

Employment Relations Amendment Bill

Government Bill

As reported from the committee of the whole House

Key to symbols used in reprinted bill

As reported from a select committee

Struck out (majority)	
▬ Subject to this Act, ▬	Text struck out by a majority
New (majority)	
▭ Subject to this Act, ▭	Text inserted by a majority
<u><Subject to this Act,></u>	Words struck out by a majority
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Hon Ruth Dyson

Employment Relations Amendment Bill

Government Bill

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Part 6A

Continuity of employment if employees' work affected by restructuring

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Employment Relations Amendment Act **2006**.

2 Commencement

Struck out

This Act comes into force on the day after the date on which it receives the Royal assent.

New

- (1) The following provisions come into force 3 months after the date on which this Act receives the Royal assent: 5
- (a) **subpart 1A of Part 6A** of the principal Act (as inserted by **section 4** of this Act); and
 - (b) **sections 5A and 5B** of this Act.
- (2) The rest of this Act comes into force on the day after the date on which it receives the Royal assent. 10

2A Principal Act amended

This Act amends the Employment Relations Act 2000.

3 Purpose

The purpose of this Act is to substitute a new **Part 6A** of the principal Act to extend and clarify its application, especially to specified categories of employees in relation to subsequent contracting (sometimes referred to as succession contracts) and subcontracting. 15

New (majority)

3A New section 6A inserted

The following section is inserted after section 6: 20

“6A Status of examples

- “(1) In this Act, an example is only illustrative of the provision it relates to and does not limit the provision.
- “(2) If an example and the provision it relates to are inconsistent, the provision prevails. 25
- “(3) In this section, **example** includes any note that relates to the example.”

4 New Part 6A substituted

Part 6A is repealed and the following Part substituted:

**“Part 6A
“Continuity of employment if employees’ work
affected by restructuring**

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“Subpart 1—Specified categories of employees

“69A Object of this subpart

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

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“(a) the employees a right to elect to transfer to the other person as employees on the same terms and conditions of employment; and

“(b) the employees who have transferred a right,—

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“(i) subject to their employment agreements, to bargain for redundancy entitlements from the other person if made redundant by the other person *<because the other person, as a result of the transfer of the employees, has surplus employees>* <for reasons relating to the transfer of the employees or to the circumstances arising from the transfer of the employees>; and

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“(ii) if redundancy entitlements cannot be agreed with the other person, to have the redundancy entitlements determined by the Authority.

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“69B Interpretation

In this subpart, unless the context otherwise requires,—

“**agreement** means a contract or arrangement

“**contracting in** has the meaning set out in **section 69C**

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“**contracting out** has the meaning set out in **section 69C**

“**independent contractor** means a person engaged to perform work under an agreement that is not an employment agreement

“**new employer** has the meaning set out in **section 69D**

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“**redundancy entitlements** includes redundancy compensation

“restructuring—

- “(a) means—
 - “(i) contracting out; or
 - “(ii) contracting in; or
 - “(iii) subsequent contracting; or 5
 - “(iv) selling or transferring an employer’s business (or part of it) to another person; but
- “(b) to avoid doubt, does not include,—
 - “(i) in the case of an employer that is a company, the sale or transfer of any or all of the shares in the company; or 10
 - “(ii) any contract, arrangement, sale, or transfer entered into, made, or concluded while the employer is adjudged bankrupt or in receivership or liquidation 15

“subcontractor—

- “(a) means a person engaged by an independent contractor to perform work—
 - “(i) under an agreement that is not an employment agreement; and 20
 - “(ii) that the independent contractor has agreed to perform for another person; and
- “(b) includes another person engaged by a subcontractor (within the meaning of **paragraph (a)**) to perform the work or part of the work under an agreement that is not an employment agreement 25

“subsequent contracting has the meaning set out in **section 69C**

“work, in relation to work performed by an employee, includes part of the work performed by the employee. 30

“69C Meaning of contracting in, contracting out, and subsequent contracting

- “(1) In this subpart, unless the context otherwise requires, **contracting in** means a situation where—
 - “(a) a person (**person A**) has an agreement with another person (**person B**) under which person B performs work as an independent contractor for person A; and 35

Struck out (majority)

“(b) the employees of person B, or of any person to whom the work is subcontracted, actually perform the work; and

New (majority)

“(b) the work or some of the work is actually performed by employees of person B or of a subcontractor; and

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“(c) the agreement, or that part of the agreement, under which person B performs the work expires or is terminated; and

“(d) the work is to be performed by person A or *person A's* employees *(if any)* of person A.

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“(2) In this subpart, unless the context otherwise requires, **contracting out** means a situation where—

“(a) a person (**person A**) enters into an agreement with another person (**person B**) under which person B is to perform work as an independent contractor for person A; and

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“(b) the employees of person A are actually performing, or employed to undertake, the work *(or some of the work)* before the agreement takes effect.

Struck out (majority)

“(3) The definition of **contracting out** applies whether or not the work is to be performed by employees of person B or of a subcontractor.

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New (majority)

“(3) The definition of **contracting out** applies whether or not the work is to be performed by—

“(a) person B or employees (if any) of person B; or

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“(b) a subcontractor or employees (if any) of a subcontractor.

- “(4) In this subpart, unless the context otherwise requires,
 “**subsequent contracting** means a situation where—
 “(a) a person (**person A**) has an agreement with another person (**person B**) under which person B performs work as an independent contractor for person A; and 5
 “(b) the work <or some of the work> is actually performed by employees of person B or of a subcontractor; and
 “(c) the agreement or that part of the agreement under which person B performs the work expires or is terminated; and 10
 “(d) person A enters into an agreement with another person (**person C**) under which person C is to perform the work as an independent contractor for person A.
 “(5) The definition of **subsequent contracting** applies whether or not— 15
 “(a) the work concerned has previously been the subject of a subsequent contracting:
 “(b) the engagement of person B as an independent contractor constituted a contracting out:

Struck out (majority)

“(c) the work is to be performed by employees of person C or of a subcontractor. 20

New (majority)

“(c) the work is to be performed by—
 “(i) person C or employees (if any) of person C; or
 “(ii) a subcontractor or employees (if any) of a subcontractor. 25

- “(6) To avoid doubt, in the definitions of **contracting in**, **contracting out**, and **subsequent contracting**, references to work in relation to person A—
 “(a) mean work that person A is doing or would otherwise do in person A’s own right; and 30
 “(b) include work that person A is doing or would otherwise do as an independent contractor or as a subcontractor.

“69D Meaning of new employer

“(1) In **section 69I**, **new employer**,—

“(a) in relation to contracting in, means person A in the definition of that term:

“(b) in relation to contracting out,—

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“(i) means person B in the definition of that term; but

“(ii) if, instead of *<person B’s>* *<person B or>* employees *<(if any) of person B>* performing the work concerned, person B subcontracts the work (whether before or at the same time as the contracting out), means the subcontractor:

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“(c) in relation to subsequent contracting,—

“(i) means person C in the definition of that term; but

“(ii) if, instead of *<person C’s>* *<person C or>* employees *<(if any) of person C>* performing the work concerned, person C subcontracts the work (whether before or at the same time as the subsequent contracting), means the subcontractor:

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“(d) in relation to the sale or transfer of an employer’s business (or part of it), means the person to whom the business (or part of it) is sold or transferred.

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“(2) In the rest of this subpart, **new employer** means the person to whom an employee—

“(a) may elect or has elected to transfer under **section 69I**; or

“(b) has transferred under that section.

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“69E Examples of contracting in, contracting out, and subsequent contracting

“(1) This section contains examples of contracting in, contracting out, and subsequent contracting.

Struck out (majority)

“(2) An example is only illustrative of the definition it relates to and does not limit the definition.

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“(3) If an example and the definition it relates to are inconsistent the definition prevails.

“(4) Whether, in the following examples, an employee comes within the protection provided by this subpart depends on whether **section 69F** applies to the employee.

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“(5) This subsection sets out examples of contracting in.

Example A

A rest home carries on business in the age-related residential care sector. Instead of providing food catering services through its employees, it enters into an agreement with an independent contractor to provide those services.

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The agreement under which the independent contractor provides those services to the rest home expires or is terminated.

The rest home then uses its employees or engages further employees to provide those services.

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Employees of the independent contractor to whom **section 69F** applies may elect to transfer to the rest home.

Example B

The circumstances in this example are the same as in example A except that the independent contractor engages a subcontractor to provide food catering services to the rest home.

15

As a result of the agreement between the rest home and the independent contractor expiring or being terminated, the agreement between the independent contractor and the subcontractor expires or is terminated.

Employees of the subcontractor to whom **section 69F** applies may elect to transfer to the rest home.

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Note

In both example A and example B it does not matter whether the rest home’s or the independent contractor’s employees originally provided the food catering services or whether the work was contracted out or subcontracted at the outset.

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In example A and example B, the persons relate to the definition of contracting in as follows:

- the rest home is person A;
- the independent contractor is person B.

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“(6) This subsection sets out examples of contracting out.

Example C

A school has employees who provide cleaning services.

The school then enters into an agreement with an independent contractor to do that work or some of that work.

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The employees of the school to whom **section 69F** applies may elect to transfer to the independent contractor.

Note

Example C would not be a contracting out if, at the outset, the school did not have employees providing cleaning services.

In example C, the persons relate to the definition of contracting out as follows:

- the school is person A:
- the independent contractor is person B.

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Example D

The circumstances in this example are the same as in example C except that later on the independent contractor decides that, instead of using its employees for the contract for the school, it will engage a subcontractor to do the work or some of the work.

Employees of the independent contractor to whom **section 69F** applies may elect to transfer to the subcontractor.

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Note

In example D, the persons relate to the definition of contracting out as follows:

- the independent contractor is person A:
- the subcontractor is person B.

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Note

In example C and example D if, at the outset, the independent contractor did not have employees providing cleaning services, but subcontracts the work straight away, then the employees to whom **section 69F** applies may elect to transfer to the subcontractor.

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“(7) This subsection sets out examples of subsequent contracting.

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Example E

An airport operator enters into an agreement with an independent contractor to provide food catering services at the airport.

Some time later, the agreement under which the independent contractor provides those services expires or is terminated.

The airport operator then enters into an agreement with a second independent contractor to provide food catering services at the airport.

Employees of the first independent contractor to whom **section 69F** applies may elect to transfer to the second independent contractor.

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Note

In example E, it does not matter whether the agreement between the airport operator and the first independent contractor constitutes a contracting out.

In example E, the persons relate to the definition of subsequent contracting as follows:

- the airport operator is person A:
- the first independent contractor is person B:
- the second independent contractor is person C.

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Example F

The circumstances in this example are the same as in example E except that the first independent contractor engages a subcontractor to do the work or some of the work.

Later on the agreement under which the subcontractor provides the work expires or is terminated and the first independent contractor engages a second subcontractor to provide food catering services at the airport.

The employees of the first subcontractor to whom **section 69F** applies may elect to transfer to the second subcontractor.

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Note

In example F, the subsequent contracting occurs at the subcontracting level.

In example F, the persons relate to the definition of subsequent contracting as follows:

- the independent contractor is person A:
- the first subcontractor is person B:
- the second subcontractor is person C.

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“69F Application of this subpart

“(1) This subpart applies to an employee if—

“(a) Schedule 1A applies to the employee; and

“(b) as a result of a proposed restructuring,—

“(i) the employee will no longer be required by his or her employer to perform the work performed by the employee; and

“(ii) the work performed by the employee (or work that is substantially similar) is to be performed by or on behalf of another person.

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- “(2) To avoid doubt, this subpart applies even though the performance of the work by or on behalf of the other person does not begin immediately after an employee ceases to perform the work for his or her employer.
- “**69G Notice of right to make election** 5
- “(1) Before a restructuring takes effect, the employer of the employees who will be affected by the restructuring must provide the employees affected with—
- “(a) a reasonable opportunity to exercise the right to make an election under **section 69I(1)**; and 10
- “(b) the date by which the right to make an election must be exercised; and
- “(c) information sufficient for the employees to make an informed decision about whether to exercise the right to make an election. 15
- “(2) Without limiting **subsection (1)(c)**, the information provided under that provision must include—
- “(a) the name of the new employer;
- “(b) the nature and scope of the restructuring;
- “(c) the date on which the restructuring is to take effect: 20
- “(d) how to make an election, the person to whom an election is to be sent, and the form in which the election is to be sent (for example by post, fax, or email).
- “(3) If the restructuring is a contracting in or a subsequent contracting, person A in the definition that applies must give the employer sufficient notice of, and information about, the restructuring to enable the employer to comply with **subsection (1)**. 25
- “(4) An employer or other person who fails to comply with this section is liable to a penalty *<under this Act>* <imposed by the Authority>. 30
- “**69H Employee bargaining for alternative arrangements**
- “(1) To avoid doubt, an employee may, after his or her employer has complied with **section 69G** and before deciding whether to elect to transfer to the new employer, bargain with his or her employer for alternative arrangements. 35
- “(2) If the employee and employer agree on alternative arrangements,—

- “(a) the alternative arrangements must be recorded in writing; and
- “(b) if **paragraph (a)** is complied with, the employee may not subsequently elect to transfer to the new employer.

- “69I Employee may elect to transfer to new employer** 5
- “(1) An employee to whom this subpart applies may, before the date provided to the employee under **section 69G(1)(b)**, elect to transfer to the new employer.
 - “(2) If an employee elects to transfer to the new employer, then to the extent that the employee’s work is to be performed by the new employer, the employee— 10
 - “(a) becomes an employee of the new employer on and from the specified date; and
 - “(b) is employed on the same terms and conditions by the new employer as applied to the employee immediately before the specified date, including terms and conditions relating to whether the employee is employed full-time or part-time; and 15
 - “(c) is not entitled to any redundancy entitlements under those terms and conditions of employment from his or her previous employer because of the transfer. 20
 - “(3) To avoid doubt,—
 - “(a) the election of an employee to transfer to a new employer may result in the employee being employed by more than 1 employer if— 25
 - “(i) only part of the employee’s work is affected by the restructuring; or
 - “(ii) the work performed by the employee will be performed by or on behalf of more than one new employer; and 30
 - “(b) a person becomes the new employer of an employee who elects to transfer to the new employer whether or not the new employer—
 - “(i) has, or intends to have, employees performing the type of work (or work that is substantially similar) to the work performed by the employee who has elected to transfer to the new employer; or 35
 - “(ii) was an employer before the employee transferred to the new employer.

“(c) this section does not affect the employment agreement of an employee who elects not to transfer to the new employer.

Example

This example relates to **subsection (3)(a)**. A retailer owns 3 gift shops and engages an independent contractor to clean the shops. The independent contractor employs a cleaner to clean the gift shops.

The cleaning contract between the retailer and the independent contractor expires.

The retailer enters into a cleaning contract with a second independent contractor for the cleaning of 1 shop, and enters into a new cleaning contract with the first independent contractor for the cleaning of the other 2 shops.

As a result, the first independent contractor no longer requires the cleaner to clean 1 of the shops.

The cleaner may elect to transfer and become an employee of the second independent contractor in relation to 1 shop while remaining an employee of the first independent contractor in relation to the other 2 shops.

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“(4) In this section,—

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Struck out (majority)

“**specified date** means—

“(a) a date agreed by the employee and his or her previous employer; but

“(b) if no date is agreed, the date on which the restructuring takes effect.

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New (majority)

“**specified date** means the date on which the restructuring takes effect.

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

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

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- “(2) To avoid doubt, and without limiting **subsection (1)**,—
- “(a) in relation to an employee’s entitlements under the Holidays Act 2003,—
- “(i) the period of employment of an employee with the employer *<immediately before>* <that ends with> the transfer must be treated as a period of employment with the new employer for the purpose of determining the employee’s entitlement to annual holidays, sick leave, and bereavement leave; and 5 10
- “(ii) the employer must not pay the employee for annual holidays not taken before the date of transfer; and
- “(iii) the new employer must recognise the employee’s entitlement to— 15
- “(A) any sick leave, including any sick leave carried over under section 66 of that Act, not taken before the date of transfer; and
- “(B) any annual holidays not taken before the date of transfer; and 20
- “(C) any alternative holidays not taken or exchanged for payment under section 61 of that Act before the date of transfer:

Struck out (majority)

- “(b) for the purposes of determining an employee’s rights and benefits to parental leave and parental leave payments under the Parental Leave and Employment Protection Act 1987,— 25
- “(i) the period of employment of an employee with the employer immediately before the transfer must be treated as a period of employment with the new employer; and 30
- “(ii) the employer who employed the employee immediately before the transfer and the new employer must be treated, in relation to that employee, as the same employer. 35

New (majority)

- “(b) for the purposes of determining an employee’s rights and benefits to parental leave and parental leave payments under the Parental Leave and Employment Protection Act 1987,—
- “(i) the period of employment of an employee with the employer that ends with the transfer must be treated as a period of employment with the new employer; and 5
- “(ii) the new employer must treat any notice given to or by the employer under the Act as if it had been given to or by the new employer. 10

“69K Terms and conditions of employment of transferring employee under fixed term employment

- “(1) This section applies to an employee if—
- “(a) he or she is an employee of— 15
- “(i) person A in the definition of contracting out; or
- “(ii) person B or of a subcontractor in the definition of contracting in; or
- “(iii) person B or of a subcontractor in the definition of subsequent contracting; or 20
- “(iv) an employer who is selling or transferring the employer’s business (or part of it) to another person; and
- “(b) the employee’s terms and conditions of employment include a term agreed under section 66(1) that is— 25
- “(i) linked to the expiry or termination of the agreement under which his or her employer performs the work; or
- “(ii) included in contemplation of his or her employer entering into an agreement that constitutes a restructuring. 30
- “(2) Despite the employee’s terms and conditions of employment containing a term referred to in **subsection (1)(b)**, the employee may elect, under **section 69I**, to transfer to the new employer.
- “(3) If the employee elects, under **section 69I**, to transfer to the new employer, then the following provisions apply: 35
- “(a) if the restructuring is a contracting out, the employee’s terms and conditions of employment must be read and

applied as if the term agreed under section 66(1) was linked to the expiry or termination of the agreement between person A and person B (or a subcontractor):

- “(b) if the restructuring is a contracting in, the employee’s terms and conditions of employment cease to include the term referred to in **subsection (1)(b)**: 5
- “(c) if the restructuring is a subsequent contracting, the employee’s terms and conditions of employment must be read and applied as if the term agreed under section 66(1) was linked to the expiry or termination of the contract or arrangement between person A and person C (or a subcontractor): 10
- “(d) if the restructuring is a sale or transfer of an employer’s business, the employee’s terms and conditions of employment cease to include the term referred to in **subsection (1)(b)**. 15

“69L Agreements excluding entitlements for technical redundancy not affected

- “(1) To avoid doubt, this subpart does not limit or affect any terms and conditions of employment under which the employee’s entitlement to redundancy entitlements is excluded where the employee may transfer to the new employer but elects not to do so. 20
- “(2) This subpart does not limit or affect section 77HA of the State Sector Act 1988. 25

“69M New employer becomes party to collective agreement that binds employee electing to transfer

- “(1) This section applies if—
 - “(a) an employee who elects to transfer to a new employer is a member of a union and bound by a collective agreement; and 30
 - “(b) the new employer is not a party to the collective agreement that the union is a party to.
- “(2) On and from the date on which the employee becomes an employee of the new employer, the new employer becomes a party to the collective agreement, but only in relation to, and for the purposes of, that employee. 35

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

- “(1) This section applies to an employee if—
 - “(a) the employee elects, under **section 69I(1)**, to transfer to a new employer; and 5
 - “(b) the new employer proposes to make the employee redundant *<because the new employer, as a result of the transfer of employees, has surplus employees>* <for reasons relating to the transfer of the employees or to the circumstances arising from the transfer of the employees>; and 10

Struck out

- “(c) the employee’s employment agreement—
 - “(i) does not provide for redundancy entitlements in that circumstance; or
 - “(ii) does not expressly exclude redundancy entitlements in that circumstance. 15

New

- “(c) the employee’s employment agreement—
 - “(i) does not provide for redundancy entitlements for those reasons or in those circumstances; or
 - “(ii) does not expressly exclude redundancy entitlements for those reasons or in those circumstances. 20

- “(2) The employee is entitled to redundancy entitlements from his or her new employer.
- “(3) If an employee seeks redundancy entitlements from his or her new employer, the employee and new employer must bargain with a view to reaching agreement on appropriate redundancy entitlements. 25

“69O Authority may investigate bargaining and determine redundancy entitlements 30

- “(1) If an employee and his or her new employer fail to agree on redundancy entitlements under **section 69N(3)**, the employee or

new employer may apply to the Authority to investigate the bargaining relating to the matter.

- “(2) After concluding the investigation, the Authority must determine—
 - “(a) if, in the Authority’s view, it is possible for the bargaining to continue, how further bargaining should occur; or 5
 - “(b) if, in the Authority’s view, further bargaining is not warranted, the redundancy entitlements due to an employee.
- “(3) In determining the redundancy entitlements under **subsection (2)(b)**, the Authority may take into account one or more of the following matters: 10
 - “(a) the redundancy entitlements (if any) provided in the employee’s employment agreement for redundancy in circumstances other than restructuring: 15
 - “(b) the employee’s length of service with his or her previous employer and new employer:
 - “(c) how much notice of the redundancy the employee has received:
 - “(d) the ability of the new employer to provide redundancy entitlements: 20
 - “(e) the likelihood of the employee being re-employed or obtaining employment with another employer:
 - “(f) any other relevant matter that the Authority thinks fit.

New

“Subpart 1A—Disclosure of costs relating to transfer of employees under proposed restructuring	25
“69OAA Object of this subpart	
The object of this subpart is to provide for the disclosure of employee transfer costs information if—	
“(a) disclosure is sought for the purpose of—	30
“(i) deciding whether to terminate an agreement or let it expire; or	
“(ii) negotiating an agreement; or	
“(iii) deciding whether to enter into an agreement; or	
“(iv) tendering for an agreement; and	35

New

“(b) a restructuring would result if the agreement were to be—	
“(i) terminated or to expire; or	
“(ii) concluded; or	
“(iii) entered into; or	5
“(iv) awarded.	
“69OAB Interpretation	
“(1) In this subpart, employee transfer costs information , in relation to a proposed restructuring,—	
“(a) means information about the employment-related entitlements of the employees who would be eligible to elect, under section 69I , to transfer to a new employer if the proposed restructuring were to proceed; and	10
“(b) includes—	
“(i) the number of employees who would be eligible to elect to do so; and	15
“(ii) the wages or salary payable in a stated period (for example, a week, fortnight, or month) to the employees for performing the work that would be subject to the proposed restructuring; and	20
“(iii) the total number of hours the employees spend in a stated period (for example, a week, fortnight, or month) performing the work that would be subject to the proposed restructuring; and	
“(iv) the cost of service-related entitlements of the employees whether legislative or otherwise; and	25
“(v) the cost of any other entitlements of the employees in their capacity as employees, including any entitlements already agreed but not due until a future date or time.	30
“(2) Any term or expression defined in subpart 1 and used but not defined in this subpart has the same meaning as in subpart 1 .	
“69OAC Disclosure of employee transfer costs information	
“(1) A request for the disclosure of employee transfer costs information may be made if—	35
“(a) disclosure is sought for the purpose of—	

New

<ul style="list-style-type: none"> “(i) deciding whether to terminate an agreement or let it expire; or “(ii) negotiating an agreement; or “(iii) deciding whether to enter into an agreement; or “(iv) tendering for an agreement; and 	5
<ul style="list-style-type: none"> “(b) a restructuring would result if the agreement were to be— <ul style="list-style-type: none"> “(i) terminated or to expire; or “(ii) concluded; or “(iii) entered into; or “(iv) awarded. 	10
<ul style="list-style-type: none"> “(2) The persons who may make the request are the persons who would, if the restructuring were to proceed and they were parties to the restructuring, be— <ul style="list-style-type: none"> “(a) person A in the definition of contracting in: “(b) person B in the definition of contracting out: “(c) person C in the definition of subsequent contracting: “(d) the person to whom an employer’s business (or part of it) is sold or transferred. 	15
<ul style="list-style-type: none"> “(3) The persons to whom a request may be made are the persons who would, if the restructuring were to proceed and they were parties to the restructuring, be— <ul style="list-style-type: none"> “(a) person B in the definition of contracting in: “(b) person A in the definition of contracting out: “(c) person A in the definition of subsequent contracting: “(d) the seller or transferor in the case of the sale or transfer of an employer’s business (or part of it). 	20
<ul style="list-style-type: none"> “(4) A person to whom a request is made under subsection (3) must provide to the person who made the request under subsection (2) employee transfer costs information that relates to the proposed restructuring. 	30
<ul style="list-style-type: none"> “(5) A person must provide the employee transfer costs information in sufficient time for the person who made the request to take the information into account for the purpose for which it was requested. 	35
<ul style="list-style-type: none"> “(6) Employee transfer costs information provided under this section must be provided— <ul style="list-style-type: none"> “(a) in aggregate form; and 	

New

“(b) to the extent practicable, in a form that protects the privacy of the employees concerned.

“**690AD Provision of employee transfer costs information by other persons**

- “(1) **Subsection (2)** applies to a person who receives a request for employee transfer costs information under **section 690AC(3)(a)**. 5
- “(2) If the request relates (whether wholly or in part) to work that has been subcontracted and the person receiving the request does not have some or all of the information requested, the person must immediately require the subcontractor to provide the information. 10
- “(3) **Subsection (4)** applies to a person who receives a request for employee transfer costs information under **section 690AC(3)(c)**.
- “(4) If the person does not have some or all of the information requested, the person must immediately require the person who performs the work to which the request relates to provide the information. 15
- “(5) If the person who performs the work has subcontracted some or all of the work and does not have some or all of the information requested, the person must immediately require the subcontractor to provide the information. 20
- “(6) A person required to provide information—
 - “(a) under **subsection (2) or (4)** must provide the information—
 - “(i) to the person who received the request; and
 - “(ii) in time for that person to comply with **section 690AC(5)**: 25
 - “(b) under **subsection (5)** must provide the information—
 - “(i) to the person who required the information; and
 - “(ii) in time for the person who received the request to comply with **section 690AC(5)**. 30
- “(7) However, if the subcontractor who is required to provide the information under **subsection (2) or (5)** does not have some or all of the information requested because the work has been further subcontracted, the subcontractor must immediately provide to the person who required the information any details the subcontractor has about who the other subcontractor is and 35

New

how to contact the other subcontractor, and (to avoid doubt) **subsection (2) or (5)** (as the case may require) applies accordingly.

- “(8) Employee transfer costs information provided under this section must be provided— 5
- “(a) in aggregate form; and
 - “(b) to the extent practicable, in a form that protects the privacy of the employees concerned.
- “**690ADA Updating disclosure of employee transfer costs information** 10
- “(1) This section applies if—
- “(a) employee transfer costs information has been provided under **section 690AC or 690AD**; and
 - “(b) after the provision of the information, there is a change in the employment-related entitlements or circumstances that the information relates to; and 15
 - “(c) the change makes the information provided out of date.
- “(2) The person who provided the employee transfer costs information must, immediately after the change in the employment-related entitlements or circumstances, provide to the person who was originally provided with the information details specifying— 20
- “(a) the information that is out of date; and
 - “(b) what the up-to-date information is.
- “(3) If the person who is provided with the up-to-date employee transfer costs information is not the person who made the request for the original information under **section 690AC**,— 25
- “(a) the person must, immediately after receiving the up-to-date information, provide it to the person who received the request for the original information; and 30
 - “(b) that person must, immediately after receiving the up-to-date information, provide it to the person who made the request for the original information.
- “(4) A person is not required to provide up-to-date information if, at the time of the change in the employment-related entitlements or circumstances, a request could not have been made for the information under **section 690AC**. 35

New

“69OAE Employer who is subject to Official Information Act 1982

Nothing in the Official Information Act 1982 (except section 6) enables an employer that is subject to that Act to withhold information that is requested under this subpart.

5

“69OAF Subpart prevails over agreement

A contract, agreement, or other arrangement has no force or effect to the extent that it is inconsistent with this subpart.

“Subpart 2—Other employees

Struck out (majority)

“69P Object of this subpart

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

15

“69Q Interpretation

“(1) In this subpart, unless the context otherwise requires,—

“**employee** means an employee to whom Schedule 1A does not apply

20

“**employee protection provision** means a provision—

“(a) the purpose of which is to provide protection for the employment of employees affected by a restructuring; and

25

“(b) that includes—

“(i) a process that the employer must follow in negotiating with a new employer about the restructuring to the extent that it relates to affected employees; and

30

Struck out (majority)

- “(ii) the matters relating to the affected employees’ employment that the employer will negotiate with the new employer, including whether the affected employees will transfer to the new employer on the same terms and conditions of employment; and 5
- “(iii) the process to be followed at the time of the restructuring to determine what entitlements, if any, are available for employees who do not transfer to the new employer 10
- “**new employer**, in relation to a restructuring, means—
- “(a) in the case of a contracting out, person B in the definition of that term; or
- “(b) in the case of a sale or transfer of a business, the person to whom the business is sold or transferred 15
- “**restructuring**—
- “(a) means—
- “(i) contracting out; or
- “(ii) selling or transferring the employer’s business (or part of it) to another person; but 20
- “(b) to avoid doubt, does not include—
- “(i) contracting in; or
- “(ii) subsequent contracting; or
- “(iii) in the case of an employer that is a company, the sale or transfer of any or all of the shares in the company; or 25
- “(iv) any contract, arrangement, sale, or transfer entered into, made, or concluded while the employer is adjudged bankrupt or in receivership or liquidation. 30
- “(2) For the purposes of this subpart, an employee is an **affected employee** if,—
- “(a) as a result of a restructuring, the employee is, or will be, no longer required by his or her employer to perform the work performed by the employee; and 35
- “(b) the type of work performed by the employee (or work that is substantially similar) is, or is to be, performed by or on behalf of the new employer.

Struck out (majority)

“(3) Any term or expression defined in **subpart 1** and used but not defined in this subpart has the same meaning as in **subpart 1**.

“**69R Collective agreements and individual employment agreements must contain employee protection provision**
 Every collective agreement and every individual employment agreement must contain an employee protection provision to the extent that the agreement binds employees to whom this subpart applies. 5

“**69S Affected employee may choose whether to transfer to new employer** 10
 If an employer, in relation to a restructuring, arranges for an affected employee to transfer to the new employer, the affected employee may—
 “(a) choose to transfer to the new employer; or
 “(b) choose not to transfer to the new employer. 15

New (majority)

“**69OA Object of this subpart**
 The object of this subpart is to provide protection to employees to whom subpart 1 does not apply if, as a result of a restructuring, their work is to be performed by or on behalf of another person and, to this end, to require their employment agreements to contain employee protection provisions relating to negotiations between the employer and the other person about the transfer of affected employees to the other person. 20

“**69OB Interpretation**
 “(1) In this subpart, unless the context otherwise requires,— 25
 “**employee** means an employee to whom Schedule 1A does not apply
 “**employee protection provision** means a provision—
 “(a) the purpose of which is to provide protection for the employment of employees affected by a restructuring; 30
 and
 “(b) that includes—

New (majority)

“(i) a process that the employer must follow in negotiating with a new employer about the restructuring to the extent that it relates to affected employees; and	
“(ii) the matters relating to the affected employees’ employment that the employer will negotiate with the new employer, including whether the affected employees will transfer to the new employer on the same terms and conditions of employment; and	5
“(iii) the process to be followed at the time of the restructuring to determine what entitlements, if any, are available for employees who do not transfer to the new employer	10
“ new employer , in relation to a restructuring, means—	15
“(a) in the case of a contracting out, person B in the definition of that term; or	
“(b) in the case of a sale or transfer of a business, the person to whom the business is sold or transferred	
“ restructuring —	20
“(a) means—	
“(i) contracting out; or	
“(ii) selling or transferring the employer’s business (or part of it) to another person; but	
“(b) to avoid doubt, does not include—	25
“(i) contracting in; or	
“(ii) subsequent contracting; or	
“(iii) in the case of an employer that is a company, the sale or transfer of any or all of the shares in the company; or	30
“(iv) any contract, arrangement, sale, or transfer entered into, made, or concluded while the employer is adjudged bankrupt or in receivership or liquidation.	
“(2) For the purposes of this subpart, an employee is an affected employee if,—	35

New (majority)

- “(a) as a result of a restructuring, the employee is, or will be, no longer required by his or her employer to perform the work performed by the employee; and
- “(b) the type of work performed by the employee (or work that is substantially similar) is, or is to be, performed by or on behalf of another person. 5
- “(3) Any term or expression defined in **subpart 1** and used but not defined in this subpart has the same meaning as in **subpart 1**.
- “**690C Collective agreements and individual employment agreements must contain employee protection provision** 10
Every collective agreement and every individual employment agreement must contain an employee protection provision to the extent that the agreement binds employees to whom this subpart applies.
- “**690D Affected employee may choose whether to transfer to new employer** 15
If an employer, in relation to a restructuring, arranges for an affected employee to transfer to the new employer, the affected employee may—
- “(a) choose to transfer to the new employer; or 20
“(b) choose not to transfer to the new employer.”

New**Subpart 3—Review of Part**

- 690E Review of operation of Part after 3 years**
- (1) The Minister must, as soon as is practicable, 3 years after the commencement of the Employment Relations Amendment Act **2006**, require a report to be prepared on— 25
- (a) whether the operation of this Part since the commencement of that Act has met the objects specified in **sections 69A and 690A**; and
- (b) if not, whether any amendments to this Part are necessary or desirable to meet those objects. 30

New

- | | | |
|-----|--|---|
| (2) | The Minister must ensure that the persons and organisations (including representatives of employees and employers), that the Minister thinks appropriate, are consulted during the preparation of the report about the matters to be considered in the report. | 5 |
| (3) | The Minister must present a copy of the report to the House of Representatives. | |

5 Personal grievance

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|-----|---|----|
| (1) | Section 103(1)(f) is amended by adding “; or”. | |
| (2) | Section 103(1) is amended by adding the following paragraph: | 10 |
| | “(g) that the employee’s employer has failed to comply with section 69G <u>a requirement of Part 6A</u> .” | |

New

5A Power of Authority to order compliance

Section 137(1)(a) is amended by repealing subparagraph (ii) and substituting the following subparagraph: 15

“(ii) Parts 1, 3 to 6, **6A** (except **subpart 1A**), 6B, 7, and 9; or”.

5B New section 140A inserted

The following section is inserted after section 140: 20

“140A Compliance order in relation to disclosure of employee transfer costs information

- | | | |
|------|---|----|
| “(1) | This section applies where— | |
| | “(a) any person has not observed or complied with section 690AC, 690AD, or 690ADA ; or | 25 |
| | “(b) there are reasonable grounds to believe that a person will not observe or comply with section 690AC, 690AD, or 690ADA . | |

- | | | |
|------|---|----|
| “(2) | Where this section applies, the Authority may, in addition to any other power it may exercise, by order require that person | 30 |
|------|---|----|

New

to do any specified thing or to cease any specified activity for the purpose of preventing—	
“(a) further non-observance of or non-compliance with section 690AC, 690AD, or 690ADA ; or	
“(b) non-observance of or non-compliance with section 690AC, 690AD, or 690ADA .	5
“(3) The Authority must specify a time within which the order is to be obeyed.	
“(4) An application to the Authority for an order of the kind described in subsection (2) may be made by the following persons:	10
“(a) a person who has made or proposes to make a request under section 690AC(2) ;	
“(b) a person who has required another person to provide information under section 690AD(2), (4), or (5) ;	15
“(c) an employee who would be eligible to elect to transfer to the new employer under section 69I ;	
“(d) a union of which the employee is a member.	
“(5) Where a person alleges that a person has been or would be affected by non-observance of or non-compliance with section 690AC, 690AD, or 690ADA , that person may take action against another person by applying to the Authority for an order of the kind described in subsection (2) .	20
“(6) The power given to the Authority by subsection (2) may be exercised by the Authority—	25
“(a) of its own motion; or	
“(b) on the application of a person described in subsection (4) .	
“(7) Sections 138(2) to (4), (5), and (6), 140(6), and 161 apply, with all necessary modifications, to a compliance order under subsection (2) as if the compliance order were a compliance order made under section 137(2).	30
“(8) For the purposes of section 161(1), any non-observance of or non-compliance with or proposed non-observance of or non-compliance with section 690AC, 690AD, or 690ADA or failure to comply with a compliance order under subsection (2) is to be treated as if it were an employment relationship problem.”	35

New

5C Jurisdiction

Section 161(1)(da) is amended by omitting “69J” and substituting “**690**”.

6 Transitional provision

- (1) *<This section>* ~~<Subsection (2)>~~ applies to restructurings (within the meaning of Part 6A of the principal Act as in force before the commencement of ~~(this Act)~~ this section), the agreements for which are concluded before the commencement of ~~(this Act)~~ this section even if the restructurings they relate to are to take effect after the commencement of ~~(this Act)~~ this section. 5
10
- (2) Part 6A of the principal Act, as in force immediately before the commencement of ~~(this Act)~~ this section, continues to apply to the restructurings as if this Act had not been passed.

New

- (2A) **Subpart 1A of Part 6A** does not apply in relation to any negotiations begun, or any tenders called for, before the commencement of that subpart. 15

New (majority)

- (3) The amendments to section 103(1) of the principal Act made by **section 5** of this Act—
 - (a) apply in relation to restructurings whether the agreements for ~~(which)~~ the restructurings are concluded before or after the commencement of ~~(this Act)~~ this section; but 20
 - (b) in relation to restructurings the agreements for which were concluded before the commencement of ~~(this Act)~~ this section, apply to failures to comply with Part 6A that occurred only after the commencement of ~~(this Act)~~ this section. 25

Legislative history

15 February 2006	Introduction (Bill 19-1)
1 March 2006	First reading and referral to Transport and Industrial Relations Committee
28 July 2006	Reported from Transport and Industrial Relations Committee (Bill 19-2)
30 August 2006	Second reading
31 August 2006, 5 September	Committee of the whole House (Bill 19-3)

