
EMPLOYMENT

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LAW ON EMPLOYMENT PROTECTION IN RESTRUCTURING UNDER REVIEW - CHANCE FOR FEEDBACK



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A review is underway of the law surrounding protection for employees in the event of a business restructuring.

Part 6A of the Employment Relations Act provides two-tier protection for affected employees should a business restructuring result in their work being performed by a new employer. Restructuring includes first time contracting out and subsequent contracting, contracting in, and business transfers and sales.

Under the law, specified categories of “vulnerable” employees have the statutory right to transfer to the new employer, as well as certain bargaining rights. These vulnerable workers include employees who provide cleaning, food catering, laundry, orderly or caretaking services in specified work places.

For all other employees, employment agreements - collective and individual - must contain an “employee protection provision” (EPP) which provides protection relating to negotiations between the current employer and potential new employer about the transfer of affected employees.

The policy for Part 6A was to provide special protection for certain employees reported to be disadvantaged by restructuring, while retaining viability and efficiency of the market.

Amendments to Part 6A in 2006 included a requirement to review the legislation after three years. That time has arrived.

Is it working and relevant?

Public consultation has now started on a discussion document which looks at the operation and policy of Part 6A.

The first part of the review assesses whether the legislation has achieved its stated objectives and, if not, any necessary or desirable amendments. Part two considers whether the policy of providing special protection for a defined group of workers is still relevant and desirable.

Issues for comment

The discussion document seeks the views of employers, employees, their representatives and other interested organisations on a list of questions. The questions focus feedback on the particular areas under review. Issues regarding the operation of Part 6A include:

- Current levels of awareness of Part 6A provisions;
- Problems associated with the transfer of accrued entitlements (holiday pay, annual holidays and sick leave) following a restructure, and whether there should be a choice between

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accrued entitlements either transferring or being paid out, and whether there should be an obligation on the outgoing employer to transfer funds for accrued entitlements;

- Partial transfer of employees, for example where an employee's role is split between two employers following a restructuring;
- Transfers involving poorly performing service providers and the impact of Part 6A on tendering processes;
- Definition of specified categories of employees known as "vulnerable workers";
- EPPs, particularly the extent to which they protect employees and how compliance should be achieved.

Importantly, the Employment Court considered what constitutes an EPP in two recent cases concerning whether an employer could be restrained from restructuring in the absence of such a provision (*Norske Skog Tasman Limited v Manufacturing & Construction Workers Union Inc* and *Eastern Bay Independent Industrial Workers Union Inc v Carter Holt Harvey Limited*). To be compliant, an EPP must set out a process for the employer to negotiate with a new employer, the matters to be negotiated and a process to be followed at the time of a restructuring. The Court found in both cases that there were no compliant EPPs. A bare obligation "to meet with the new employer" did not constitute a process for negotiating with the new employer. Rather, a process should include details of the timing of meeting(s); advice to the union and employees of such meeting(s) and intended agenda; the method of meeting; identities of attendees; and a process of reporting back the outcomes of such meeting(s). The Court went on to hold that a clause setting out the consequences of

an employee rejecting an offer of employment from the new employer (disentitling the employee to redundancy compensation) did not amount to a process to be followed at the time of the restructuring but was in essence an employer protection provision.

Part two of the review seeks views on:

- Whether the policy for Part 6A is still valid and effective;
- What categories of employees, if any, should have greater protection; and
- Other possible ways to address any disadvantage that would better meet the policy objectives.

Deadline for feedback

Submissions close at 5pm on 15 March 2010. Further information about making submissions is available at the Department of Labour website:

www.dol.govt.nz/consultation/

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