disclosed may translate into additional compliance costs for businesses.	
Universities New Zealand	<ul style="list-style-type: none">• Universities NZ have provided the Ministry with two instances of employees requesting large volumes of material from employers during a restructuring process including materials which have long been considered to be confidential such as the interview notes of other applicants.• The Ministry has met with Universities New Zealand to discuss a range of possible options. Universities New Zealand seemed broadly supportive of options for legislative change.	

Appendix one: Good Faith

Section 4 – Parties to employment relationship to deal with each other in good faith

- (1) The parties to an employment relationship specified in subsection (2)—
 - (a) must deal with each other in good faith; and
 - (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
 - (i) to mislead or deceive each other; or
 - (ii) that is likely to mislead or deceive each other.
- (1A) The duty of good faith in subsection (1)—
 - (a) is wider in scope than the implied mutual obligations of trust and confidence; and
 - (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
 - (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
 - (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
 - (ii) an opportunity to comment on the information to their employer before the decision is made.
- (1B) Subsection (1A)(c) does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information.
- (1C) For the purpose of subsection (1B), good reason includes—
 - (a) complying with statutory requirements to maintain confidentiality;
 - (b) protecting the privacy of natural persons;
 - (c) protecting the commercial position of an employer from being unreasonably prejudiced.
- (2) The employment relationships are those between—
 - (a) an employer and an employee employed by the employer;
 - (b) a union and an employer;
 - (c) a union and a member of the union;
 - (d) a union and another union that are parties bargaining for the same collective agreement;
 - (e) a union and another union that are parties to the same collective agreement;
 - (f) a union and a member of another union where both unions are bargaining for the same collective agreement;
 - (g) a union and a member of another union where both unions are parties to the same collective agreement;
 - (h) an employer and another employer where both employers are bargaining for the same collective agreement.
- (3) Subsection (1) does not prevent a party to an employment relationship communicating to another person a statement of fact or of opinion reasonably held about an employer's business or a union's affairs.
- (4) The duty of good faith in subsection (1) applies to the following matters:
 - (a) bargaining for a collective agreement or for a variation of a collective agreement, including matters relating to the initiation of the bargaining;
 - (b) any matter arising under or in relation to a collective agreement while the agreement is in force;
 - (ba) bargaining for an individual employment agreement or for a variation of an individual employment agreement;
 - (bb) any matter arising under or in relation to an individual employment agreement while the agreement is in force;
 - (c) consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees' collective employment interests, including the effect on employees of changes to the employer's business;

- (d) a proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business:
 - (e) making employees redundant:
 - (f) access to a workplace by a representative of a union:
 - (g) communications or contacts between a union and an employer relating to any secret ballots held for the purposes of bargaining for a collective agreement.
- (5) The matters specified in subsection (4) are examples and do not limit subsection (1).
- (6) It is a breach of subsection (1) for an employer to advise, or to do anything with the intention of inducing, an employee—
- (a) not to be involved in bargaining for a collective agreement; or
 - (b) not to be covered by a collective agreement.

Appendix two: summary of decision

Facts and background

- 2 The defendants were employed as senior lecturers at Massey University. They were made redundant after a restructure, in which several jobs were disestablished and fewer new positions were created.
- 3 Section 4(1A)(c) requires the employer to give affected employees access to certain information and an opportunity to comment on that information before any final decision is made affecting their employment. In the course of the selection process the defendants were provided with information as to why they were not selected. The information included; their scores, reasons for their non-selection and written recommendations of the selection panel (information relating to other candidates was omitted). The defendants were also given an opportunity to comment on this information before a final decision. However, the defendants claimed that they were entitled to access additional information. The additional information included recommendations made by the selection panel that they should not be selected for the available positions, copies of handwritten notes and information about how other, successful, candidates had been scored and assessed. Massey University considered that it was not obliged to give access to the additional information and that it had fully discharged its duty by disclosing the information it did.
- 4 The defendants took a case to the Employment Relations Authority (the Authority) seeking access to the additional information, on the grounds that Massey had breached the obligation of good faith set out in s 4(1A)(c). The claim was investigated by the Authority which upheld one part of the defendants claim and dismissed the remainder. Massey University challenged the whole of the Authority's determination and the matter proceeded before the Court by way of a hearing de novo.
- 5 In an interlocutory judgment on 11 May 2010⁴, the Chief Judge directed that certain documents be disclosed by Massey University to the defendants for the purposes of the litigation.

Decision

- 6 The Court supported a wide interpretation and application of the obligation imposed by section 4(1A)(c) of the Act. The Court expressed a preliminary view that Massey University ought to have provided the defendants with access to all of the disputed documents, however it was not able to reach a final conclusion with regard to some of the information requested and reserved leave for any party to seek a final determination.

⁴ *Vice-Chancellor of Massey University v Wrigley* [2010 NZEmpC 52].

