

# Employment Relations Amendment Bill

5 December 2005

Attorney-General

## LEGAL ADVICE

### CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: EMPLOYMENT RELATIONS AMENDMENT BILL

1. We have considered whether the Employment Relations Amendment Bill (the "Bill") (PCO 6758/9) is consistent with the New Zealand Bill of Rights Act 1990. We understand that this Bill is likely to be considered by the Cabinet Business Committee (CBC) at its meeting on Wednesday, 7 December 2005.
2. The Bill seeks to substitute a new Part 6A of the Employment Relations Act 2000 (the principal Act) to extend and clarify its application, especially to specified categories of employees in relation to subsequent contracting and subcontracting.
3. We have concluded that the Bill appears to be consistent with the Bill of Rights Act. In reaching this conclusion, we considered a potential issue of inconsistency with section 17 (the right to freedom of association) of the Bill of Rights Act, which can be justified in terms of section 5 of that Act.

## The Bill

4. The Bill proposes to implement Government policy by extending the application of Part 6A of the principal Act to specified groups of employees in situations where their employer loses a contract for services to a new contractor (subsequent contracting). This will ensure the integrity of subpart 1 of Part 6A of the principal Act in providing protection to specified employees in all change of employer situations. The nature of this protection is the right for affected employees to elect to transfer to the new employer on their existing terms and conditions of employment.
5. The Bill states that the amendments are necessary due to the recent decision of the Employment Court in *Gibbs (and others) v Crest Commercial Cleaning Ltd*. In that case, the Court found that subpart 1 of Part 6A of the principal Act did not provide specified employees with the protection the Government originally intended in subsequent contracting situations.
6. The Bill ensures that an employee will be able to transfer to any subsequent holder of a contract for services on their same terms and conditions of employment. Employees will have the right to transfer in situations where:
  - an employer sells their business
  - an employer transfers the work that the employees perform to another provider

- an employer contracts with a provider to perform work that is currently being undertaken by employees in-house
- a contract ends between a principal and a provider, who has employees performing the work, and is awarded to a new provider
- a contract ends with a provider and the employer performs the work themselves

### **Section 17 of the Bill of Rights - Freedom of Association**

7. Section 17 provides that "everyone has the right to freedom of association". This provision recognises that persons should be free to enter into consensual arrangements with others and to promote the common interests and objectives of the associating group. The right also extends to the right not to associate, and protects the right of individuals to decide freely whether they wish to associate with others.
8. The Bill, by substituting a new Part 6A of the principal Act, will enable employees to transfer to any subsequent holder of a contract for services on their same terms and conditions of employment. While it gives employees an election as to whether they wish to be employed by the new employer as pointed out by the Employment Court in *Gibbs* (para. 103), it provides new employers with no right of veto. That is, if an affected employee elects to transfer to the new employer, that new employer is bound to accept the position. Although the new employer may terminate that employment by reason of redundancy (see new section 69N), as the Employment Court noted "that both entails a new employment relationship (even if transitorily) and ...[an] unwanted cost of doing so" (para. 103). The new employer cannot avoid the obligation to employ.
9. New section 69I provides that it is for an employee to elect to transfer to the new employer. In such circumstances, the employee will become the employee of the new employer on the same terms and conditions (new section 69I(2)). The new employer will have no entitlement to bargain about the terms and conditions of a new employment relationship. Further, new section 69J deems the new employment relationship to have been "continuous", including for the purpose of service-related entitlements, whether legislative or otherwise, which must be met by the new employer.
10. Where a transferring employee is a member of a union and bound by a collective agreement, new section 69M provides that the new employer shall become a party to the collective agreement. Again, the Employment Court noted that such a provision "removes employers' rights of choice and in bargaining" (para105). New section 69N allows transferring employees to bargain for redundancy. This entitlement – which the Employment Court noted lies with the transferring employee and not the new employer (para105) – is only available if the new employer has surplus employees. If this situation does not exist, "the new employer is not entitled in law to buy out the employee for money" (para.105).

11. Taking these factors into account, the Employment Court stated that a freedom of association issue arose under the principal Act:

*So a new employer under this legislation is required by law to associate with a new employee or new employees in a way unknown to the previous common law and, very arguably, prohibited by it. It is a significant new law setting aside long-established common law. This is therefore a freedom of association issue. It is a long-standing principle of employment law that no person may be compelled to engage and continue in an employment relationship with another. Where that involved compulsion of an employee, it once took the form of slavery and servitude. (para 106)*

12. We note, however, that prior to *Gibbs*, New Zealand case law and that of other jurisdictions largely only raised the right to freedom of association in relation to employees. Moreover, the Supreme Court of Canada in *R v Advance Cutting & Coring* [2001] 3 S.C.R 209 held that freedom of association includes a negative right to not associate only if the forced association imposed "ideological conformity" on the individual, and, consequently, "the bare obligation to belong to a union" did not impose any such conformity.
13. In light of this case law, a compelling argument could be made that the right not to associate is not engaged by the regime set up by new Part 6A of the principal Act. This is because while a new employer is required to take on an employee on the same terms and conditions of employment, the new employer is not being asked to conform with any ideology espoused by the employee.
14. The decision in *Gibbs*, however, takes a broader interpretation of this right and extends it to any situation where an employer is compelled to engage and continue in an employment relationship with another. As the *Gibbs* decision represents the current position on freedom of association in employment in New Zealand, we conclude that the regime established by new Part 6A of the principal Act raises an issue of inconsistency with section 17 of the Bill of Rights Act. We have, therefore, gone on to consider whether new section 69M is justified under section 5 of that Act.

#### **Is this a justified limitation under section 5?**

15. Where a provision is found to be *prima facie* inconsistent with a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a "reasonable limit" that is "justifiable" in terms of section 5 of the Bill of Rights Act. The section 5 inquiry is essentially two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and that objective.<sup>[1]</sup>
16. The purpose of the Bill is to ensure that employees, specified as particularly vulnerable to having their terms and conditions of employment undermined in restructuring situations, have protection from loss of employment and undermining of terms and conditions in restructuring situations (including successive contracting

situations). We understand that subsequent contracting gives rise to particular problems for employees in sectors such as cleaning and food services. We consider that is an important and significant objective and therefore the Bill satisfies the first limb of the section 5 justification test.

17. Turning to the proportionality and rationality of the Bill, we note the concerns the Employment Court raised in *Gibbs* that:

17.1 the new employer will have no entitlement to bargain about the terms and conditions of a new employment relationship;

17.2 the new employment relationship will be deemed to be "continuous", including for the purpose of service-related entitlements; and

17.3 the new employer, where a transferring employee is a member of a union and bound by a collective agreement, shall become a party to the collective agreement.

18. However, we do not consider that the presence of these factors affect the overall proportionality of the regime established by new Part 6A of the principal Act. Despite the requirements in 17.1 and 17.3 above, once an employee has transferred, both parties to the employment agreement (employees and employers for individual agreements, and unions and employers for collective agreements) are able to renegotiate the terms and conditions of employment in accordance with the provisions of the principal Act. In any case, the due diligence process, where a restructuring is contemplated, will enable the new employer to become informed about the terms and conditions of employment of transferring employees, prior to these employees electing to transfer.

19. Where a new employer is not satisfied with the performance of a transferred employee, that performance may be addressed through a performance management procedure. These procedures include informing an employee about the necessary improvements to be made in their performance and allowing the employee with a reasonable opportunity to improve their performance. If the employee's performance continues to be unsatisfactory, then the new employer may have grounds to dismiss the employee. In such a situation, the rules relating to justifiable dismissals will apply.

20. In relation to the requirement that the new employer becomes a party to the collective agreement (see 17.3 above), the Department of Labour has advised that this is necessary as it allows:

"... specified employees to transfer on their existing terms and conditions of employment. If the new employer is not obliged to become a party to the collective agreement, there is a risk that a specified employee's employment agreement would be altered from a collective to an individual agreement. Requiring the new employer to become a party to the collective agreement in relation to a transferred employee ensures that the status of that employee's employment agreement is retained."

21. On the basis of this material, we consider that the limit on the right to freedom of association proposed by the regime established by new Part 6A of the principal Act is reasonable and justified in terms of section 5 of the Bill of Rights Act.

## Conclusion

22. We have concluded that the Bill appears to be consistent with the Bill of Rights Act.

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## Footnote

1 See *Ministry of Transport (MOT) v Noort* [1993] 3 NZLR 260; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; and *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 and Supreme Court of Canada's decision in *R v Oakes* (1986) 26 DLR (4th).

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