



## COVERSHEET

<b>Minister</b>	Hon Michael Wood	<b>Portfolio</b>	Workplace Relations and Safety
<b>Title of Cabinet paper</b>	Additional Employment Protections for Security Officers Under Part 6A: Approval to Draft	<b>Date to be published</b>	2 February 2021 (RIA published 15 March 2021)

<b>List of documents that have been proactively released</b>		
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25/11/2020	<i>Additional Employment Protections for Security Officers Under Part 6A: Approval to Draft</i>	<i>Office of the Minister for Workplace Relations and Safety</i>
25/11/2020	<i>Cabinet minute: Additional Employment Protections for Security Officers Under Part 6A – Approval to Draft</i>	<i>Cabinet Office</i>
10/11/2020	<i>Impact Summary: Security officers and Part 6A of the Employment Relations Act 2000</i>	<i>Ministry of Business, Innovation and Employment</i>

<b>Information redacted</b>	<b>YES / NO</b>
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# Impact Summary: Security officers and Part 6A of the Employment Relations Act 2000

## Section 1: General information

**Purpose**

The Ministry of Business, Innovation and Employment (MBIE) is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing decisions to proceed with a policy change to be taken by the Minister (as agreed by Cabinet).

**Key Limitations or Constraints on Analysis**

We have only considered two options: the status quo and adding security officers to Schedule 1A of the *Employment Relations Act 2000*. We think this is appropriate given the statutory decision making process which has been activated by the application from the E tū union to add security officers to Schedule 1A of the Act.

As we have set out in our consultation report, limited data exists on the security industry, including outcomes for workers.

We have undertaken consultation with the security industry (primarily through the NZ Security Association) and unions in the sector prior to preparing the consultation report. Engagement with the consultation report itself was limited (only five submissions received), and we have not heard from any non-union employees in the security industry.

**Responsible Manager (signature and date):**



Tracy Mears  
Manager, Employment Relations Policy Team  
Workplace Relations and Safety Policy Branch  
Ministry of Business, Innovation and Employment  
10 November 2020

**Quality Assurance Reviewing Agency:**

MBIE's Regulatory Impact Analysis Review Panel (RIARP) has reviewed the Impact Summary.

**Quality Assurance Assessment:**

The Panel considers that the information and analysis summarised in the Impact Summary meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

**Reviewer Comments and Recommendations:**

RIARP confirms that its feedback is reflected in the Impact Summary. It has undergone moderate changes as a result of the RIARP process.

## Section 2: Problem definition and objectives

### 2.1 What is the policy problem or opportunity?

#### **Context**

This project is responding to an application received by the Minister for Workplace Relations and Safety from the union E tū to add security officers to Schedule 1A of the *Employment Relations Act 2000* (the Act). Categories of employees listed in Schedule 1A have additional employment protections under subpart 1 of Part 6A of the Act. The Minister is required to make a decision on whether to approve or decline the application having considered specified statutory criteria, but there is no statutory timeframe for the Minister to respond.

MBIE has already assessed whether the statutory criteria have been met in a report which we consulted on.<sup>1</sup> Overall we were satisfied the criteria were met.

After the close of consultation, we prepared advice on whether the application should be approved. We have considered two questions:

1. Are the statutory criteria met? In other words ‘can the application be approved?’ This was the focus of our consultation report. Once we had feedback from stakeholders we considered whether we should change our view that the criteria were met.
2. What are the relative costs and benefits of approving the application? In other words, ‘should the application be approved?’ This is the focus of this Regulatory Impact Analysis.

The criteria in the Act are that the category of employees:

- Are employed in a sector in which restructuring frequently occurs
- Have terms and conditions of employment that tend to be undermined by restructuring
- Have little bargaining power.

The decision-making process in section 237A of the Act does not require the Minister to approve the application if the statutory criteria are met (rather the Minister ‘may’ approve the application). Therefore if the costs of approving the application significantly outweigh the benefits, we consider the Minister would have the option of declining the application.

#### **Problem definition**

Security officers are subject to frequent restructuring (e.g. retendering, contracting in, contracting out) which is undermining terms and conditions and leading to employment instability.

The underlying cause of the problem is an industry which supplies services to clients/engagers in a competitive process which holds down labour costs. The process of awarding contracts (through tendering in the case of larger contracts) can have the effect of holding down costs. Clients are often cost-conscious and want low prices, and given that labour costs are a high proportion of the ultimate product price, this flows

<sup>1</sup> The report is available on the MBIE website: <https://www.mbie.govt.nz/business-and-employment/employment-and-skills/employment-legislation-reviews/security-officers-application-to-amend-schedule-1a/>

through to employers offering low wages. While competition can be beneficial for clients who receive low prices for security services, it can have negative impacts for employees who are subject to employment instability and low wages.

We have heard from the security industry that employers are in an ongoing process to educate clients on the benefits on the quality of services provided of paying higher prices and therefore the employer being able to offer higher wages (e.g. the living wage), but ultimately clients have the final say on how much they are willing to pay for services.

The practical effect of the current situation is that if a security officer's employer loses a contract they risk being made redundant – likely without compensation – and losing all their service-related entitlements (e.g. sick leave, long service leave), although they would be paid out annual leave. If they are made redundant in this situation, the employee(s) could apply for a job at the new employer who took over the contract, but if they were successful there is no guarantee they would receive the same hours of work, pay rates, or terms and conditions, and they would start again in relation to service-related entitlements (indeed, the incoming employer may have won the contract by offering lower wages and terms). The ease with which an employee could transfer employment in a restructuring situation could depend on factors such as the state of the labour market (whether there was a shortage of security officers), whether the gaining employer had sufficient capacity to undertake work already, or perceptions of the worker's effectiveness.

Minimum employment standards provide some protection for all employees and form a floor below which employers cannot go below in the competitive process. However, these standards provide only procedural protections against redundancy (rather than compensation) and service-related entitlements do not transfer between employers. Part 6A recognises that due to a combination of circumstances, certain categories of workers need additional protections that go beyond the minimum standards which apply across the labour market.

The applicant provided some evidence in the application, regarding whether security guards have low bargaining power, whether they are subject to frequent restructuring, and whether their terms and conditions are being undermined by restructuring. We have evidence relating to low bargaining power and restructuring, but less evidence in relation to whether terms and conditions tend to be undermined by restructuring.

## 2.2 Who is affected and how?

**Security industry employees** are subject to employment instability in restructuring situations where their employer loses a contract, including potential undermining of their pay and terms and conditions in those restructuring situations. Where they are able to get a new job with the incoming employer, they would have to restart their service-based entitlements.

There are approximately 5,500 security officers in New Zealand, which is forecast to rapidly grow to over 8,000 by 2023.<sup>2</sup> Union density is low amongst security officers at about 10%, and they are typically paid close to minimum wage. A higher proportion of

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<sup>2</sup> 2013 Census; MBIE Occupation Outlook for Security Workers <https://occupationoutlook.mbie.govt.nz/service-industries/security-workers/>

Māori and Pacific work in the security industry compared to workers across all occupations.<sup>3</sup>

**Security industry employers** operate in a competitive industry where clients often seek low prices. Incumbent employers can be undercut by competing companies offering lower wages. Employers invest in some training, and these trained employees may or may not be able to move to a new employer in the event the incumbent loses a contract. Employers are the main parties whose behaviour we are seeking to change.

**Purchasers of security services** enjoy low prices for security services, but arguably at the expense of the quality of services provided. The government is a significant purchaser of security services, such as in the health sector and outside Ministry of Social Development offices.

## 2.3 What are the objectives sought in relation to the identified problem?

The policy objectives are to:

- Protect vulnerable workers from the effects of restructuring (e.g. contracting in, contracting out, subsequent restructuring) such as reduced wages and terms and conditions.
- Avoid unnecessary costs for employers (i.e. costs which are disproportionate to the benefits for workers)
- Ensure labour markets are flexible and can adapt to changing conditions

We have given primary weight to the first two criteria, but have included the third criterion to ensure that consideration is given to the overall effects of the change on the sector.

## Section 3: Options identification

### 3.1 What options have been considered?

We have considered two options below. The Part 6A system is designed to apply in circumstances set out in the Act, and the Minister is required to respond to the application, so we have focussed our analysis on the status quo versus approving the application.

We do not consider any non-regulatory options to be feasible. While the industry could potentially establish an expectation that incoming employers transfer across incumbent employees where possible, compliance would be voluntary and it would not be possible to guarantee transfers without a regulatory system. There would likely be disputes about the exchanging of information prior to a transfer and a voluntary process for transferring liability for service-related entitlements would not be feasible.

#### **Option 1: Status quo**

The limited procedural requirements ('employment protection provisions') in subpart 3 of Part 6A would continue to apply.

<sup>3</sup> For more information see the MBIE Report on the Part 6A Application: <https://www.mbie.govt.nz/business-and-employment/employment-and-skills/employment-legislation-reviews/security-officers-application-to-amend-schedule-1a/>

Increases to the minimum wage in future will act as a floor for security officers pay, helping to mitigate the effect of low bargaining power on wages.

### **Option 2: Adding security officers to Schedule 1A**

This would mean that security officers receive the additional employment protections in subpart 1, and employers would be subject to the various procedural requirements in Part 6A.

Subparts 1 and 2 of Part 6A apply in 'restructuring' situations. Under the Act restructuring includes:<sup>4</sup>

- Contracting out (where a service provided 'in house' by an employer is contracted out to a third party).
- Contracting in (where a service provided by a third party is instead provided 'in house').
- Subsequent contracting (where one contractor loses business to another contractor).
- Selling or transferring an employer's business to another person.

As set out above, the Minister may only approve an addition to Schedule 1A if the category of workers:

- Are employed in a sector in which restructuring frequently occurs
- Have terms and conditions of employment that tend to be undermined by restructuring
- Have little bargaining power.

### **3.2 Which of these options is the proposed approach?**

After putting the report out for consultation, we remain of the view that the criteria in the Employment Relations Act are met to add security officers to Schedule 1A.

While we are unable to quantify the scale of the benefits and costs/risks of applying Part 6A to security officers, there is evidence of outcomes from workforces already covered by part 6A that we can draw from.

The 2012 MBIE review of Part 6A found the benefits of the system outweighed the costs. Employers will inevitably face some costs complying with this regulation, but the experience of occupations already covered by Part 6A – such as cleaning – show that the costs can be absorbed.

We consider applying Part 6A to security officers would generate similar outcomes, which include wellbeing benefits for workers. These benefits include more confidence about continuing employment (and service-related entitlements), more stable terms and conditions, and in limited circumstances the ability to bargain for redundancy

compensation. There is a significant body of evidence to suggest redundancy and unemployment has a major effect on both mental wellbeing and health outcomes.<sup>5</sup>

We anticipate the changes would not significantly change the functioning of the market for security services. Restructuring situations would continue to arise, but where they did occur, employees would receive additional protections as noted above. An example of how Part 6A could operate is included below:

- John works for Incumbent Security Services as a guard outside the office of Banking Corporation.
- Banking Corporation is coming to the end of a contract and decides to put out a tender for security services.
- New Security Services wants to bid for the Banking Corporation contract, but wants to know the labour costs associated with the current contract. It requests from information from Incumbent Security Services information including the number of employees who could transfer, their wages, hours of work, service related entitlements, etc.
- Incumbent Security Services provides the information to New Security Services with enough time for it to decide to make a bid for the contract.
- Banking Corporation selects New Security Services to take over the contract.
- New Security Services requests individualised employee information from Incumbent Security Services. This includes personnel records, records of disciplinary action, employment agreements, wage details, information about service-related entitlements, etc.
- Incumbent Security Services notifies John that his role is affected by the restructure and he can elect to transfer to New Security Services. John decides to transfer to New Security Services.
- Incumbent Security Services notifies New Security Services that John and others have elected to transfer.
- John and the others' employment is transferred across on the restructure date. Their current wages and terms and conditions are maintained, as are their service-related entitlements.
- Incumbent Security Services compensates New Security Services for the value of service-related entitlements up to restructure date.

## Section 4: Impact Analysis (Proposed approach)

### 4.1 Summary table of costs and benefits

Affected parties	Comment: nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks	Impact
Additional costs of proposed approach, compared to taking no action		
Regulated employers	There would be a one-off (or short term) cost associated with training management	Medium

<sup>5</sup> Canterbury District Health Board, "Health Impact and the Public Health Response to Major Job Losses in Small Communities: An Overview of the International and New Zealand Literature", 2013  
<https://www.cph.co.nz/wp-content/uploads/healthimpactjobloss.pdf>



	and HR professionals, and with establishing processes and systems for complying with Part 6A (e.g. exchanging information in a tendering situation, transferring employees). In the event of relevant restructures, there would also be compliance costs associated with exchanging information and transferring employees.	
Security officer employees	There is a risk that employers would have less incentive to train employees, which would reduce professional development opportunities for employees. <sup>6</sup>	Low
Purchasers of security services	Various effects, such as a 'floor' effect with regards to prices for security services. They would have less control about which workers were present at their sites, and there is a limited risk of less innovation in services if Part 6A reduces employers' flexibility, or reduced quality of services if less training is provided by employers.	Low
Employment institutions	There may be a small ongoing impact on employment institutions if applying Part 6A generates additional disputes	Low
<b>Total Monetised Cost</b>		
<b>Non-monetised costs</b>		<i>Medium</i>

#### Expected benefits of proposed approach, compared to taking no action

Regulated employers	There will be some benefits for employers. Incoming employers will have access to an existing source of labour. It would be difficult for incumbents to be undercut on the basis of lower wages. <sup>7</sup>	Low
Security officer employees	There would be benefits for employees in transfer situations. They would face less instability in employment in a restructuring situation. They would also have access to more stable pay and terms and conditions of employment. A limited number of employees would be able to bargain for redundancy	Medium

<sup>6</sup> Views among stakeholders were divided on this point. Employers were concerned that if Part 6A were to apply to them, employees who they had invested in through training could be lost to a competitor in a restructuring situation. The competitor would therefore 'free ride' on the investments of the incumbent, which could reduce the incentive for employers to invest in training. E tū responded to this claim by arguing there is currently very little training paid by security employers beyond what the law and the client requires, and that if a good employer invested in training and higher wage rates, employees would likely remain with the current employer if there was a contract change.

<sup>7</sup> The potential exception to this is the issue identified by the NZ Security Association, where a new employer may be able to undercut the incumbent because it did not have to invest in training for the workers.

	compensation in the event of restructuring situation where the new employer does not need them. <sup>8</sup>	
<b>Total Monetised Benefit</b>		
<b>Non-monetised benefits</b>		<i>Medium</i>

#### 4.2 What other impacts is this approach likely to have?

It is possible that the change would stimulate collective bargaining, as if an employer gains transferring employees who are subject to a collective agreement then the gaining employer also becomes subject to the collective agreement in relation to those employees. Over time this could encourage multi-employer collective bargaining, partly as a way of reducing compliance costs for employers (such has occurred in the cleaning industry). If such collective bargaining were to occur it could help to mitigate the imbalance of bargaining power employees' face.

## Section 5: Stakeholder views

#### 5.1 What do stakeholders think about the problem and the proposed solution?

Consultation has been undertaken with the security industry and relevant unions, including the NZ Council of Trade Unions. We have also engaged with the Building Services Contractors of NZ (BSCNZ) to better understand the current operation of Part 6A in the cleaning industry.

##### **Unions stakeholders strongly supported the application**

The union stakeholders we engaged with were strongly supportive of the application. E tū argued that the criteria in the Act were met, and the benefits of adding security officers to Schedule 1A “vastly outweigh” the costs as it would give a vulnerable group more security of employment.

The NZ Council of Trade Unions suggested the change would encourage competition based on improvements in service quality and productivity, rather than just low cost.

The Tertiary Education Union commented that it had some security officer members employed at universities where it had successfully bargained for better conditions, but most security officers “are still predominantly employed in insecure work with low wages”, and Part 6A would provide additional protection for all security guards.

##### **Employers raised a variety of concerns**

<sup>8</sup> As noted elsewhere, employees are only able to bargain for redundancy compensation where their employment agreement does not include such provisions and it also does not expressly exclude such compensation (see s69N(1)(c)).

We did not explicitly test with employers whether they agreed with the problem definition, but the NZ Security Association noted that the industry was working proactively to educate clients about the benefits of higher prices, and therefore higher wages and better trained workforces. We anticipate the industry's preferred solution would be to continue voluntary industry efforts to raise standards and wages. Moreover the industry noted that the government was a significant purchaser of security services, so potentially had the power to shape the prevailing standards in the industry through its procurement. In other words, if it paid more for security officer services, wages across the industry could rise.

The NZ Security Association accepted the conclusion in the report that the criteria were met, but did not consider that the benefits of adding security officers to Schedule 1A outweighed the costs and risks. It had three specific concerns about the addition of security workers:

- it would reduce the incentive for employers to invest in training
- it would increase compliance costs, which would be significant and difficult to recover from customers
- it would require intensive enforcement to be successful, which is likely to be lacking.

The negative predicted impact on training was disputed by E tū, who noted very little training was occurring in any case, and that if an employer was investing in its staff, they would likely seek to stay in a restructuring situation rather than transferring to the new company. We do not expect the change would significantly reduce the incentive to invest in training, as even under the status quo employers risk losing their trained staff in a restructuring situation. Moreover, as E tū notes, workers could choose to stay with the incumbent employer if they provided valuable training (so long as there was sufficient work to do).

In relation to enforcement, E tū noted that although there had been issues with non-compliance in the cleaning industry in the past (e.g. in relation to franchisees), these issues had been resolved through legal action and proactive work by franchise companies to educate their franchisees. We anticipate that while there will be a period of adjustment and education in the security industry, eventually the vast majority of employers would comply with the regulations. The NZ Security Industry has comprehensive membership among employers, and is in a good position to be able to encourage compliance and potentially help resolve disputes.

Armourguard Security shared the concerns of the NZ Security Association, and also argued Part 6A's information sharing provisions would impact on competition in the security industry. We note the experience of the cleaning industry is that competition has not been disrupted by the provisions of Part 6A.

BSCNZ noted that improvements to the framework in Part 6A could reduce complexity for employers and therefore increase benefits for workers, and recommended that these changes be progressed before security officers were added to Schedule 1A. If it was not possible to make improvements, BSCNZ suggested that providing a delay in commencement would be critical, combined with resources for the security industry (both employers and workers) to understand the provisions of Part 6A and how they would work in practice.

## Section 6: Implementation and operation

### 6.1 How will the new arrangements be given effect?

The new arrangements would be given effect by the Minister for Workplace Relations and Safety making a recommendation to the Governor-General to make an Order in Council adding security officers to Schedule 1A of the Employment Relations Act.<sup>9</sup>

We have recommended that the Minister delays commencement of the Order in Council by three months to allow the industry time to prepare for the new regulations. The minimum time period is at least 28 days after notification of the Order in the *Gazette*.

It will be necessary to promote awareness of the new regulations among employers in the security industry and among workers. MBIE will work with stakeholders in the industry to inform them of the change.

## Section 7: Monitoring, evaluation and review

### 7.1 How will the impact of the new arrangements be monitored?

We will monitor the arrangements in line with our regulatory stewardship obligations. We also expect stakeholders to inform us if there are any issues.

We will continue to monitor Employment Relations Authority and Employment Court decisions for cases of significance.

### 7.2 When and how will the new arrangements be reviewed?

No specific review of the change is planned. However, if we become aware of significant concerns in the industry after the change we would consider whether a review was required.

Stakeholders would have the option of applying to the Minister for Workplace Relations and Safety to amend the mention of security officers in Schedule 1A or remove them entirely.

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<sup>9</sup> See section 237A of the Employment Relations Act 2000