

## **REGULATORY IMPACT STATEMENT**

### **REVIEW OF THE HOLIDAYS ACT 2003**

#### **Agency disclosure statement**

- 1 The Department of Labour prepared this Regulatory Impact Statement. The Regulatory Impact Statement provides an analysis of options to revise the Holidays Act 2003. The analysis is provided at two levels. The first level is as a response to the broader policy problem of perceived failings of the Act (this is the RIS itself). The second level of analysis is as a response to particular issues raised by a Ministerial Advisory Group and the Department of Labour in administering the legislation (the appendix provides this second level of analysis).
- 2 The objectives of the review, and the proposed legislative changes, are to:
  - a make the Act easier for businesses and employees to understand and apply
  - b reduce direct and compliance costs, and
  - c make the Act more readily applicable to a range of employment patterns.
- 3 The review aims to make changes without decreasing the current core holidays and leave entitlements or returning to the ordinary pay calculation used under the Holidays Act 1981.
- 4 The analysis of the policy options under consideration is constrained by the limited availability of objective evidence of problems with the current holidays legislation, both on the type and the extent of any problems. There is a lack of robust data available to quantify the potential impacts of the policy options considered.
- 5 The Department of Labour considers that there will be no increased direct costs for employers if employees are able to cash up annual holidays. This is because the additional payment is offset by the additional work undertaken by the employee. This assumes that productivity is the same during the additional time worked as at other times and that productivity is not adversely affected if employees take less time off work. If an employer is concerned that cashing up annual holidays may negatively impact on an employee's health (thereby reducing productivity) then they are able to decline a request. The Department is unable to determine what impact there will be on productivity overall as it depends on individual circumstances. It is possible that in some circumstances productivity may be increased, for instance if cashing up reduces the use of less experienced staff to replace employees who are on holidays.
- 6 There are two levels of compliance costs to employers with the option to cash up annual holiday entitlements. The first is the cost of considering an employee's request to cash up. However, these costs are very minor as an employer can refuse to cash up for any reason, without giving reasons, and can also have a policy to not cash up annual holidays. The second is the cost in relation to the mechanism and process of cashing up annual holidays. While these are slightly higher than the cost of simply considering a request, the fact that an employer can refuse a request for any reason ensures that they will not have to accept the cash up request if they consider that the associated compliance costs will be too high.

- 7 The Department of Labour's 2009 research on the Holidays Act involved interviews with employers, payroll administrators and employees from ten independent, private sector businesses. The participants were self-selected. It can be assumed that employers who were knowingly not complying with the Act would be unlikely to agree to participate. The researchers were unable to locate any firms (which met the size and sector criteria) in which employees were paid commission or productivity bonuses. This omits a sector of businesses that has expressed dissatisfaction with the relevant daily pay mechanism.
- 8 The Regulatory Impact Statement includes an estimate of the wage bill if Easter Sunday was made a 12<sup>th</sup> public holiday. This is based on information from the Time Use Survey 1999, Quarterly Employment Survey (QES) December 2009 and Linked Employer-Employee Data (LEED). There is no similar data to that used from the Time Use Survey that is more recent than 1999. It is possible that working patterns have changed since this time. There is no reliable information on the extent that penal rates apply to working on a Sunday (or Easter Sunday). Making Easter Sunday a public holiday is not a policy that is progressed in the Holidays Amendment Bill.
- 9 The policy options under consideration are expected to impact on compliance costs for businesses. Some options are likely to have a greater impact than others and some types of businesses, e.g. small and medium-sized enterprises, are more likely to be affected.

*PS Barker*

Paul Barker  
Group Manager - Workplace Policy (Acting)  
for Secretary of Labour

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## **Status quo and problem definition**

### **Overview**

- 10 The objective of providing minimum holiday and leave entitlements is to ensure that all employees have access to entitlements at a standard that society as a whole considers acceptable.
- 11 The Holidays Act 2003 sought to address criticisms that the 1981 Act was complicated, difficult to understand and apply and did not reflect changes in working patterns that had occurred in the intervening years.
- 12 The Government's 2008 pre-election commitments included allowing employees to cash up the fourth week of annual holidays and establishing a working party to review the Holidays Act, especially the issue of relevant daily pay.
- 13 A review of the Holidays Act was included in the Government's 2009 and 2010 Regulatory Reform Agenda. The review aims to address concerns that the current legislation is unnecessarily complex and does not reflect modern working arrangements.

### **Current settings**

- 14 The Holidays Act 2003 seeks to promote balance between work and other aspects of employees' lives. It provides minimum entitlements to:
  - four weeks of annual holidays for rest and recreation
  - paid public holidays for the observance of days of national, religious or cultural significance
  - five days of sick leave per year (after six months' continuous employment) to assist employees who are unable to work because they are sick or injured or someone they care for is sick or injured, and
  - bereavement leave<sup>1</sup> to assist employees who have suffered a bereavement.
- 15 The legislation also sets out payments for holidays and leave. Annual holidays are paid at the greater of average weekly earnings<sup>2</sup> or ordinary weekly pay<sup>3</sup>. If an employee works on a public holiday they are entitled to payment of time and a half for the hours worked and an alternative holiday, if the public holiday was an otherwise working day for them. Sick and bereavement leave and public and alternative holidays are paid at the employee's relevant daily pay<sup>4</sup>.

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<sup>1</sup> After six months' continuous employment, the Act provides three days' bereavement leave upon the death of a close family member and one day's leave upon the death of another person where the employer accepts that the employee has suffered a bereavement.

<sup>2</sup> Average weekly earnings is based on an average of gross earnings for the 12 months immediately before the end of the last pay period before the annual holiday.

<sup>3</sup> Ordinary weekly pay is the amount the employee receives under their employment agreement for an ordinary working week. If it is not possible to determine ordinary weekly pay, then it is calculated based on a four week average. An employment agreement may specify a special rate of ordinary weekly pay that is equal to or greater than what would otherwise be calculated under the Act.

<sup>4</sup> Relevant daily pay is the amount an employee would otherwise have earned on the day if they had worked. If it is not certain what the employee would have received on the day then there is an averaging formula based on gross earnings for the last four weeks. An employment agreement may specify a special rate of RDP that is equal to or greater than what would otherwise be calculated under the Act.

### **Ministerial Advisory Group**

- 16 A Ministerial Advisory Group, representing both employers and unions and with an independent Chair<sup>5</sup>, was established in June 2009 as part of the Government's review of the Holidays Act [CAB Min (09) 7/4 refers].
- 17 The Group's terms of reference identified seven areas of interest, based on consultation by the Department of Labour. The terms of reference signalled that radical changes to the legislation were not being sought.
- 18 The Group received 241 written public submissions. They heard oral submissions from the Small Business Advisory Group, Labour Inspectors, Mediation Services, New Zealand Payroll Providers' Association and the Chief Judge of the Employment Court. The Group carefully considered the issues and proposed options raised by submitters. They also considered the legislative settings in other countries (such as Australia, Canada and the United Kingdom), research undertaken by the Department of Labour and the findings of previous reviews of the Holidays Act.
- 19 In December 2009, the Group made recommendations to the Minister of Labour on ways to improve the operation of the Holidays Act. A copy of their report is available on the Department's website: <http://dol.govt.nz/publications/research/holidays-act-review-2009/index.asp>.
- 20 The Group reached agreement on three areas: making no changes to the treatment of public holidays or the entitlements of casual employees and allowing the transfer of public holidays within set criteria. The Group did not reach agreement on the other areas reviewed: the status of Easter Sunday; the accumulation of alternative holidays; allowing the cashing up of annual holidays; and relevant daily pay.

### **Problem definition**

- 21 At the broadest level of analysis, the three main problem areas identified with the legislation are:
  - some areas of the Act are overly complex for businesses and employees to understand and apply, particularly the calculation of relevant daily pay
  - the Act has reportedly increased compliance and direct costs for businesses, and
  - the Act is not easily applied to all businesses, employment or industry types such as 24 hour a day, 7 day a week businesses.
- 22 There is limited data available to assess the type and extent of problems with the holidays legislation. Most of the issues raised are based on anecdotal feedback to the Department of Labour and submissions to the Ministerial Advisory Group. This can lead to bias towards issues where the legislation is not working for some individuals or groups – even though it may be working for others, perhaps even the majority.

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<sup>5</sup> The Group consisted of: Peter Kiely (Chair, Barrister and Solicitor), Paul Mackay (Business New Zealand), Helen Kelly (New Zealand Council of Trade Unions), Philip Doak (Air New Zealand) and James Ritchie (New Zealand Dairy Workers Union).

23 Available evidence on the operation of the legislation is:

- information requests to the Department's contact centre increased when the minimum entitlement to annual holidays changed and have since decreased, but remain well above pre-change levels (37,722 enquiries in 2005/06 to 59,143 in 2007/08 to 50,201 in 2008/09). The number of complaints to the Labour Inspectorate have fluctuated over the same period (2,204 in 2005/06, 1,831 in 2006/07, 2,049 in 2007/08 and 2,563 in 2008/09)
- the October 2008 Business New Zealand-KPMG compliance cost survey identified applying the Holidays Act to be one of the top five compliance costs facing New Zealand businesses<sup>6</sup>
- during the 2006/07 Quality Regulation Review the Act was criticised for its perceived complexity and generic approach. Issues relating to minimum entitlements were raised by the four sectors surveyed: hospitality, horticulture, retail and viticulture. These included concerns that public holiday entitlements are financially adverse to businesses and cannot be recuperated through surcharges, and the impact on businesses of public holiday closures.
- qualitative research<sup>7</sup> on the overall impact of the Holidays Act on small and medium-sized enterprises indicates that:
  - employers were most familiar with the entitlements related to annual holidays and public holidays
  - many employees did not know their specific entitlements under the Act
  - employers' perceptions tended to be focused on the direct costs of the fourth week of annual holidays and, to a lesser extent, employees' entitlements for working on public holidays
  - employers whose business started after the increase in annual holidays' entitlements (April 2007) were more likely to consider the Act a fact of business life, without a particular impact on their firms that other businesses did not also face<sup>8</sup>. This suggests that some of the impacts (including perceptions) of the Act relate to regulatory change rather than the regulation itself
  - overall the Act was seen as a minor constraint by employers in the survey (because they made their own arrangements), particularly

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<sup>6</sup> This result indicates businesses' views of compliance for the Holidays Act relative to other types of compliance costs. It does not provide an indication of the size of compliance for the Holidays Act. This survey does provide information on the size of employment-related compliance costs, which would include the Holidays Act. In 2008, employment-related internal compliance costs were estimated to be \$4,687 (based on 198.1 hours at \$23.66 an hour), 34.8 percent of respondents used external advice (the average external cost was estimated at \$7,202). Employment-related compliance costs were estimated to make up 25.8 percent of total compliance costs. By comparison, in 2003 (before the current Holidays Act was in force), employment-related internal compliance costs were estimated to be \$10,466, 58.3 percent of respondents used external advice (the average cost of which was estimated at \$8,625) and employment-related compliance costs were estimated to make up 29.4 percent of total compliance costs.

<sup>7</sup> Department of Labour (2009) *The effect of the Holidays Act 2003 on small and medium enterprises - a qualitative study*. Available at: [www.dol.govt.nz](http://www.dol.govt.nz)

<sup>8</sup> This may also be reflected in the 2008 Business New Zealand-KPMG compliance cost survey where only 13.8 percent of firms that had been operating for a year or less listed the Holidays Act as their top compliance cost priority, compared with 21.1 percent of all firms in the survey.

compared to product market and (to a lesser extent currently) labour market constraints, and

- marginal compliance costs imposed by the Act were considered insignificant by employers in the study<sup>9</sup>.

24 The key groups that are most likely to experience difficulties with the current Act are:

- small businesses as they generally have fewer human resource and payroll resources and expertise and they deal with some parts of the Act less frequently than larger businesses
- sectors that work variable hours, days or shifts, such as manufacturing, some hospitality and retail businesses and seasonal industries (horticulture and agriculture)
- sectors that have variable rates of pay (such as piece rates and commission-based pay) like the retail sector and the meat processing industry
- employees who are already disadvantaged in the labour market or who have poor ability to advocate for their rights. In particular this will include some low skilled workers, Māori, Pacific people and young workers, and
- employees in "casual" employment situations.

#### ***Impacts of changes to the Holidays Act***

25 Changes to the Holidays Act will directly affect all employers and employees to differing degrees, depending on the issue under consideration. More detailed consideration of the impacts of the options considered is outlined in the assessment of the options in Appendix one.

#### **Objectives**

26 The objectives of the review of the Holidays Act 2003 are to:

- a make the Act easier for businesses and employees to understand and apply
- b reduce direct and compliance costs, and
- c make the Act more readily applicable to a range of employment patterns.

27 The review aims to make changes without decreasing the current core holidays and leave entitlements or returning to the ordinary pay calculation used under the Holidays Act 1981.

28 The objectives are not weighted. For some of the options considered, one objective is met at the expense of the other objectives being fully realised.

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<sup>9</sup> Differences between the Department of Labour's research and the Business New Zealand-KPMG surveys may reflect differences in the methodologies, including the type of firms included in the research. For instance, the Business New Zealand-KPMG survey covered firms of all sizes, while the Department of Labour research focused on SMEs. In the Business New Zealand-KPMG survey, firms employing between 50 and 99 employees were more likely to list the Holidays Act as their top compliance cost priority (31.1 percent). In the Department of Labour research, the firm with the highest number of employees (75 employees) had the highest compliance costs. Five of the firms in the research had between 0 and five employees. Only 17.8 percent of firms this size listed the Holidays Act as their top priority in the Business New Zealand-KPMG survey.

## Options

- 29 Options were considered for each of the seven areas identified for the review:
- a cashing up annual holidays
  - b relevant daily pay
  - c transferring public holidays
  - d casual employees
  - e the accumulation of alternative holidays
  - f the treatment of public holidays, and
  - g the status of Easter Sunday.
- 30 The options outlined in the Regulatory Impact Statement and Appendix One are primarily based on the options considered by the Ministerial Advisory Group. Additional options have been identified by the Department of Labour, from submissions to the Ministerial Advisory Group, and from the Minister of Labour.

## Assessment of the options

- 31 Below is the overlying analysis for different combinations of policy options. Appendix one contains detailed analysis of the individual areas in the review; it includes information about the issues, the Group's recommendations and an assessment of the policy options for each of the areas reviewed.
- 32 There is a lack of data to fully quantify the potential impacts of the policy options considered in the time available. The Department's assessment is based on what is known to it, which includes anecdotal evidence.
- 33 The Minister of Labour has considered three different sets of recommendations based on the areas of interest on which the Group did or did not reach agreement and other policy options. The table below shows the degree of change that would be achieved by each set of recommendations.

<p style="text-align: center;"><b>Option A</b></p> <p style="text-align: center;"><b>Areas of interest on which the Group reached agreement</b></p> <p style="text-align: center;"><b>Low level of change to the Act</b></p>	<p style="text-align: center;"><b>Option B</b></p> <p style="text-align: center;"><b>Areas of interest on which the Group did not reach agreement</b></p> <p style="text-align: center;"><b>High level of change to the Act</b></p>	<p style="text-align: center;"><b>Option C</b></p> <p style="text-align: center;"><b>Areas of interest on which the Group reached agreement and other policy options considered by the Minister of Labour</b></p> <p style="text-align: center;"><b>Medium level of change to the Act</b></p>
<ul style="list-style-type: none"> <li>• Transfer of public holidays</li> <li>• No changes to the treatment</li> </ul>	<ul style="list-style-type: none"> <li>• Cash up of annual holidays</li> <li>• Standard daily pay<sup>10</sup> (replaces relevant daily pay for the</li> </ul>	<ul style="list-style-type: none"> <li>• Transfer of public holidays</li> <li>• No changes to the treatment</li> </ul>

<sup>10</sup> The Group made some progress towards agreeing on an alternative formula (called standard daily pay). The Group did not agree on some of the components of the formula.

<p>of public holidays</p> <ul style="list-style-type: none"> <li>• No changes to the treatment and entitlements of casual employees</li> </ul>	<p>calculation of public holidays, alternative holidays, sick leave and bereavement leave)</p> <ul style="list-style-type: none"> <li>• Using standard daily pay to calculate annual holidays</li> <li>• Accumulating and deducting entitlements for holidays and leave in work units (or hours)</li> <li>• Adding alternative holidays to annual holiday balances</li> <li>• Allowing employers and employees to agree to alternative methods for calculating payments and accruing entitlements</li> <li>• Making Easter Sunday an additional 12<sup>th</sup> public holiday</li> </ul>	<p>of public holidays</p> <ul style="list-style-type: none"> <li>• No changes to the treatment and entitlements of casual employees</li> <li>• Cash up of annual holidays</li> <li>• Average daily pay (replaces relevant daily pay for the calculation of public holidays, alternative holidays, sick leave and bereavement leave)</li> <li>• Codify "but for" test for working out an otherwise working day<sup>11</sup></li> <li>• Require that employers and employees agree on when alternative holidays are taken and, failing agreement, the employer may reasonably decide</li> <li>• No changes to Easter Sunday</li> <li>• Increase penalties for non-compliance</li> <li>• Provide clearer legislative definitions of some of the components of gross earnings</li> <li>• Provide employers with the ability to request medical certificates without reasonable grounds to suspect that the sick leave is not genuine at the employer's cost</li> </ul>
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### **Status quo**

- 34 The Department of Labour has also considered the implications of the status quo (not making any changes to the Act). The status quo will not address issues that can be easily fixed or address perceived problems with the Act. Some parts of the Act have been criticised as being unclear, overly complex and lacking choice for both employers and employees. A lack of clarity in holiday provisions has a negative impact on employment relationships and productivity because employers and employees have to spend time and resources trying to establish what their rights and obligations are.
- 35 The Department considers that the legislation in part reflects the complexity of modern employment arrangements. While the Department does not consider that major changes are needed, there are some areas where it is desirable to improve the operation of the legislation. There are some areas where the existing legislation

<sup>11</sup> Using the "but for" test, an employer or employee can ask themselves "would an employee have worked on this day but for the public holiday/sick day etc". The test is recognised in case law but is not actually listed in the Act as one of the factors that employers and employees can use to work out an otherwise working day.

may work better if employers and employees were provided with more tailored information and guidance, such as the calculation of relevant daily pay.<sup>12</sup> However, it is unlikely that provision of this information alone will address some of the more commonly held concerns over the legislation.

### **Option A**

- 36 Option A contains only the recommendations where the Group reached agreement. This option would go a small way towards meeting the objective of making the Act more readily applicable to a range of employment arrangements. However, as most of the agreed recommendations are to retain the status quo, it will not address the other objectives of making the Act easier for businesses and employees to understand and apply or reduce direct and compliance costs.
- 37 Overall, option A would have only a limited effect and does not address concerns with the existing legislation.

### **Option B**

- 38 Option B is made up of the recommendations that seek to make the greatest/most active changes to the Act. This option aims to simplify the Act and reduce direct and compliance costs by providing for one rate at which all leave is paid.
- 39 The benefits of this option are likely to be outweighed by the costs. The costs include increased compliance costs for all employers, a reduction to sick leave entitlements, a potential reduction to annual holiday entitlements, and a reduction in entitlements for employees on unpaid leave including ACC and parental leave.
- 40 Unions consider that workers will be unduly disadvantaged by the more active changes in this option, such as the additional proposed changes to annual holiday pay and the accumulation of entitlements.
- 41 Overall, option B is unlikely to reduce compliance costs or complexity. Instead it will significantly increase compliance costs for all employers as they will need to accumulate and deduct holiday and leave entitlements in a different way and substantially renegotiate employment agreements. This option will go some way towards meeting the objective of making the Act more readily applicable to a range of employment arrangements and reducing direct costs, but it will not address the other objectives of making the Act easier for businesses and employees to understand and apply, or reduce compliance costs. It is likely to have a negative impact on disadvantaged or casual workers and may reduce flexibility for some part-time and flexible work arrangements.
- 42 Overall, Option B would not sufficiently simplify the Act to justify the implementation changes employers and employees would be required to make or the potential reduction in entitlements and payments for a significant proportion of employees.

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<sup>12</sup> The Department provides an on-line tool to help employers and employees calculate what an employee should be paid (that is, their "relevant daily pay" for their day off or for working on a public holiday)

### **Option C**

- 43 Option C is a mix of recommendations from the Group (as a whole or from the different representatives) and other policy options considered by the Minister of Labour. This option represents the Minister of Labour's preferred combination of options. Option C provides a reasonable balance in meeting employer and employee interests and represents a "middle ground" that also addresses the main areas of concern with the legislation.
- 44 Some changes under this option provide greater choice for employees (cashing up annual holidays and transferring public holidays). Other changes may make it easier for employers to understand and comply with the legislation (average daily pay (ADP), the "but for" test and defining some components of gross earnings). The limited ability for employees to cash up annual holidays and transfer public holidays should also limit compliance costs for businesses.
- 45 The introduction of ADP is likely to remove any perceived incentives for employees to take leave on high rate days because regardless of whether an employee takes a long or short day's leave they will only receive an averaged payment.
- 46 The Department of Labour considers that the option to remove the ability for employees to decide when the alternative holiday is taken will reduce existing entitlements (the default right to nominate the day on which the alternative holiday is taken).
- 47 Overall, option C is likely to have minimal impacts on small businesses. It is likely to have some positive impacts on sectors that work variable hours, days or shifts, and sectors that have variable rates of pay. It is likely to increase compliance costs for some employers, such as those with traditional working hours or where pay rates and hours are easily identified. As the Act specifies the minimums for calculating holiday and leave payments, these employers may agree to continue with their current method of calculating payments providing it is equal to or greater than that provided in the Act. Option C would have less of an impact on salaried workers and their employers than option B.
- 48 There are risks that the proposed changes will have short-term negative impacts, such as confusion or lack of understanding of the changes, that may undermine the purpose of the proposed changes to the holidays legislation. There are likely to be one-off compliance costs for employers as part of implementing the changes, such as making changes to payroll systems and renegotiating employment agreements.

### **Consultation**

- 49 The Ministerial Advisory Group received 241 written public submissions. Submitters included employers (106), employees (22), employer representatives (32), unions (5 submissions representing 42 unions), youth (19), women's groups (4), payroll software suppliers/providers (8), employment lawyers/firms/academics (11), Māori organisations (1), self-employed individuals (2), other individuals (24) and other organisations (7).
- 50 The Group also heard oral submissions from Labour Inspectors, Mediation Services, the Small Business Advisory Group, the New Zealand Payroll Practitioners' Association and the Chief Judge of the Employment Court.

- 51 A summary of the submissions is included in the Group's report. Some of the main issues raised by submitters on particular topics are included in the appendix.
- 52 The Department of Labour consulted with the Treasury, Ministry of Economic Development, Ministry of Pacific Island Affairs, Ministry of Women's Affairs, Te Puni Kōkiri, Ministry of Social Development, Ministry of Health, Ministry of Education, Inland Revenue, Ministry of Justice, State Services Commission and the Department of the Prime Minister and Cabinet on the content of the Cabinet paper.
- 53 Treasury and the Ministry of Economic Development (MED) have concerns that the proposed package of changes may not improve the functioning of the legislation. Agencies have had limited time to consider the current proposals and a number of proposals that may impose additional costs on businesses were made late in the review process. The balance of costs and benefits of the package of proposed changes is not clear. At a minimum, amendments are likely to impose transitional costs on both employers and employees and the extent of other potential costs is unclear.
- 54 Treasury and MED are particularly concerned that the costs to business associated with the proposal to replace relevant daily with average daily pay for public holidays, alternative holidays, sick leave and bereavement leave may exceed the benefits and therefore not provide an effective solution to the current problems with calculating relevant daily pay for the portion of businesses where employees have complex work arrangements. There is also a risk that this proposal will impose unnecessary costs on the majority of employers for which the current method of calculation is relatively straightforward. Providing an additional option for employers to calculate pay could add to the confusion that some employers already have about which calculation to use. This would increase compliance costs, particularly for small businesses.
- 55 It is not clear how viable the proposal that employees be able to cash-up a maximum of one week's annual leave is as the cost of implementing it (particularly if employees apply to cash-up leave incrementally) may be so high that employers choose to have a no cash-up policy. There is also a risk that this proposal could create new employment tensions between employers and employees.

## **Conclusions and recommendations**

- 56 The Department of Labour's preferred options for each of the individual areas reviewed by the Ministerial Advisory Group were:
- retain relevant daily pay as a means to calculate public holidays taken, sick leave, bereavement leave and alternative holidays, but amend the second tier of relevant daily pay (section 9(3)) so that the averaging formula is extended from a four week to a 52 week period. The first tier (section 9(1)) remains in place for salaried workers. Only employees with complex work arrangements would therefore be affected by this option. This option aims to minimise the distorting impacts that can sometimes be caused by averaging over four weeks, represents the lowest reduction in entitlements of the options considered and accommodates some employers for whom relevant daily pay may not be working currently
  - including the "but for" test in legislation to provide an additional tool for employers and employees to identify an otherwise working day

- making no changes to the accumulation of alternative holidays as the Department considers that this issue only affects a small number of employers and none of the options considered will make a significant improvement to the operation of the legislation in a way that meets the objectives of the review
- making no changes to the treatment of public holidays as there is not a significant call for change and there is no clear consensus on what changes should be made, and
- making Easter Sunday a mondayised public holiday as it will provide protections for those employees who do not have Easter Sunday provisions in their employment agreements and it may help with compliance with shop trading restrictions by aligning the Holidays Act with the shop trading legislation.

57 The Department of Labour has not taken a position on:

- whether employees should be allowed to cash up some part of their minimum entitlement to annual holidays due to the lack of evidence around the implications of this option. The Department considers that if it does proceed then this option needs to provide a balance between opportunities for rest and recreation, employee choice and fairness for employees and employers
- whether to allow public holidays to be transferred. In the Department's view the current situation is working well and only a minority of submitters considered that public holidays should be allowed to be transferred. However, including a transfer provision will provide increased choice for those employers and employees who do wish to transfer public holidays, although it will increase the complexity of the legislation
- making changes to entitlements to alternative holidays. The Department considers that the issue of an employee choosing when an alternative holiday is taken is limited to a few employers (less than 10 submitters to the Group said that employees should not be allowed to choose when alternative holidays are taken)

58 The Department of Labour did not support the proposed changes that were part of the Standard daily pay (SDP) package<sup>13</sup> as these changes were likely to represent a significant reduction in current entitlements and, in some cases, it was not clear that the proposed options were the most effective way to address the perceived problems.

59 The impact of the new calculation of Average daily pay (ADP) on employees will vary. This provision will replace Relevant daily pay (RDP) so that instead of a calculation being made on the basis of what an employee would have earned on a specific day of leave, the calculation will be made on averaging an employee's gross

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<sup>13</sup> These included using standard daily pay to calculate payment for annual holidays; changing the way holiday and leave entitlements are calculated to be in work units (for example, annual holidays would be accumulated at 4/52 of contractual hours and sick leave at 1/52 contractual hours); including alternative holidays in annual holiday balances (and thereby changing the amount of alternative holiday received for working on a public holiday and removing employees' ability to choose when they take the alternative holiday); and allowing employers and employees to agree to different calculation methods that may be lower than those provided in the Act.

earnings over the previous 52 weeks before the leave is taken. Over the course of a year some employees are likely to receive a lower payment than they would under RDP, for instance employees who have had a pay rise in the last 12 months.<sup>14</sup> As on average around half of wage and salary workers may receive a pay rise over a year there could be significant numbers negatively affected to some extent.<sup>15</sup> Other types of employees may receive an increase or a decrease in payments compared with RDP, depending on a number of factors, such as any additional payments received in the previous four weeks. Consequently, it is difficult to accurately estimate how many employees will be advantaged or disadvantaged by ADP. As the Act sets out minimum payments for leave, it is possible that employers may pay their employees a higher amount that is in line with current practice.

- 60 ADP is likely to reduce compliance costs in sectors with complex work arrangements (payment by commission or productivity or variable hours of work). It is likely to increase compliance costs for some employers such as those with traditional working hours or where pay rates and hours are easily identifiable as they would have to undertake calculations which they currently do not have to do, as RDP is identifiable.<sup>16</sup> As the Act specifies the minimums for calculating holiday and leave payments, these employers may continue with their current method of calculating payments providing it is equal to or greater than that provided in the Act.
- 61 The Minister of Labour determined the proposal regarding the provision of medical certificates, and the Department of Labour was not asked to provide advice on this matter in the policy development process.
- 62 The preferred package of policy options, option C, provides a reasonable balance in meeting employers' and employees' interests and represents a "middle ground" that also addresses the main areas of concern with the legislation.
- 63 This option will address the review's objectives in the most effective way. While some changes will provide greater choice, others will make it easier for both employers and employees to understand and comply with the legislation. Where appropriate, changes to the legislation are accompanied by some limitations on employees (to address concerns about increased compliance costs to employers) and some limitations on employers (to protect statutory minimums).
- 64 Overall, option C is likely to have minimal impacts on small businesses. It is likely to have some positive impacts on sectors that work variable hours, days or shifts, and sectors that have variable rates of pay. It may increase compliance costs for some employers, such as those with traditional working hours or where pay rates

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<sup>14</sup> Because the calculation of ADP is over a 52 week period it effectively smoothes out increases in pay. This avoids the spiking that can be caused by RDP's four week averaging formula which delivers a payment that is linked to the employee's recent earnings.

<sup>15</sup> It appears that a majority of wage and salary earners experience an increase in their pay rates each year. In the year to September 2009, 47 percent of surveyed salary and ordinary time wage rates increased. This is lower than previous changes, which ranged between 55 percent (in the year to June 2009) and 62 percent (in the year to September 2008) (Labour Cost Index).

<sup>16</sup> According to the Survey of Working life (March 2008 quarter) 62.7 percent of employed people said they usually work all of their hours between 7am and 7pm, Monday to Friday (standard working times), and 35.3 percent said they did not. With regards to variable hours of work, when the SoWL asked about workers' overall patters 4.7 percent of respondents said that they worked shifts that changed from day to day or week to week.

and hours are easily identified. As the Act specifies the minimums for calculating holiday and leave payments, these employers may agree to continue with their current method of calculating payments providing it is equal to or greater than that provided in the Act. Option C would have less of an impact on salaried workers and their employers than option B.

### **Implementation**

- 65 The Department recommends implementing any legislative changes to the Holidays Act 2003 by 1 July 2011. This is to allow sufficient time for employers, employees and providers to become familiar with the new requirements, negotiate changes to employment agreements, where necessary, and to make changes to payroll systems.
- 66 The Minister of Labour intends to release the Cabinet paper publicly once decisions have been made by Cabinet in respect to the proposals outlined in the paper.
- 67 The Regulatory Impact Statement will be published on the Department of Labour's website, subject to any appropriate withholding of information under the Official Information Act 1982.
- 68 Before any changes to the Act come into force, the Department of Labour will undertake an awareness raising campaign targeting employers and employees. The aim of the campaign will be to inform employers and employees of the changes and how they may be affected and to prompt employers and employees to be prepared before the changes come into effect.
- 69 The awareness raising campaign is likely to include print and internet advertising and articles in targeted media. We will use existing stakeholder networks, including the New Zealand Payroll Practitioners' Association, to target specific groups. We will also work with the social partners to identify potential information needs and explore how they can assist with informing their members.
- 70 On an ongoing basis, the Department of Labour will provide information for employers and employees through its website, contact centre and other customer services.
- 71 The awareness raising campaign and ongoing information provision will be undertaken within the Department of Labour's existing baseline funding. The Department may need to reprioritise funding if the Holidays Act online tool needs to be updated.
- 72 It is expected that there will be an increase in calls to the Department's contact centre and complaints to Labour Inspectors when changes to the legislation first come into effect. It is uncertain whether complaints to Labour Inspectors will increase or decrease from existing levels once the initial implementation period is over.

### **Monitoring, evaluation and review**

- 73 The Department of Labour will provide the Minister of Labour with advice on the monitoring and evaluation of the impact of any changes to the Holidays Act.
- 74 As well as a potential formal review of any amendments, the Department will undertake informal monitoring of the Holidays Act through media reports, research and contacts with the Department's contact centre and Labour Inspectors.

## **APPENDIX ONE: ASSESSMENT OF POLICY OPTIONS FOR THE HOLIDAYS ACT 2003**

- 1 This appendix is an assessment of the policy options considered for the Holidays Act 2003. The assessment is based on the impact on:
- understandability
  - direct and compliance costs
  - applicability to a range of employment patterns, and
  - existing entitlements.

### **A. Cashing up annual holidays**

#### ***Background***

- 2 Employees are entitled to a minimum of four weeks' annual holidays after each 12 months of service. Employees and employers are currently unable to agree to exchange any of the minimum entitlement for cash. They are able to reach agreement to cash up any annual holiday entitlements provided above the minimum of four weeks.
- 3 According to the Survey of Working Life, 65.5 percent of employees were entitled to four weeks' paid annual holidays in their main job and 14.9 percent were entitled to more than four weeks<sup>1</sup>.

#### ***Issues***

- 4 Submitters were split on this issue, though the majority supported allowing cashing up, providing that there were adequate protections for employees and employers and depending on the design criteria.
- 5 Issues raised by submitters about not being able to cash up annual holidays included:
- the inability of employees to cash up holidays if they have financial difficulties
  - it is difficult to take four weeks off work, and

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<sup>1</sup> Statistics New Zealand (2008) *Survey of Working Life*. Available at [www.stats.govt.nz](http://www.stats.govt.nz)

- high annual holiday accumulations can create high financial liabilities for employers.
- 6 Issues raised by submitters about allowing the cashing up of annual holidays included:
- it is contrary to the intent of the Act and reduces opportunities for rest and recreation
  - it may increase inequities for women and for low paid workers, and
  - it may erode entitlements to holidays and pay over time.
- 7 The Department's 2009 research<sup>2</sup> found that:
- The accumulation of annual holidays was not considered a problem by employers in the research as they tended to either actively manage annual holidays or did not object to it accumulating.
  - Many employers were interested in employees having the option to cash up a week's annual holidays because it would address difficulties with providing cover for staff on holidays.
  - Employees were generally interested in having the option to cash up annual holidays, as long as it was at the employee's request.

### **Group's recommendations**

- 8 The Group has split recommendations on the cashing up of annual holidays. The union representatives strongly oppose allowing the cashing up of annual holidays because they are concerned about the potential negative impact on disadvantaged workers and that it will reduce entitlements to holidays and pay over time. The employer representatives support cashing up, but consider that employers should be aware of potential issues arising from agreeing to cash up holidays. The employer representatives made recommendations on their preferred design features.

### **Options for cashing up annual holidays**

Option	Benefits	Disadvantages/Costs	Impacts	Assessment
1. Status quo	<ul style="list-style-type: none"> <li>• Entitlements are easy to understand and apply</li> <li>• All employees have a minimum</li> </ul>	<ul style="list-style-type: none"> <li>• Employees have less choice around exercising their entitlement to holidays</li> </ul>	<p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>• Unable to cash up holidays if faced with financial hardship or</li> </ul>	<ul style="list-style-type: none"> <li>• Will not change understandability</li> <li>• Will not change direct or</li> </ul>

<sup>2</sup> Department of Labour (2009) *The effect of the Holidays Act 2003 on small and medium enterprises – a qualitative study*. Available at: [www.dol.govt.nz](http://www.dol.govt.nz)

	<p>entitlement for rest and recreation purposes, including well-being, health and safety and participation in community/family activities. Not allowing cashing up helps to protect entitlements for disadvantaged workers</p> <ul style="list-style-type: none"> <li>• Breaks away from work reduce stress and may increase motivation and productivity</li> <li>• Current operations/rosters are based on employees taking four weeks' holidays</li> </ul>		<p>for other reasons (if only entitled to the four weeks' minimum)</p> <ul style="list-style-type: none"> <li>• Entitlements to holidays are clear and easily understood</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>• May need to find replacement staff for staff on holidays</li> <li>• Financial liability from high leave balances</li> <li>• Have to decline requests from employees to cash up holidays even if they would like to grant the request</li> <li>• Less choice in managing employees' leave balances</li> </ul>	<p>compliance costs</p> <ul style="list-style-type: none"> <li>• Will not change applicability to different working patterns</li> <li>• Will retain existing entitlements</li> </ul>
<p>2. Allow employees to request to cash up some of their minimum entitlement to annual holidays</p>	<p>Greater choice for employees</p> <ul style="list-style-type: none"> <li>• Assist employers when there are labour/skill shortages and may reduce the need for replacement staff when employees are on holidays (this may have negative impacts on employment levels)</li> <li>• Provide financial assistance to employees if they are faced with an unexpected bill</li> <li>• May help to reduce holiday balances and the financial liability associated with that</li> <li>• May increase productivity if experienced workers do not need to be replaced temporarily with workers with less experience</li> </ul>	<p>Will reduce opportunities for rest and recreation away from work</p> <ul style="list-style-type: none"> <li>• May increase working hours overall and decrease time for community and family activities</li> <li>• May negatively impact on health and safety including increased risk of fatigue and stress-related illnesses, which could increase sick leave - both employer and employee have responsibilities to ensure staff are fit for work and not at risk from long-term fatigue</li> <li>• May disproportionately negatively impact on groups of workers who are already</li> </ul>	<p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>• Able to meet unexpected financial obligations, may reduce need to go into debt to meet these</li> <li>• May be harder to work out annual holidays' entitlements</li> <li>• Employees may come under direct or indirect pressure to cash up from employer, colleagues or to meet family commitments</li> <li>• Employees who work at firms with annual closedowns may have reduced ability to cash up holidays, or reduced time off during the rest of the year</li> </ul>	<ul style="list-style-type: none"> <li>• May decrease understandability</li> <li>• Will increase compliance costs</li> <li>• May not increase direct costs<sup>3</sup></li> <li>• Will not change applicability to different working patterns</li> <li>• Changes the way existing entitlements are accessed. Possibility that may reduce entitlements over time</li> </ul>

<sup>3</sup> While employers will be paying an additional week's wages, for example, this will be offset by the employee working for an additional week. This assumes that workers' productivity is the same during the additional week's work as at other times. Cashing up annual holidays may have an impact on workplaces' budgeting/financial management depending on whether they have planned for the additional payment.

• Should not increase direct costs (for example, while employers will pay an additional week's pay this will be offset by the employee working for an additional week)

disadvantaged in the labour market, e.g. women, low paid, youth, Māori and Pacific peoples

- May increase gaps in income between genders
- May reduce entitlements over time; workers may feel pressure to cash up holidays to keep up with financial commitments if they do not receive pay increases
- Net payment received may be less than expected if cashing up a week's annual holiday moves employee into a higher income tax bracket. It may reduce social assistance received, e.g. Working for Families
- May decrease motivation and productivity if workers do not have adequate breaks away from work
- May increase compliance costs (unless employers are able to decline requests)
- May impact on workplaces' budgeting/financial management if they have not planned for the additional payment
- May increase disputes between employers and employees, for example around the payment received for cashed up holidays; whether agreements are genuine and if an employee believes their request has been unfairly declined

**Employers:**

- May be required to distinguish between cashed holidays and paid holidays taken. This may impact more on small businesses
- May reduce financial liability from high outstanding holiday balances
- May cause financial difficulties if have insufficient cash flow to meet a request to cash up (unless employers are able to decline requests)

**Other:**

- May reduce involvement in community and family activities, which may have negative social consequences
- May reduce domestic tourism if employees take less holidays. Alternatively, it may enable employees to go away when they are on holiday

**Design of cashing up annual holidays**

- 9 If the cashing up of annual holidays proceeds then it needs to provide a balance between opportunities for rest and recreation, protections for workers, employee choice and fairness for employees and employers. The Department of Labour suggests the following guiding principles are used to shape the design of cashing up annual holidays:
- Employees continue to have adequate opportunities for rest and recreation each year.
  - Only employees can request to cash up annual holidays, and it cannot be raised as part of wage/salary negotiations.
  - Employers and employees have a choice about whether to cash up annual holidays.
  - Cashing up annual holidays is not an alternative to good management of holidays by employers.
  - The rules around cashing up of annual holidays are easy to understand and administer.
  - There are low compliance costs.

10 The key design features for cashing up annual holidays are in the table below. The employer representatives' recommended features are marked by a "\*\*".

**Design features of cashing up annual holidays**

Design feature	Option	Benefits	Disadvantages/Costs
Type of holidays to be cashed up	Accrued and entitled annual holidays	<ul style="list-style-type: none"> <li>• Low understanding of difference between accrued and entitled holidays</li> </ul>	<ul style="list-style-type: none"> <li>• Cashing up of holidays that employees not yet entitled to</li> <li>• Potential issues if employees leave employment and have cashed up accrued holidays</li> </ul>
	Only entitled annual holidays*	<ul style="list-style-type: none"> <li>• Prevents employees from accumulating a debt with the employer (if they cashed up accruing holidays)</li> </ul>	<ul style="list-style-type: none"> <li>• Low understanding of difference between accrued and entitled holidays (may think have an entitlement to cash</li> </ul>

<b>Amount of holidays that can be cashed up</b>	One full week a year <sup>4</sup>	<ul style="list-style-type: none"> <li>• Simpler to administer</li> <li>• Protects against large amounts of holiday entitlements being cashed up</li> <li>• Encourages employees to take some holidays off work</li> <li>• Lower compliance for employers than cashing up "up to one week"</li> </ul>	up when don't)
	Up to one week a year	<ul style="list-style-type: none"> <li>• Protects against large amounts of leave entitlements being cashed up</li> <li>• Encourages employees to take some holidays off work</li> <li>• Greater choice than only being able to cash up one full week</li> </ul>	<ul style="list-style-type: none"> <li>• Limits the amount of holidays employees can cash up in a year</li> <li>• Large holiday balances may still be an issue for some employers and employees</li> </ul>
	Any amount providing there is a minimum balance of three weeks' entitlement after cash up*	<ul style="list-style-type: none"> <li>• May reduce large holiday balances for some employees</li> <li>• Greater choice than only being able to cash up "one full week" or "up to one week"</li> </ul>	<ul style="list-style-type: none"> <li>• Large holiday balances may still be an issue for some employers and employees</li> <li>• Increased compliance for employers than cashing up a full week of holidays; may increase disputes if hard to track or keep poor records</li> </ul>
<b>Protections</b>	<ul style="list-style-type: none"> <li>- Request to cash up must be initiated by the employee*</li> <li>- They can request for any reason*</li> <li>- Request must be in writing*</li> <li>- A new request made each time holidays are cashed up</li> </ul>	<ul style="list-style-type: none"> <li>• Reduces likelihood of being forced to cash up if on employees' request</li> <li>• Written record of request increases shared understanding and reduces risk of disputes</li> <li>• Don't have to give personal reasons for cashing up to employer</li> <li>• Reduces risk of having an on-going agreement to cash up every year</li> </ul>	<ul style="list-style-type: none"> <li>• Employees may not take any holidays off work; negative impacts on health and safety and workplace productivity</li> <li>• Employees may be encouraged to cash up more than one week</li> <li>• Increased compliance</li> </ul>
	<ul style="list-style-type: none"> <li>- Employers must consider the request within a reasonable time period*</li> <li>- Advise the employee in writing whether they agree or refuse request*</li> </ul>	<ul style="list-style-type: none"> <li>• Reduces risk that employers may delay responding to request</li> <li>• Have ability to decline if unable to meet request for business reasons, e.g. lack of cash flow or wish employee to take time off</li> </ul>	<ul style="list-style-type: none"> <li>• Increased compliance</li> <li>• Risk that if don't give reasons for declining requests that some employees may think that they have been discriminated against (e.g. if the employer has accepted other requests)</li> </ul>

<sup>4</sup> "Year" means the year from which an employee becomes entitled to annual holidays. For instance, if an employee starts work on 1 February 2010, they are entitled to four weeks' annual holidays on 1 February 2011. The employee could make a request to cash up one week of annual holidays on or after 1 February 2011 and before 1 February 2012.

	- Can refuse for any lawful reason*	<ul style="list-style-type: none"> <li>Written record of decision increases shared understanding and reduces risk of disputes</li> <li>Reduces likelihood of being forced to cash up</li> <li>Shared understanding of process</li> </ul>	<ul style="list-style-type: none"> <li>Some employees may feel that they are required to request to cash up annual holidays, depending on how the employment agreement is drafted</li> </ul>
	Cashing up cannot be raised in salary negotiations* or be a condition of employment		
	Include process for cashing up annual holidays in employment agreements (but unable to include requests to cash up)		
<b>Value of cashed up holidays</b>	Same rate as what employee would have received had they taken the holidays away from work*	<ul style="list-style-type: none"> <li>Does not incentivise one way of taking annual holidays (cashing up or taking time away from work) over another</li> </ul>	
<b>Timing of payment</b>	As soon as practicable*	<ul style="list-style-type: none"> <li>Similar timeframe for the cashing up of alternative holidays (section 61(4))</li> <li>May have lower costs than a set timeframe as employers able to process as part of normal pay cycle</li> </ul>	<ul style="list-style-type: none"> <li>Meaning of "as soon as practicable" may not be as clear as a set timeframe (e.g. within 14 days)</li> </ul>

**Limited ability for employees to request to cash up annual holidays**

- 11 Based on submissions, there are likely to be some employers who do not wish to or will be unable to agree to employees' requests to cash up annual holidays. For instance, the employer may have an annual closedown period and wish to ensure employees have enough holidays to cover this period or they may operate in an industry where four weeks' holidays away from work is desirable for health and safety reasons. If employees have a general ability to request to cash up, employers would have to consider all requests they receive even though they may have no intention to ever agree to the request. They will be unable to have a blanket "no cash up" workplace policy. This may increase employment relationship problems if an employer does not agree to an employee's request to cash up. For instance, if the employee considers that the employer has not given due consideration to their request.
- 12 Better outcomes may be achieved if employers can inform employees that the employer has a "no cash up" policy. An employer may have a "no cash up" policy covering the whole business, or some parts of its business but not others.
- 13 If employees have a limited ability to request to cash up, employers should advise employees before they accept an offer of employment that the employer has a "no cash up" policy, which may be set out in the employment agreement. The employee would be unable to then make a cash up request at a later date, unless the employer changes their policy. For existing employees, the

Department of Labour expects that employers would consult with their employees in the development of any policies on cashing up annual holidays in good faith.

- 14 Allowing employers to not have to consider requests to cash up through the use of workplace policies may be seen as not being in line with the good faith requirements on employers and employees. However, this is balanced by ensuring that employers are upfront with employees about their position on cashing up annual holidays.
- 15 This option should also limit compliance costs for businesses that are never able to or wish to agree to cashing up annual holidays, as they will not have to consider requests they would never agree to. However, it may make the provision harder for employers and employees to understand and may increase employment relationship problems if it is not correctly implemented and followed.

#### ***Other issues***

- 16 The Department of Labour is concerned that some employees and employers may not be aware of all of the implications of cashing up annual holidays, such as the impact on KiwiSaver and other superannuation contributions, income tax and social assistance payments. If cashing up of annual holidays goes ahead, the Department will provide information on these areas as part of its promotional work around changes to the legislation and ongoing guidance.
- 17 The employer and employee representatives on the Group were split as to whether the value of cashed up annual holidays should be included in gross earnings. The Department considers that the payment for cashed up annual holidays should not be included in gross earnings. If it is included in gross earnings, employees who cash up annual holidays will receive higher payments for holidays and leave than employees who do not cash up. The design of cashing up annual holidays may then create a financial incentive for cashing up annual holidays over not cashing up annual holidays.

#### **B. Relevant daily pay**

##### ***Background***

- 18 Relevant daily pay (RDP) is used to calculate the payment of sick and bereavement leave and public and alternative holidays. The policy intent of RDP is to ensure that employees are no worse off financially than if they had worked on the day. RDP is what the employee would have received for working on the day (inclusive of overtime and incentive payments that would have been received had they worked) (RDP1). If it is not certain what the employee would have received on the day, then there is an averaging formula based on gross earnings for the last four weeks (RDP2). Employers and employees are able to provide for an alternative rate of RDP in their employment agreement, providing it is equal to or greater than RDP1 and RDP2.

**Issues**

- 19 RDP is relatively straightforward for the majority of employers and employees.<sup>5</sup> Where employees have complex work arrangements (e.g. payments by commission or productivity or variable hours/days of work) it can be harder to know whether RDP2 should be used and to determine what components make up the gross earnings component of RDP2.
- 20 The main issues raised by submitters around RDP are that:
- it creates increased compliance costs, particularly for small and medium-sized enterprises (SMEs), because a new RDP1 may need to be calculated for each day of leave, and
  - it may create incentives for employees to take alternative holidays on "high rate" days.
- 21 Much of the discontent around RDP is that it has increased the cost of leave where employers previously paid only an employee's base rate. This was an intended consequence of RDP to avoid the incentive for employers to create pay structures where the base rate of pay bore little resemblance to the employee's actual pay.

**Group's recommendations**

- 22 The Group explored an alternative calculation to RDP, referred to as standard daily pay (SDP). The Group did not fully agree on some aspects of the calculation, including the definitions of the components of SDP, its application and the accumulation of entitlements.

**Options for the calculation of payment for sick and bereavement leave and public and alternative holidays**

Option	Benefits	Disadvantages/Costs	Impacts	Assessment
1. Keep RDP (status quo) and provide more	<ul style="list-style-type: none"> <li>• Concept (what would have received on day) is easy to understand (particularly for workers on salaries, with regular</li> </ul>	<ul style="list-style-type: none"> <li>• It is a theoretical calculation that looks at what would have happened on the day taken as leave. It can be hard to apply</li> </ul>	<p>Employees:</p> <ul style="list-style-type: none"> <li>• Not disadvantaged by not being at work. (Previous calculation provided an incentive</li> </ul>	<ul style="list-style-type: none"> <li>• May increase understandability</li> <li>• May not change direct or compliance costs</li> <li>• Will not change applicability to</li> </ul>

<sup>5</sup> Employees with traditional working hours or where pay rates and hours are easily identifiable such as salaried and part-time employees. According to the Survey of Working life (March 2008 quarter) 62.7 percent of employed people said they usually work all of their hours between 7am and 7pm, Monday to Friday (standard working times), and 35.3 percent said they did not.

Option	Benefits	Disadvantages/Costs	Impacts	Assessment
<p>information and guidance and promote the use of the online tool to calculate RDP</p>	<p>work patterns or simple pay structures)</p> <ul style="list-style-type: none"> <li>Systems are already set up to use RDP. Some of the alternative calculations represent significant change</li> </ul>	<p>concept to some work patterns (particularly variable hours and/or pay rates)</p> <ul style="list-style-type: none"> <li>Some employers do not view it as a fair concept (paying employees for conditions of work that do not apply when they are on leave)</li> <li>Belief (and in some cases reality) that it is hard to calculate RDP influences employer behaviour, e.g. default to averaging formula which can increase costs unnecessarily</li> <li>Some confusion around definitions, e.g. gross earnings</li> <li>Some employees can benefit by taking leave on "high pay" days</li> <li>Increased direct costs for employers who were formerly paying base rates (this was intentional)</li> </ul>	<p>to be at work when sick)</p> <ul style="list-style-type: none"> <li>Some certainty around what payment will be received (particularly for workers on salaries or with regular work patterns)</li> <li>For workers with irregular hours and pay rates, RDP2 can produce higher or lower payments for the day than the employer could have estimated</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>Increased costs compared with previous calculation under Holidays Act 1981 (this was an intended consequence)</li> <li>Increased employee absenteeism because of financial incentive to take alternative holidays on high rate days (difficult to verify this, but it is a common employer complaint)<sup>6</sup></li> </ul> <p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>May be less likely to take sick leave if financially disadvantaged</li> <li>Impacts on: <ul style="list-style-type: none"> <li>sectors that work variable</li> </ul> </li> </ul>	<p>different working patterns</p> <ul style="list-style-type: none"> <li>Will retain existing entitlements</li> </ul>
<p>2. Retain RDP1 and extend the averaging period for</p>	<ul style="list-style-type: none"> <li>It is a change to RDP and not a wholesale change (so it may not require a lot of implementation changes)</li> <li>Reduces incentives for</li> </ul>	<ul style="list-style-type: none"> <li>Will reduce the value of leave for some employees</li> <li>May increase compliance costs</li> <li>May increase incentives to use the averaging approach for</li> </ul>	<p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>May increase understandability</li> <li>May increase compliance costs</li> <li>May decrease direct costs</li> <li>Will not change applicability to different working patterns</li> </ul>	

<sup>6</sup> In the Department of Labour's 2009 research few employees had entitlements to alternative holidays. Those who did were likely to take them with their annual holidays in order to have a longer break rather than on a specific day because of the rate of pay. The research did not find any examples of employees taking sick leave because of higher rates under RDP, though this may be related to the fact that none of the employees were aware of specific entitlements. (*Department of Labour (2009) The effect of the Holidays Act 2003 on small and medium enterprises - a qualitative study. Available at: www.dol.govt.nz*). The issue about employers having to manage suspected sick leave abuse and concerns around absences on particular days (for example, a pattern of absences on Mondays or Fridays) are not new issues. If employers believe that employees are gaming sick or bereavement leave in order to get a certain amount of pay, the Act provides employers with tools to manage the taking of the leave. Section 68 of the Act allows employers to obtain medical certificates within three days' absence if they have reasonable grounds to suspect their employees are not genuinely sick. The Department considers that this balances any perceived incentive to abuse sick leave entitlements.

Option	Benefits	Disadvantages/Costs	Impacts	Assessment
RDP2 from 4 weeks to 52 weeks (the Department's preferred option)	<p>employees to take leave on high rate days</p> <ul style="list-style-type: none"> <li>Provides more certainty around the value of leave for any particular day</li> <li>Easier for employers and employees to understand because the method for the averaging formula is similar to average weekly earnings (for annual holidays)</li> </ul>	<p>employees on salary or on set hours or pay rates who receive pay rises (because it smooths out increases in pay)</p> <ul style="list-style-type: none"> <li>Employers will still have to decide which calculation to apply</li> <li>Doesn't address concerns with RDP1 (for example, the timing of leave for employees who work long and short days)</li> <li>Doesn't completely remove the incentive to take alternative holidays on high rate days. Employees with long and short days could still have an incentive to take holidays on long days</li> <li>Creates two different leave concepts for different work arrangements. Employees on salary and set hours and pay rates will receive what they would have earned, and employees on irregular hours and pay rates will receive an averaged payment over a longer period</li> </ul>	<p>hours, days or shifts, such as manufacturing, some hospitality and seasonal industries (horticulture and agriculture)</p> <ul style="list-style-type: none"> <li>sectors that have variable rates of pay (e.g. piece rates, commission-based pay) such as the retail sector and meat processing industry</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>Impacts on:             <ul style="list-style-type: none"> <li>sectors that work variable hours, days or shifts, such as manufacturing, some hospitality and seasonal industries (horticulture and agriculture)</li> <li>sectors that have variable rates of pay such as the retail sector and meat processing industry.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>May reduce existing entitlements for some employees</li> </ul>
3. Standard daily pay <sup>7</sup> (SDP)	<ul style="list-style-type: none"> <li>Is a change from RDP (so overcomes existing perception issues)</li> </ul>	<ul style="list-style-type: none"> <li>Unclear whether it will be significantly easier to understand or apply</li> </ul>	<p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>Will reduce payments for employees who receive a pay</li> </ul>	<ul style="list-style-type: none"> <li>May reduce understandability</li> <li>May increase compliance costs</li> <li>Will decrease direct costs</li> </ul>

<sup>7</sup> SDP = annual gross earnings divided by contractual hours for the relevant period multiplied by the contractual hours of leave taken. The Group did not reach a consensus on the definitions of these components. Annual gross earnings means gross earnings received by the employee in the 52 weeks immediately prior to the last pay period prior to the period of leave, where gross earnings has the definition set out currently in section 14 of the Holidays Act 2003 (i.e. all payments made under the employment agreement to the employee excluding non-contractual payments such as discretionary payments, ACC payments etc and reimbursements (whether incurred or assessed) and employer contributions to superannuation). [Where employees have been employed for less than 52 weeks the annual gross earnings is from when they commenced employment.] Contractual hours means the work units or hours which the employee is required to work under the employee's employment agreement (including leave) [see section 65(2)(a)(iv) of the Employment Relations 2000] and excludes for example overtime or additional work units or hours for which the employee was paid under

Option	Benefits	Disadvantages/Costs	Impacts	Assessment
4. Ordinary pay <sup>9</sup>	<ul style="list-style-type: none"> <li>Do not have to decide which calculation to use (as with RDP)</li> </ul>	<ul style="list-style-type: none"> <li>May increase compliance costs where RDP is straightforward to work out</li> <li>Will reduce payments for some workers (may increase it for others)</li> <li>Does not solve confusion with gross earnings</li> <li>May increase disputes</li> <li>Need to specify contractual hours may reduce flexibility where hours are variable by necessity (e.g. where employment agreement currently allows for a range of hours to be worked)</li> <li>Will heavily reduce payments for some workers</li> <li>May act as an incentive for employers to restructure remuneration systems to reduce the value of ordinary pay</li> <li>Would increase incidence of workers coming to work sick,</li> </ul>	<p>rise in the year before taking leave<sup>8</sup></p> <ul style="list-style-type: none"> <li>May be less likely to take sick leave when sick if financially disadvantaged</li> </ul> <p>Employers:</p> <ul style="list-style-type: none"> <li>Will initially increase compliance costs</li> <li>May reduce ability to use manual payroll systems</li> <li>May increase or reduce direct costs but likely to reduce direct costs overall</li> <li>May increase or decrease compliance costs</li> </ul> <p>Employees:</p> <ul style="list-style-type: none"> <li>Heavy impacts on: <ul style="list-style-type: none"> <li>employees who receive shift/penal payments (e.g. employees in the health and manufacturing sectors)</li> <li>employees receiving productivity/incentive payments</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>May reduce the applicability to different working patterns</li> <li>Will reduce existing entitlements for employees</li> </ul> <ul style="list-style-type: none"> <li>Will not significantly change understandability</li> <li>May decrease compliance costs</li> <li>Will decrease direct costs</li> <li>Will not change applicability to different working patterns</li> <li>Will reduce existing entitlements for some employees</li> </ul>

the employment agreement, but did not work at the request, or with the consent of the employer. Work units means the unit of time in which all leave is accrued and taken as agreed between the employer and employee and, failing agreement, is the appropriate unit as determined by a Labour Inspector. [Note the employer and union representatives did not agree on whether to use "work units" or "hours".] Relevant period means the period or periods (including leave) in which the employee earned the annual gross earnings. Leave means any form of paid leave under the Act (but not for example any form of leave without pay).

<sup>8</sup> In the year to September 2009, 47 percent of surveyed salary and ordinary time wage rates increased. This is lower than other recent changes which ranged between 55 percent (in the year to June 2009) and 62 percent (in the year to September 2008). (Labour Cost Index, available from Statistics New Zealand, [www.stats.govt.nz](http://www.stats.govt.nz))

<sup>9</sup> Ordinary pay was the proposed formula in the Holidays Bill when it was introduced into Parliament in 2003. It was a two tier system: 1) ODP1 was the amount of pay (including any commission and the cash value of any board or lodging that the employee would have received under the employment agreement for an ordinary day. If an employment agreement sets a composite rate of pay, then ordinary pay includes the constituent parts of that rate unless the constituent parts of that rate clearly defined and able to be excluded under excluded payments. 2) ODP2 was an averaging formula = gross earnings for four weeks (less excluded payments) divided by the number of days worked or on paid leave. Employers and employees could agree to an alternative rate that was greater than ODP1 or ODP2. Excluded payments were payments payable in defined circumstances or at defined times not being payments for an ordinary working day (e.g. overtime, bonus payments, productivity or incentive based payments (except where payment by the piece is the primary or sole method of payment).

Option	Benefits	Disadvantages/Costs	Impacts	Assessment
	<p>focus from what would have been earned on the day</p> <ul style="list-style-type: none"> <li>• It is a less complex calculation than RDP because a number of payments are not added to the ordinary rate</li> <li>• Employers may view it as a fairer calculation because it excludes payments for defined circumstances</li> <li>• Would bring New Zealand in line with Australia which also provides for ordinary pay rates</li> </ul>	<p>spreading illness and decreasing productivity</p> <ul style="list-style-type: none"> <li>• Commission payments can cause spiking if averaging formula (ODP2) is used. DoL could provide guidance about averaging over four weeks</li> <li>• Concept of ordinary pay is not as easily understood as what the employee would have earned on the day. Because it is termed ordinary pay, employees may think that some excluded payments are included</li> </ul>	<p>(e.g. employees in the retail and meat processing sectors), and - employees in a range of sectors who regularly work overtime that is not formalised into fixed times</p> <p>Employers:</p> <ul style="list-style-type: none"> <li>• Reduces direct and compliance costs</li> </ul>	
5. Average daily pay (ADP) <sup>10</sup>	<ul style="list-style-type: none"> <li>• Is a change from RDP (so overcomes existing perception issues)</li> <li>• Do not have to decide which calculation to use (as with RDP)</li> <li>• Reduces incentives for employees to take leave on high rate days</li> <li>• Provides more certainty around the value of leave for any particular day</li> <li>• Easier for employers and employees to understand because the method is similar to average weekly earnings</li> </ul>	<ul style="list-style-type: none"> <li>• May increase compliance costs in cases where RDP is straightforward, e.g. salary and standard hourly rates</li> <li>• Will reduce payments for some employees</li> </ul>	<p>Employers:</p> <ul style="list-style-type: none"> <li>• Will reduce payments for employees who receive a pay rise</li> <li>• May be less likely to take sick leave if financially disadvantaged</li> </ul> <p>Employers:</p> <ul style="list-style-type: none"> <li>• Will reduce direct costs overall</li> <li>• May increase compliance costs overall</li> </ul>	<ul style="list-style-type: none"> <li>• May increase understandability</li> <li>• May increase or decrease compliance costs</li> <li>• Will decrease direct costs</li> <li>• Will not change applicability to different working patterns</li> <li>• Will reduce existing entitlements for some employees</li> </ul>

### Further options for the use of standard daily pay

23 As part of their recommendation on SDP, the employer representatives also recommend:

<sup>10</sup> Average daily pay is an averaging formula based on an employee's gross earnings for the previous 52 weeks before the end of the pay period immediately before the calculation is made.

- using SDP to calculate payment for annual holidays
- changing the way holiday and leave entitlements are calculated to be in work units (for example, annual holidays would be accumulated at 4/52 of contractual hours and sick leave at 1/52 contractual hours)
- including alternative holidays in annual holiday balances (and thereby changing entitlements to alternative holidays around the amount of alternative holiday received and removing employees' ability to choose when they take the alternative holiday), and
- allowing employers and employees to agree to different calculation methods that may be lower than those provided in the Act.

**Additional options for the use of standard daily pay**

Option	Benefits	Disadvantages/Costs	Impacts	Assessment
1. Use SDP to calculate payment for annual holidays	<ul style="list-style-type: none"> <li>• Using one formula for all types of holidays and leave would help simplify the Act</li> </ul>	<ul style="list-style-type: none"> <li>• Reduction in payments for most employees</li> <li>• Current calculation is longstanding. Not aware of significant problems</li> <li>• Uncertain that SDP is significantly easier to interpret or apply</li> <li>• May provide incentive for employers to direct employees to take (or cash up) annual holidays at "low cost" times</li> </ul>	<p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>• Will reduce payments for employees</li> <li>• May be less likely to take annual holidays; may have negative impacts on work-life balance and productivity</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>• May increase financial liabilities if high leave balances (if employees take less annual holidays)</li> </ul>	<ul style="list-style-type: none"> <li>• May reduce understandability</li> <li>• May decrease compliance costs</li> <li>• Will decrease direct costs</li> <li>• Will not change applicability to different working patterns</li> <li>• May reduce existing entitlements for some employees</li> </ul>
2. Accumulate entitlements in work units	<ul style="list-style-type: none"> <li>• May ease the automation of leave processing</li> <li>• Only have the hours of actual sick leave taken deducted instead of a whole day (e.g. if go home sick). However, employers and employee can currently agree to deduct sick leave in hours</li> <li>• Reduces incentives for employees to take "high rate" days off and for employers to direct employees to take holidays on "low rate" days</li> </ul>	<ul style="list-style-type: none"> <li>• Will reduce sick leave entitlements for all employees (as currently get five days after six months' continuous service. Under this option, full-time employees would only have 2.5 days after six months. Part-time employees would also have their entitlements pro-rated)</li> <li>• May reduce annual holiday entitlements for some employees</li> <li>• May require more accurate and manual record keeping, which may increase compliance costs</li> <li>• Not clear what problem this</li> </ul>	<p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>• Reduced sick leave entitlements may increase the number of people who go to work sick</li> <li>• May increase the need for unpaid leave causing financial difficulties</li> <li>• Likely to negatively impact more on parents and carers and employees with serious illnesses</li> <li>• May be harder to plan holidays and encourage people to take short breaks from work</li> <li>• Is likely to negatively impact</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>• May increase or decrease compliance costs</li> <li>• Will decrease direct costs</li> <li>• Will change the applicability to different working patterns</li> <li>• Will reduce existing entitlements for all employees</li> </ul>	<ul style="list-style-type: none"> <li>• May reduce understandability</li> <li>• May increase or decrease compliance costs</li> <li>• Will decrease direct costs</li> <li>• Will change the applicability to different working patterns</li> <li>• Will reduce existing entitlements for all employees</li> </ul>

		<p>option seeks to address. Payrolls are able to calculate entitlements in hours already, providing minimum entitlements are met</p> <ul style="list-style-type: none"> <li>• May increase litigation on the interpretation of existing employment agreements</li> <li>• Likely to have unintended consequences on other areas of the Act (length of service requirement, the continuous hours test, pay-as-you-go provisions) and the Parental Leave and Employment Protection Act 1987</li> </ul>	<p>more on people who take unpaid leave including ACC and parental leave</p> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>• Increased unpaid leave may complicate the calculation of payments for holidays and leave</li> <li>• May make it harder to manage holiday balances</li> </ul>	
<p>3. Include alternative holidays in annual holiday balance</p>	<ul style="list-style-type: none"> <li>• May be easier for payroll systems</li> </ul>	<ul style="list-style-type: none"> <li>• Reduces entitlements for employees as would only get the number of hours actually worked on a public holiday credited to their annual holidays balance (instead of a full alternative holiday) and unable to choose a day of significance to them in first 12 months</li> <li>• Is likely to increase disputes about whether alternative holidays have been correctly included</li> <li>• It may not significantly simplify payroll systems as an audit mechanism will be required</li> </ul>	<p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>• May reduce incentives to work on public holidays</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>• May make it harder to manage holiday balances</li> </ul>	<ul style="list-style-type: none"> <li>• May reduce understandability</li> <li>• May increase or decrease compliance costs</li> <li>• Will decrease direct costs</li> <li>• Will not change applicability to different working patterns</li> <li>• Will reduce existing entitlements</li> </ul>
<p>4. Allow employers and employees to agree on alternative methods to any</p>	<ul style="list-style-type: none"> <li>• May reduce unintended consequences where a current agreement may have an alternative method that would otherwise need to be changed to meet any new legislative requirements</li> </ul>	<ul style="list-style-type: none"> <li>• Employers and employees can currently agree to alternative arrangements that are equal to or greater than the Act. Under the proposed option this rate would no longer need to be equal to or greater than that provided in the Act</li> </ul>	<p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>• May not be aware that agreeing to arrangements that are lower than those provided in legislation</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>• May be difficult to understand</li> </ul>	<ul style="list-style-type: none"> <li>• May reduce understandability</li> <li>• May increase or decrease compliance costs</li> <li>• May decrease direct costs</li> <li>• May change applicability to different working patterns</li> <li>• May reduce existing entitlements for some employees</li> </ul>

prescribed in the Act		<ul style="list-style-type: none"> <li>• Many employees and employers are not in a position to reasonably determine whether an alternative method would leave them no worse off</li> <li>• Likely to be concerned about allowing employers and employees to contract out of part of the minimum employment relations framework</li> </ul>	<ul style="list-style-type: none"> <li>• May be able to agree to arrangements that suit particular business needs</li> </ul>
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## C. Transferring public holidays

### Background

24 Prior to a Supreme Court decision in 2007 employers and employees could agree to transfer public holidays<sup>11</sup>. Allowing the transfer of public holidays was intended to provide flexibility around the observance of public holidays that recognised the operational needs of the employer and the cultural or religious beliefs of employees<sup>12</sup>.

### Issues

25 The Supreme Court decision and subsequent monitoring by the Department highlighted that the intended flexibility of the previous transfer provision was operating (in some cases) at the expense of minimum standards. For example, public holidays being transferred to non-working days or without genuine agreement. Submitters were asked for feedback on how the previous transfer provisions had operated. Most submitters commented that the ability to transfer had worked well for them. Unions commented that the transfer could be used by employers to avoid providing public holiday entitlements.

26 The majority of submitters did not support allowing the transfer of public holidays. The main issues were administrative complexity and compliance costs; it was unnecessary as employees could use other types of holidays to celebrate other days of significance; and it may reduce the significance of public holidays.

<sup>11</sup> *New Zealand Airline Pilots' Association Industrial Union of Workers Incorporated v Air New Zealand Ltd* (SC 91/2006 [2007] NZSC 89).

<sup>12</sup> Since at least 1908, employment legislation has recognised the concept of public holidays being observed on days other than the calendar days on which the public holiday actually falls. The original purpose of transfer was to allow employees a day off from work to observe a day of religious or cultural significance with their families when this day fell on the weekend. The 2003 Act maintained the position under the Holidays Act 1981, where the specified public holidays were default days which applied in the absence of an agreement providing otherwise.

27 Submitters identified the benefits of allowing the transfer of public holidays as: recognising and enhancing cultural diversity; greater flexibility for employers and employees to reach more diverse arrangements for public holidays; and reduced costs from avoiding the payment of penal rates on public holidays.

**Group's recommendations**

28 The Group recommends allowing the transfer of public holidays and included specific conditions for transferring public holidays.

**Options on the transfer of public holidays**

Option	Benefits	Disadvantages/Costs	Impacts	Assessment
1. Status quo (only shifts that cross into or out of a public holiday can be transferred <sup>13</sup> )	<ul style="list-style-type: none"> <li>In Department's experience, the current provisions are working well</li> <li>Greater clarity for employers, employees and those who enforce the Act</li> <li>Less potential for abuse of employees' entitlements to public holidays</li> <li>Consequently less employment relationship problems from public holidays not being transferred in good faith</li> <li>Provides opportunity for the common observance of days of national, religious or cultural significance</li> </ul>	<ul style="list-style-type: none"> <li>Lack of choice for employers and employees</li> </ul>	<p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>May use alternative holidays, annual holidays or unpaid leave to celebrate special days that are not listed public holidays</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>Cannot transfer public holidays for genuine business reasons by agreement with their employees (for example moving a public holiday to make a long weekend)</li> </ul> <p><i>Other:</i></p> <ul style="list-style-type: none"> <li>Local observance of provincial anniversary days affected by the inability of employers, employees and unions to reach agreement on transferring the</li> </ul>	<ul style="list-style-type: none"> <li>Will not change understandability</li> <li>Will not change direct or compliance costs</li> <li>Will not change applicability to different working patterns</li> <li>Will retain existing entitlements</li> </ul>

<sup>13</sup> An amendment to the Holidays Act in 2008 allows employers and employees working a shift that crosses into or out of a public holiday to reach agreement that the public holiday can be recognised on one whole shift. This was because businesses operating over 24 hour periods and their employees were reported to be experiencing significant disruption as a result of the Supreme Court decision.

<sup>14</sup> The Act provides that provincial anniversary days can be observed on the "day of the anniversary of a province or the day locally observed as that day". For example, in 2007 there was no consensus on a single day of local observance for Otago Anniversary day (the competing dates were Monday, 24 March or Tuesday, 25 March). Workplace by workplace agreements around when the public holiday should be observed was restricted by the inability of employers and employees to agree to transfer the public holiday.

Option	Benefits	Disadvantages/Costs	Impacts	Assessment
2. Allow employers and employees to agree to transfer public holidays, at either parties' request	<ul style="list-style-type: none"> <li>Gives employers and employees more choice to observe public holidays on another day in line with the operational needs of the employer or the individual needs of the employee</li> <li>Recognises cultural and religious diversity in the workplace</li> </ul>	<ul style="list-style-type: none"> <li>Increased compliance costs</li> <li>Potential abuse of employees' entitlements to public holidays</li> <li>Potential for employment relationship problems</li> <li>Less clarity than the status quo for employers, employees and those who enforce the Act</li> </ul>	<p>public holiday<sup>4</sup></p> <p><b>Employees:</b></p> <ul style="list-style-type: none"> <li>Able to transfer public holidays to celebrate other days of significance to them (by agreement)</li> </ul> <p><b>Employers:</b></p> <ul style="list-style-type: none"> <li>Able to transfer public holidays for operational reasons (by agreement)</li> </ul> <p><b>Other:</b></p> <ul style="list-style-type: none"> <li>May reduce the significance of existing public holidays</li> </ul>	<ul style="list-style-type: none"> <li>May reduce understandability</li> <li>May increase compliance costs</li> <li>May reduce direct costs</li> <li>May increase applicability to different working patterns</li> <li>May reduce existing entitlements (for example if employee leaves employment before the day the public holiday is transferred to)</li> </ul>

**Conditions for the transfer of public holidays**

- 29 The Group recommends that the following conditions<sup>15</sup> should be included in the legislation should the ability to transfer public holidays be restored:
- the public holiday to be worked must be identified
  - the other day on which the public holiday is to be observed must be identified or identifiable
  - the public holiday must otherwise have been a working day for the employee
  - the public holiday should be transferred to a day that is otherwise a working day for the employee and not another public holiday
  - the agreement must be complete, including on the observance day before work commences on what would otherwise be the public holiday
  - there must be a true agreement which is informed and voluntary

<sup>15</sup> These conditions are based on tests set out in case law, summarised by Anderson J in *The New Zealand Airline Pilots Association Industrial Union of Workers Incorporated v Air New Zealand Limited* SC 91/2006 [2007] NZSC 89.

- the parties must reach their agreement in good faith consistent with section 73 of the Holidays Act 2003, and
  - while an agreement to observe a public holiday on another day may result in no time and a half, or alternative holiday, for working on a public holiday, the avoidance by the employer of the obligation to make such a payment must not be the objective of the transfer.
- 30 These conditions seek to prevent some of the problems associated with the previous transfer provisions, including preventing employer-driven transfer agreements. The Group considered that the primary driver of an agreement to transfer public holidays must not be because the employer wishes to avoid paying time and a half for work on a public holiday.
- 31 The Department of Labour considers that the conditions outlined above:
- could provide greater clarity for employers and employees around how transfer agreements should operate
  - are likely to provide a check on potential employer abuse of a transfer provision, and
  - would help to ensure that transfers only take place where there is genuine agreement between employers and employees as the agreement is required to be made in good faith.
- 32 Including more specific conditions around transferring public holidays in legislation is likely to have greater compliance implications for employers and employees. However, this should be offset by the increased certainty around when and how public holidays can be transferred, as well as providing protections for employees.
- 33 The Department of Labour also considers that employees and employers should record their agreement in writing, whether in an employment agreement or otherwise. This would assist with the parties' understanding and enforcement of any agreements and is consistent with the requirements for transferring shifts that cross into or out of a public holiday.

***Limited ability for employees to request to transfer public holidays***

- 34 A limited ability for employees to request to transfer public holidays would be similar to the suggestion for limiting the ability for employees to request to cash up annual holidays.
- 35 Based on submissions, there are likely to be some employers who do not wish to or will be unable to agree to employees' requests to transfer public holidays. For instance, it may not be operationally feasible for the workplace to open when only one employee is working. If employees have a general ability to request a transfer, employers would have to consider all requests they receive even though they may have no intention to ever agree to the request. They will be unable to have a "no transfer" workplace policy. This may increase employment relationship problems if an employer does not agree to an employee's request to transfer.

- 36 If employees have a limited ability to request transfer, employers should advise employees before they accept an offer of employment that the employer has a "no transfer" policy<sup>16</sup>, which may be set out in the employment agreement. The employee would be unable to then make a transfer request at a later date unless the employer changes their policy. For existing employees, I expect that employers would consult with their employees in the development of any policies on transferring public holidays in good faith.
- 37 Allowing employers to not have to consider requests to transfer through the use of workplace policies may be seen as not being in line with the good faith requirements on employers and employees. However, this is balanced by ensuring that employers are up front with employees about their position on transferring public holidays.
- 38 This option should also limit compliance costs for businesses that are never able to or wish to agree to transfer public holidays, as they will not have to consider requests they would never agree to. However, it may make the transfer provision harder for employers and employees to understand and may increase employment relationship problems if it is not correctly implemented and followed.

## **D. Casual employees**

### **Background**

- 39 Casual employment is usually employment on an "as and when" required basis, with no guarantee of set hours or continuation of employment. Casual employees have many of the same employment rights, entitlements and obligations as other employees.
- 40 According to Statistics New Zealand's Survey of Working Life 2008<sup>17</sup>, 9.4 percent of employees were temporary employees<sup>18</sup>; 52 percent of these were casual employees.

### **Issues**

- 41 One of the main issues around casual employment is the general lack of knowledge about employment rights and obligations for casual employees, which in turn contributes to the inaccurate treatment of permanent part-time employees as casuals. On the basis

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<sup>16</sup> Some employers may never wish to agree to transfer for operational reasons.

<sup>17</sup> Statistics New Zealand (2008) *Survey of Working Life*. Available at [www.stats.govt.nz](http://www.stats.govt.nz)

<sup>18</sup> Temporary employees were defined as an employee whose job only lasts for a limited time or until the completion of a project. They included: casual workers; temporary agency workers and fixed-term workers.

of their employment status some employees are denied access to holiday and leave entitlements. The viability of some sectors with a highly casual labour force may be maintained in part by employers not providing access to holiday and leave entitlements (either deliberately or because of misconceptions about entitlements).

42 The underlying issues around casual employment (a general lack of awareness and the inaccurate treatment of some permanent part-time employees) are wider than holiday and leave entitlements. Working out entitlements for casual employees can raise issues for employers and employees, as well as undermining the provision of entitlements for some employees.

**Group's recommendations**

43 Beyond providing more educational material on casuals' employment entitlements the Group recommends making no changes in this area. They consider that the existing law already provides adequate protection for casual employees and that the key issue is ensuring the calculation and delivery of entitlements.

44 In December 2009, the Department undertook a campaign to raise employers' knowledge about employment rights and obligations for casual employees.

**Options for casual employees**

Option	Benefits	Disadvantages/Costs	Impacts	Assessment
1. Status quo	<ul style="list-style-type: none"> <li>Flexible work arrangements that suit employers and employees</li> </ul>	<ul style="list-style-type: none"> <li>Some employees do not have access to leave and holiday entitlements</li> <li>Workers who have the right to decline an offer of work can be considered to be declining work if the reason is sickness or bereavement (so do not get sick or bereavement leave)</li> </ul>	<p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>For genuine casuals, casual work arrangements may meet their needs</li> <li>For other employees, they may not be accessing entitlements (potential social and economic consequences)</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>For genuine casuals, it provides work arrangements that meet the employers' needs</li> <li>Some employers may engage in non-competitive behaviour, disadvantaging employers who recognise leave and holidays entitlements correctly</li> </ul> <p><i>Employees:</i></p>	<ul style="list-style-type: none"> <li>Will not change understandability</li> <li>Will not change direct or compliance costs</li> <li>Will not change applicability to different working patterns</li> <li>Will retain existing entitlements</li> </ul>
2. Define	<ul style="list-style-type: none"> <li>May provide more clarity</li> </ul>	<ul style="list-style-type: none"> <li>It will be difficult to reach a</li> </ul>		<ul style="list-style-type: none"> <li>May increase or decrease</li> </ul>

Option	Benefits	Disadvantages/Costs	Impacts	Assessment
<p>"casual employment" in legislation</p>	<p>around casual employment</p> <ul style="list-style-type: none"> <li>• May help to increase understanding of what are genuine casual employment arrangements</li> <li>• May help ensure access to entitlements</li> </ul>	<p>clear, agreed definition</p> <ul style="list-style-type: none"> <li>• Potential to remove some common law flexibility (may not change with changes in the labour market)</li> <li>• Reduced flexibility may decrease employment opportunities and increase costs</li> <li>• Unscrupulous employers may try to work around the definition to limit employees' entitlements</li> <li>• May increase direct costs if employers are currently not providing some entitlements</li> </ul>	<ul style="list-style-type: none"> <li>• May reduce desired flexibility</li> <li>• May increase or decrease access to entitlements</li> <li>• May improve understanding of rights and obligations</li> <li>• May further marginalise some disadvantaged workers if it impacts on employment opportunities</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>• May reduce desired flexibility</li> <li>• May improve understanding of rights and obligations</li> <li>• May increase direct costs</li> <li>• Will impact on some sectors more than others</li> </ul> <p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>• May improve understanding of rights and obligations</li> <li>• May assist in determining whether a day is an otherwise working day, making it easier to work out entitlements</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>• May improve understanding of rights and obligations</li> <li>• May assist in determining whether a day is an otherwise working day, making it easier to work out entitlements</li> </ul>	<p>understandability</p> <ul style="list-style-type: none"> <li>• May increase compliance costs</li> <li>• May increase direct costs (where employees not currently being provided with entitlements)</li> <li>• May decrease applicability to different working patterns over time</li> <li>• Will not change existing entitlements (but may increase access to existing entitlements)</li> </ul>
<p>3. Provide an additional tool for determining an otherwise working day by including the "but for" test in legislation<sup>19</sup> (the Department's preferred option)</p>	<ul style="list-style-type: none"> <li>• Including the test in the Act may help increase awareness of the test</li> <li>• Provides employers and employees with an additional tool to identify whether a day was an otherwise working day, which may reduce disputes or the need for DoL involvement</li> <li>• Legislative amendment could provide a vehicle for further awareness raising about the meaning of casuals and employees' entitlements</li> </ul>	<ul style="list-style-type: none"> <li>• A legislative amendment may not be necessary</li> <li>• It does not prevent non-casual employees being labelled as casuals, though it may assist with working out their entitlements</li> <li>• It does not prevent employers from deliberately avoiding paying casuals for an otherwise working day</li> </ul>	<p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>• May improve understanding of rights and obligations</li> <li>• May assist in determining whether a day is an otherwise working day, making it easier to work out entitlements</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>• May improve understanding of rights and obligations</li> <li>• May assist in determining whether a day is an otherwise working day, making it easier to work out entitlements</li> </ul>	<ul style="list-style-type: none"> <li>• May increase understandability</li> <li>• May decrease compliance costs</li> <li>• May increase direct costs (where employees not currently being provided with entitlements)</li> <li>• Will not change applicability to different working patterns</li> <li>• Will not change existing entitlements (but may increase access to existing entitlements)</li> </ul>

<sup>19</sup> An employee's entitlements to a public holiday, an alternative holiday, sick leave and bereavement leave are all determined with reference to whether the particular day would have been an otherwise working holiday under the Act. The Act currently sets out a number of factors to assist employers and employees to determine what would otherwise be a working day (section 1.2). From cases such as *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union*<sup>19</sup>, Labour Inspectors have developed a tool commonly known as the "but for" test. This tool helps an employer or employee to work out whether an employee would have worked on a particular day "but for" a public holiday or sickness. The test is recognised in case law but is not actually listed in the Act.

Option	Benefits	Disadvantages/Costs	Impacts	Assessment
<p>4. A "loading" for employees with intermittent or irregular work patterns so they receive a payment in lieu of paid holidays and leave</p>	<ul style="list-style-type: none"> <li>It will assist other types of employees and their employers, not just casuals</li> <li>Raise awareness of the difference between casual and permanent employees</li> <li>It may decrease compliance costs for working out entitlements</li> <li>Easier to administer, as it may remove complexities around continuous employment tests for sick and bereavement leave</li> <li>May provide a disincentive to treat permanent employees as casuals</li> <li>May increase access to entitlements for casual employees</li> </ul>	<ul style="list-style-type: none"> <li>It will increase direct costs as it will include payment for some types of leave which are triggered by an event; for some seasonal industries it may spread the costs of public holidays more evenly and for others it may increase costs<sup>20</sup></li> <li>It may be difficult to work out a loading that is fair to employers and employees</li> <li>It may provide a disincentive for providing casual work; it may provide an incentive for undertaking casual work (this may have positive and negative impacts)</li> <li>If loading is set too low, may provide incentive to employers to treat permanent employees as casual employees so they do not have to work out entitlements</li> <li>Contrary to current policy whereby some entitlements are triggered by an event (e.g. sickness)</li> <li>Contrary to current policy whereby employees are entitled to paid time off in some circumstances. May mean that</li> </ul>	<p>work out entitlements</p> <p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>May improve understanding of rights and obligations</li> <li>Increases fairness for permanent employees who are not receiving holiday or leave entitlements</li> <li>May reduce opportunities for casual employment, particularly for disadvantaged workers</li> <li>May reduce opportunities for rest and recreation (as paid out for public holidays)</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>May improve understanding of rights and obligations</li> <li>May discourage offering casual employment, reducing flexibility more than others (e.g. agriculture, horticulture, hospitality and retail)</li> </ul>	<ul style="list-style-type: none"> <li>May decrease understandability</li> <li>May decrease compliance costs</li> <li>May increase direct costs</li> <li>Will not change applicability to different working patterns</li> <li>May increase access to existing entitlements. In some cases it may increase entitlements (by covering leave that it is triggered by an event if the event does not happen). May decrease some entitlements to public holidays</li> </ul>

<sup>20</sup> A casual loading that included public holiday provisions would average the cost of public holidays over a year. For seasonal work during the winter months, there may be no public holidays, however, employers would still be required to pay a loading which included payment for public holidays. Conversely, for seasonal work over summer and Easter, where there are a number of public holidays, employers may pay less through the loading than if they were paying for each individual public holiday.

Option	Benefits	Disadvantages/Costs	Impacts	Assessment
5.Awareness raising	<ul style="list-style-type: none"> <li>• Potentially low cost option</li> <li>• Does not require legislative amendment</li> </ul>	<p>do not get time off work (paid or unpaid)</p> <ul style="list-style-type: none"> <li>• Some employees may only get a pro-rated entitlement to public holidays</li> <li>• Some employers may set wages artificially low to avoid the effect of the loading</li> <li>• Potential to create enforcement issues similar to those around the existing pay-as-you-go provisions</li> <li>• Does not address intentional non-compliance</li> <li>• Applies to conceptually different entitlements</li> <li>• Impact can be low; needs to be part of a larger package of responses</li> <li>• Does not prevent deliberate non-compliance; needs to be in conjunction with enforcement strategy</li> </ul>	<p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>• May improve understanding of rights and obligations</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>• May improve understanding of rights and obligations</li> </ul>	<ul style="list-style-type: none"> <li>• May not change understandability</li> <li>• May not change direct or compliance costs</li> <li>• Will not change applicability to different working patterns</li> <li>• Will retain existing entitlements</li> </ul>

## E. Accumulation of alternative holidays

### Background

45 Alternative holidays are an explicit codification of the legal right to a "day in lieu" introduced by section 7A of the Holidays Act 1981 and confirmed by the Court of Appeal in *Labour Inspector v Telecom Networks and Operations Ltd* [1993] 1 ERNZ 492 (CA). An employee who works on a public holiday that is an otherwise working day for them is entitled to a full day's alternative holiday regardless of the amount of time the employee worked on the public holiday. The provision for an alternative holiday seeks to recognise that employees have been unable to observe a full day's public holiday and gives them the opportunity to take a full day's holiday at another time that is significant to them. In practice, the employee is observing their entitlement to a paid public holiday on another day. If they had not worked they would have an entitlement to a full day's paid public holiday on the actual day.

- 46 An alternative holiday must be taken on a day that is agreed to by the employer and employee. If they cannot agree, then within the first 12 months of becoming entitled to the alternative holiday, the employee can choose the day they take their alternative holiday taking into account their employer's view of when is convenient. After 12 months the employer can direct the employee to take an alternative holiday on a date of the employer's choosing. In both cases, at least 14 days' notice must be given to the other party.
- 47 There is no limit on the number of alternative holidays that can be accumulated. To assist with the management of leave, after 12 months employers can direct employees to take an alternative holiday or the parties can agree to exchange the alternative holiday for payment.

### **Issues**

- 48 The issue of accumulation of alternative holidays was included because the Department of Labour was advised that the transitional provisions around "days in lieu" earned under the 1981 Act caused problems for employers because some employees choose to take their alternative holidays first because they can choose the day on which they take the holidays (and RDP provides a financial incentive to choose days on which their RDP is greatest) leaving a large accumulation of old "days in lieu", creating a financial liability for employers. This did not come through as an issue in submissions and the Group did not make recommendations for changes around accumulation.
- 49 From submissions, it appears that the main issues for employers about alternative holidays are that employees receive a whole day's holiday for working part of a public holiday and employees are able to choose when they take their alternative holiday within the first twelve months. Information on the analysis of alternative holiday entitlements is included in the table below.

### **Group's recommendations**

- 50 The Ministerial Advisory Group was split over the treatment of alternative holidays. The employer representatives considered that alternative holidays should be:
- accrued according to the number of hours an employee works on a public holiday, and
  - taken in the same way as annual holidays, whereby the employer and employee would agree on the timing of the alternative holiday or employers can direct when an employee takes the alternative holiday (employees would lose the ability to determine when the alternative holiday is taken during the first 12 months of becoming entitled to it).
- 51 The union representatives recommend no change because they consider that payroll systems do not have problems dealing with the accumulation of alternative holidays and that the calculation is not complicated. They consider that employees who work on a public

holiday should continue to be entitled to a full day's alternative holiday as it compensates them for the lost opportunity to enjoy the public holiday.

**Options for the accumulation of alternative holidays**

52 The Department of Labour considered some options to address the issue of accumulation of alternative holidays. However, the options seek to address what is an issue for only a small number of employers and the Department does not consider that any of the options will make a significant improvement to the operation of the Act in a way that meets the objectives of the review.

**Options for entitlements to alternative holidays**

Option	Benefits	Disadvantages/Costs	Impacts	Assessment
1. Status quo	<ul style="list-style-type: none"> <li>Existing entitlements are clear</li> <li>Giving each party the opportunity to decide when the alternative holiday is taken seeks to provide balance between employee and employer rights and obligations</li> </ul>	<ul style="list-style-type: none"> <li>Perceived unfairness to employers because employee decides when alternative holiday is taken in first 12 months</li> <li>May reduce productivity if employee takes alternative holiday on a day that disrupts operations</li> </ul>	<p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>Able to take full day's holiday on day of significance to employee</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>May have business disruption if employees take alternative holidays on days not convenient to employer</li> </ul>	<ul style="list-style-type: none"> <li>Will not change understandability</li> <li>Will not change direct or compliance costs</li> <li>Will not change applicability to different working patterns</li> <li>Will retain existing entitlements</li> </ul>
2. Restrict employees from taking two or more alternative holidays on consecutive days without their employer's agreement <sup>21</sup>	<ul style="list-style-type: none"> <li>Goes some way to address issue of employee choosing alternative holiday that is inconvenient to employers</li> <li>Some reduction to potential negative impacts on business operations and productivity</li> <li>Doesn't have as large an impact on employee entitlements as other options</li> </ul>	<ul style="list-style-type: none"> <li>Doesn't prevent a number of employees taking the same day off</li> <li>Reduces existing entitlements</li> <li>Employee may not be able to choose alternative days of significance to them if they are consecutive days off work</li> </ul>	<p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>May reduce incentives to work on public holidays</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>May reduce employees taking alternative holidays on days not convenient to employer</li> </ul>	<ul style="list-style-type: none"> <li>May reduce understandability</li> <li>May increase compliance costs</li> <li>Unlikely to change direct costs</li> <li>Will not change applicability to different working patterns</li> <li>Will reduce existing entitlements</li> </ul>
3. Remove ability for	<ul style="list-style-type: none"> <li>Requirements consistent with annual holidays</li> </ul>	<ul style="list-style-type: none"> <li>Reduces existing entitlements</li> <li>Employee may not be able to</li> </ul>	<p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>May reduce incentives to work</li> </ul>	<ul style="list-style-type: none"> <li>May reduce or increase understandability</li> </ul>

<sup>21</sup> The employee could still choose the date for one day's alternative holiday but not for two or more in a row.

Option	Benefits	Disadvantages/Costs	Impacts	Assessment
<p>employee to decide when alternative holiday is taken<sup>22</sup></p>	<ul style="list-style-type: none"> <li>Reduces potential negative impacts on business operations and productivity</li> </ul>	<ul style="list-style-type: none"> <li>choose alternative days of significance to them</li> <li>Shifts incentives from employee to take high rate day to employer to direct a low rate day</li> </ul>	<p>on public holidays</p> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>May reduce employees taking alternative holidays on days not convenient to employer</li> </ul> <p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>May reduce incentives to work on public holidays</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>Increased complexity to calculate entitlements</li> <li>May make it harder to manage holiday balances</li> </ul>	<ul style="list-style-type: none"> <li>May decrease compliance costs</li> <li>May decrease direct costs</li> <li>Will not change applicability to different working patterns</li> <li>Will reduce existing entitlements</li> </ul>
<p>4. Employees receive a half day's alternative holiday if they work up to half a public holiday and a full day's alternative holiday if they work more than half a day</p>	<ul style="list-style-type: none"> <li>May increase perceived fairness for employers</li> </ul>	<ul style="list-style-type: none"> <li>Reduces existing entitlements</li> <li>Complex to administer and calculate</li> <li>May be hard to take part days away from work</li> <li>Will require employers and employees to agree on what a full and half day mean to them</li> <li>May be perceived as being unfair to employees (as instead of receiving a full day's paid public holiday if they had not worked, they may only receive a half day's alternative holiday for working)</li> </ul>	<p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>May reduce understandability</li> <li>May increase compliance costs</li> <li>Will decrease direct costs</li> <li>Will not change applicability to different working patterns</li> <li>Will reduce existing entitlements</li> </ul>	<ul style="list-style-type: none"> <li>May reduce understandability</li> <li>May increase or decrease compliance costs</li> <li>Will decrease direct costs</li> <li>Will not change applicability to different working patterns</li> <li>Will reduce existing entitlements</li> </ul>
<p>5. Employee receives alternative holidays equivalent to the number of hours worked and are unable to choose when the alternative</p>	<ul style="list-style-type: none"> <li>May increase perceived fairness for employers</li> <li>May be easier for payroll systems</li> </ul>	<ul style="list-style-type: none"> <li>Reduces entitlements for employees as would only get the number of hours actually worked on a public holiday credited to their annual holidays balance (instead of a full alternative holiday) and unable to choose a day of significance to them in first 12 months</li> <li>Is likely to increase disputes about whether alternative holidays have been correctly</li> </ul>	<p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>May reduce incentives to work on public holidays</li> </ul> <p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>May make it harder to manage holiday balances</li> <li>May reduce employees taking alternative holidays on days not convenient to employer</li> </ul>	<ul style="list-style-type: none"> <li>May reduce understandability</li> <li>May increase or decrease compliance costs</li> <li>Will decrease direct costs</li> <li>Will not change applicability to different working patterns</li> <li>Will reduce existing entitlements</li> </ul>

<sup>22</sup> Employer and employee agree on when the alternative holiday is take and if they don't agree, the employer can decide

Option	Benefits	Disadvantages/ Costs	Impacts	Assessment
<p>holiday is taken. Alternative holidays are included with annual holidays<sup>23</sup></p>		<p>included</p> <ul style="list-style-type: none"> <li>• It may not significantly simplify payroll systems as an audit mechanism will be required</li> <li>• May be perceived as being unfair to employees (as instead of receiving a full day's paid public holiday if they had not worked, they may receive less than a day's alternative holiday for working)</li> </ul>		

## F. Treatment of public holidays

### Background

53 The Act provides for 11 paid public holidays: New Year's day, 2<sup>nd</sup> January, Waitangi Day, Good Friday, Easter Monday, ANZAC Day, Queen's Birthday, Labour Day, Christmas Day, Boxing Day and a provincial anniversary day.

### Issues

- 54 Issues raised by submitters on the treatment of public holidays include:
- mondayisation<sup>24</sup> can cause confusion, especially identifying which day is the public holiday for some workers
  - concern that public holiday entitlements favour employees who work Monday to Friday, as a large proportion of holidays are observed on a Monday

<sup>23</sup> As per the employer representatives' recommendations under "Further options for Standard Daily Pay"

<sup>24</sup> When Christmas Day, Boxing Day, New Year's Day and 2<sup>nd</sup> January fall on a weekend, the public holiday is observed on the weekend by weekend workers and on the following Monday or Tuesday by other workers. For example if Christmas Day is on a Saturday, a worker who normally works Saturdays observes the public holiday on the Saturday. A worker who does not work Saturdays observes the public holiday on the Monday. Employees are entitled to only one Christmas Day public holiday each year.

- concern that the concentration of public holidays in the first half of the year coincides with peak horticulture and tourism periods. These industries consider that they face greater public holiday related costs when compared with other industries, and
  - current public holidays were considered by some submitters to be less relevant to modern New Zealand society.
- 55 The main cause for concern for employers appears to be public holiday entitlements (time and a half and an alternative holiday) rather than their treatment.

56 A small majority of submitters suggested changes to some aspect of the current public holidays. However, there was no clear consensus on what changes should be made.

### **Group's recommendations**

57 The Group considered two potential changes that were within scope of their terms of reference (in addition to reviewing the status of Easter Sunday). The Group recommends the status quo as there appears to be insufficient appetite for change.

### **Options for the treatment of public holidays**

<b>Option</b>	<b>Benefits</b>	<b>Disadvantages/Costs</b>	<b>Impacts</b>	<b>Assessment</b>
1. Status quo (the Department's preferred option)	<ul style="list-style-type: none"> <li>• Public holidays are days of long standing national, cultural or religious significance</li> <li>• Familiarity with current holidays</li> <li>• No strong call for change</li> <li>• Potential resistance to changes to current public holidays</li> </ul>	<ul style="list-style-type: none"> <li>• Some employees do not get all 1.1 public holidays as paid days off work</li> <li>• Concentration of public holidays around start of the year</li> <li>• Uneven impact on seasonal industries</li> </ul>	<p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>• Predictable pattern of public holidays</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>• Predictable pattern of public holidays</li> <li>• No change to current costs</li> </ul>	<ul style="list-style-type: none"> <li>• Will not change understandability</li> <li>• Will not change direct or compliance costs</li> <li>• Will not change applicability to different working patterns</li> <li>• Will retain existing entitlements</li> </ul>
2. Mondayise Waitangi and/or ANZAC Day <sup>25</sup>	<ul style="list-style-type: none"> <li>• Aligns treatment with Christmas and New Year</li> <li>• Clearer rules as most holidays fall on a Monday or are Mondayised</li> </ul>	<ul style="list-style-type: none"> <li>• Increases direct costs</li> <li>• May increase compliance costs</li> <li>• Increases perceived bias towards Monday-Friday workers</li> <li>• May reduce productivity</li> </ul>	<p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>• Some will gain an extra day's paid holiday or public holiday entitlements for working on the Monday</li> </ul>	<ul style="list-style-type: none"> <li>• May make the Act harder to understand (by increasing the number of Mondayised holidays) or it may increase understanding (through</li> </ul>

<sup>25</sup> Waitangi Day and ANZAC Day are observed on the actual date (6 February and 25 April) regardless of whether they fall on a weekday or weekend as the actual date is of national significance. Mondayising these public holidays would align their treatment with the Christmas and New Year holidays. This would mean that when Waitangi Day and/or ANZAC Day fall on the weekend, weekend workers would observe Waitangi/ANZAC Day on the actual day and other workers would observe the public holiday on the following Monday.

Option	Benefits	Disadvantages/Costs	Impacts	Assessment
3. Establish a new public holiday between Queen's Birthday and Labour Day	<ul style="list-style-type: none"> <li>• May improve understanding of Mondayisation</li> <li>• Increased opportunities for rest and family/community activities</li> <li>• Long weekends may increase local tourism</li> <li>• Increased opportunities for rest and relaxation during this part of the year</li> <li>• Opportunity to observe another day of significance to modern New Zealand society</li> <li>• May increase domestic tourism, depending on timing</li> <li>• May increase New Zealand's reputation as an attractive place to live and work</li> </ul>	<ul style="list-style-type: none"> <li>• Mondayisation is already perceived as confusing by some</li> <li>• Increases direct and compliance costs</li> <li>• May be hard to reach agreement on a new day of significance</li> </ul>	<ul style="list-style-type: none"> <li>• Increased opportunities for rest and family/community activities</li> <li><i>Employers:</i> <ul style="list-style-type: none"> <li>• Increased direct and compliance costs</li> <li>• May require adjustment of current operations/rosters etc</li> </ul> </li> <li><i>Employees:</i> <ul style="list-style-type: none"> <li>• Will gain an additional public holiday</li> <li>• Increased opportunities for rest and family/community activities</li> </ul> </li> <li><i>Employers:</i> <ul style="list-style-type: none"> <li>• Increased direct and compliance costs</li> <li>• May require adjustment of current operations/rosters etc</li> </ul> </li> </ul>	<p>greater use of Mondayisation)</p> <ul style="list-style-type: none"> <li>• Will increase direct and compliance costs (for Monday to Friday businesses)</li> <li>• May increase applicability to different working patterns</li> <li>• Will increase existing entitlements</li> <li>• Unlikely to have a long term impact on understandability</li> <li>• Will increase direct and compliance costs</li> <li>• May increase applicability to different working patterns</li> <li>• Will increase existing entitlements</li> </ul>

58 The Group also considered changes to the treatment of the Christmas and New Year public holidays, but these options were outside of their terms of reference so they did not pursue them.

### G. Status of Easter Sunday

#### Background

59 Easter Sunday is traditionally seen as a day of significance. However, since 1936 Easter Monday has been recognised as the public holiday because at that time most people worked Monday to Friday.

#### Issues

60 As Easter Sunday is not a listed public holiday, employees who normally work on a Sunday are not entitled to time and a half and an alternative holiday when they work on Easter Sunday, or to a paid day off if they do not work or their workplace is closed (unless provided in their employment agreement).

61 Easter Sunday is a restricted trading day under the Shop Trading Act. Submissions indicate that there is some confusion over the status of Easter Sunday as a public holiday and the inconsistencies with shop trading restrictions.

**Group's recommendations**

62 The Group were split in their recommendations on Easter Sunday. The employer representatives recommend the status quo. The union representatives recommend making Easter Sunday an additional 12<sup>th</sup> public holiday.

**Options for the status of Easter Sunday**

Option	Benefits	Disadvantages/Costs	Impacts	Assessment
1. Status quo	<ul style="list-style-type: none"> <li>No change to current practice</li> <li>Familiarity with current Easter holidays (although confusion about Easter Sunday's status remains)</li> </ul>	<ul style="list-style-type: none"> <li>Does not address the issues surrounding Easter Sunday</li> </ul>	<p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>May not receive public holiday entitlements for working on a day of significance</li> <li>May not be paid if business closes for the day</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>No change to current situation</li> </ul>	<ul style="list-style-type: none"> <li>Will not change understandability</li> <li>Will not change direct or compliance costs</li> <li>Will not change applicability to different working patterns</li> <li>Will retain existing entitlements</li> </ul>
2. Make Easter Sunday an additional 12 <sup>th</sup> public holiday	<ul style="list-style-type: none"> <li>Acknowledges changing work patterns</li> <li>Employees eligible for public holiday entitlements if they normally work Sundays</li> <li>Recognises day of significance</li> <li>Could help to negate perception that public holidays are more favourable to Monday</li> </ul>	<ul style="list-style-type: none"> <li>Increased direct and compliance costs</li> <li>Estimated increase in wage bill between \$64.0m and \$96.0m<sup>26</sup></li> <li>Businesses without trading restrictions may not open due to higher labour costs</li> </ul>	<p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>Potential access to an additional paid public holiday</li> <li>Eligible for public holiday entitlements if work on Easter Sunday</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>Fiscal implications for public</li> </ul>	<ul style="list-style-type: none"> <li>May make the Act easier to understand (due to current perception that Easter Sunday is a public holiday and consistency with shop trading legislation)</li> <li>Will increase direct and compliance costs (for 7-day a week businesses)</li> <li>May increase applicability to</li> </ul>

<sup>26</sup> The estimated wage bill for an average Sunday is \$64.0 million. The cost of making Easter Sunday a 12<sup>th</sup> public holiday would incur an additional cost of \$64.0 million to cover the cost of an alternative holiday for those employees working on Easter Sunday. The cost of providing time and a half would be up to \$32.0 million. There is data that indicates that a majority of collective agreements already include time and a half or more. The estimate of \$32.0 million may be an upper bound. The costs to employers will depend on the extent to which: employment agreements already contain provisions for penal rates and an alternative holiday; employees actually work on Easter Sunday now, and may in the future, and changes to work patterns where working on Easter Sunday impacts on shift work. This estimate is based on the 1999 Time Use Survey published in 2001 and the Quarterly Employment Survey up to December 2009 (total weekly gross earnings) and the Linked Employer-Employee Data (LEED). The Time Use Survey showed that 6.1 percent of all paid working hours were on a Sunday. There is no reliable information on the extent that penal rates currently apply to Sunday work.

Option	Benefits	Disadvantages/Costs	Impacts	Assessment
<p>3. Replace Easter Monday with Easter Sunday as a Monday public holiday (the Department's preferred option)</p>	<p>- Friday workers.  <ul style="list-style-type: none"> <li>• May increase compliance with shop trading restrictions</li> <li>• May reduce confusion over restricted trading day/public holiday</li> </ul> </p>		<p>sector employers/funders  <ul style="list-style-type: none"> <li>• May recover additional costs through increasing prices or reducing staff and/or services</li> <li>• May require adjustment of current operations/rosters etc</li> <li>• More likely to impact on: wine; hospitality; horticulture/agriculture; manufacturing; some retail industries; service industries (including emergency services); 24 hour/7 day a week industries including public sector employers (such as Corrections, DHBs, Ministry of Fisheries, Customs, Police and MSD)</li> </ul> <p><i>Employees:</i></p> <ul style="list-style-type: none"> <li>• As with option 2</li> </ul> <p><i>Employers:</i></p> <ul style="list-style-type: none"> <li>• As with option 2</li> </ul> </p>	<p>different working patterns  <ul style="list-style-type: none"> <li>• Will increase existing entitlements</li> </ul> </p>
	<p>As with option 2 and:  <ul style="list-style-type: none"> <li>• Lower direct costs than option 2</li> <li>• May increase understanding of Monday arrangements</li> </ul> </p>	<p>As with option 2 and:  <ul style="list-style-type: none"> <li>• Compliance costs may be higher</li> <li>• Mondayisation is viewed as confusing by some submitters</li> </ul> </p>		<ul style="list-style-type: none"> <li>• May make the Act harder to understand (by increasing the number of Monday holidays) or it may increase understanding (through greater use of Mondayisation)</li> <li>• Will increase direct costs (but less than option 2) and compliance costs</li> <li>• May increase the applicability to different working patterns</li> <li>• Will increase existing entitlements for some employees</li> </ul>

## Other issues

### Components of gross earnings

63 The Holidays Act provides a definition of gross earnings (section 14). Some submitters raised concerns that there are no clear definitions of some of the components of gross earnings. These include discretionary payments, allowances irregular payments and exceptional payments. The Department of Labour intends to include explanations on these terms in its publicly available guidance.

It is also recommended that definitions of discretionary payments and allowances are included in the legislation. These definitions are based on the policy intent behind these two terms.

***Increasing the effectiveness of the enforcement of the employment relations framework***

- 64 The Department considers that the fairness of the legislation to employers could be increased through more efficient and effective enforcement. Under the current system some employers may deliberately delay compliance with the Holidays Act (for instance payment of holiday pay). This can create an unlevel playing field for employers who are complying. Currently labour inspectors can spend a disproportionate amount of time recovering relatively small amounts of wage or holiday pay arrears. Moreover, the application process for penalties can delay the timely resolution of non-compliance. Providing more efficient enforcement mechanisms will encourage greater compliance with legislative requirements while minimising the time spent on individual cases, particularly when dealing with repeat offenders.
- 65 A Departmental practice development programme is in place to extend the skills of, and non statutory levers available to, labour inspectors. Within this context, a wider range of statutory enforcement tools would support greater responsiveness to businesses and a more flexible and efficient use of inspection resources.
- 66 The Minister of Labour is reporting to Cabinet on options to address the limitations on the enforcement powers of labour inspectors within existing resources in the paper seeking Cabinet approval of the Minister's recommendations for the Employment Relations Act 2000. As part of this overall package on enforcement the Department recommends increasing the penalties for non-compliance with the Holidays Act from \$5,000 to a maximum of \$10,000 for individuals, and from \$10,000 to a maximum of \$20,000 for companies and other body corporates.
- 67 The Department considers that current penalty provisions are not adequately deterring non-compliance. Increasing penalties provides an incentive for employers to comply and conveys a public message that breaches of minimum entitlements are not conducive to good commercial practices.