

# REGULATORY IMPACT STATEMENT – Holidays Act Amendment

## Executive summary

- 1 An amendment to the Holidays Act 2003 (the Act) is required following a recent Supreme Court decision which found that an employer and an employee cannot agree to transfer a public holiday from a day listed in the Act to another day. The effect of the Court's decision is that the flexibility Parliament had intended to provide to employers and employees around agreements to alter when public holidays can be recognised has not been achieved. The reduction in flexibility has a significant impact for shift-based operations and means that businesses do not have the flexibility to agree to redefine a public holiday in line with the operational needs of the employer or the needs of the employee.

## Adequacy statement

- 2 The Department of Labour has reviewed the RIS and considers it is adequate according to the adequacy criteria.

## Status Quo and Problem

- 3 The Supreme Court decision in *New Zealand Airline Pilots Association Industrial Union of Workers Incorporated v Air New Zealand Limited* (14 November 2007, SC 91/2006) (*NZALPA v Air NZ*) found that an employer and an employee cannot agree to transfer a public holiday from a day listed in the Act to another day. The Court's decision means that the flexibility Parliament had intended to provide to employers and employees around agreements to alter when public holidays can be recognised has not been achieved.
- 4 One effect of the Court's decision was to render invalid transfer agreements covering shift workers. These agreements provided that where an employee's shift overlapped into a public holiday, the shift was worked and paid for as a normal shift, and the next shift was allowed as the employee's public holiday. This flexibility to transfer a public holiday to the employees' following shift allowed employees the opportunity to enjoy a full shift off as a public holiday. Employers also benefited for production and payroll purposes.
- 5 Monitoring by the Department of Labour over the 2007/2008 Christmas period revealed that the impact of the Supreme Court's decision on shift work has been significant. Where an employer chooses to close down on the public holiday, employees are required to work up to midnight of the public holiday and complete their shift from midnight at the end of the public holiday. These arrangements are not reflective of the overall intent of the Act to promote balance between work and other aspects of employees' lives. Because of the Supreme Court decision the Act no longer accommodates these non standard working conditions in relation to entitlements to public holidays. In the 1999 Time Use Survey, carried out by Statistics New Zealand, around 4% of workers indicated that on any given day they were at work between midnight and 4am.

## Objectives

- 6 The overall purpose of the Act is to promote balance between work and other aspects of employees' lives. To that end the Act provides employees with minimum entitlements to public holidays for the observance of days of national, religious or cultural significance. This included provision to transfer a public holiday from a day listed in the Act to another day.
- 7 The Act also allows the parties to agree enhanced and additional entitlements provided they do not exclude or reduce any employee's entitlement to public holidays. The objective of legislative change is to give effect to the above for shift workers.

## Alternative Options

### Maintaining the status quo

- 8 This option would mean that employers and employees will not have the flexibility to enter into agreements to agree that where a shift spans two calendar days, and one of those days is a public holiday, the public holiday may be observed on the employee's following shift. Business New Zealand (Business NZ) has indicated that this option would not be supported by shift-based businesses.
- 9 The disadvantages of maintaining the status quo are likely to be that:
  - shift-based businesses will have less flexibility around organising night shifts which could interrupt continuous production resulting in increased production costs
  - shift-based businesses will need to make changes to their payroll systems resulting in increased costs
  - shift-based businesses may make changes to their working hours to mitigate the effect of the Supreme Court decision and this may be unpopular with their employees resulting in negative impacts on employment relationships
  - there will be some uncertainty, confusion and possible breaches of law that will disrupt shift-based businesses and undermine the Act.
- 10 An advantage of the status quo is preventing possible abuse by employers of the ability to transfer.

### Consider legislative amendment in 2009 following the Department of Labour's evaluation of the Holidays Act 2003

- 11 An amendment of the Act could be reconsidered after the Department of Labour's planned evaluation of the effectiveness of the Act in achieving its objectives. Adopting this option would mean that legislative amendments would not be considered before 2009.
- 12 The disadvantage of this option is that the time delay will result in the continued disruption and loss of production to shift-based businesses identified in paragraph 9. This could be mitigated if there is a commitment to considering this issue as part of the 2008/2009 evaluation of the Act.

- 13 An advantage of this option is that a full and considered policy response can be developed following the evaluation.

### **Preferred Option**

- 14 The preferred option is to amend the Act to ensure where an employee's shift spans two calendar days, and one of those days is a public holiday, an employer and employee can enter into a genuine agreement that the public holiday may be observed on a 24 hour period that begins or ends on the public holiday, if the employee is due to work a shift in that 24 hour period.
- 15 The advantages of this option are that:
- shift-based businesses will have flexibility around organising night shifts. This will allow
    - 24 hour operations to provide their employees' with certainty and predictability concerning their working hours and their public holidays, and
    - continuous production resulting in decreased production costs
  - compliance costs would be reduced for businesses because payroll systems need not be altered to provide for 'splitting' shifts. If those systems have already been changed, those costs cannot be avoided and the public holidays that employees in shift-based operations can take will be affected until the amendment is passed.
- 16 This option is likely to be supported by shift-based businesses who are calling for a speedy return to the situation that was in place prior to the Supreme Court's decision.

### **Implementation and review**

- 17 The narrow amendment would make the legislative framework similar to how it was prior to the Supreme Court's decision for shift-based operations concerning shifts that cross into or out of a public holiday. This will reduce compliance costs for shift-based businesses that will be able to return their payroll systems and employment agreements to their original status, if the employment agreements included transfer agreements that comply with the new amendment. Any compliance costs associated with becoming familiar with the amendment will be offset through an information campaign including publications, websites and the call centre.
- 18 Following the 2008/2009 Holidays Act 2003 evaluation, the situation will be reviewed. Although there will only be limited effects by that stage, this will allow officials to look at the broader issue and see what impact this change has had.

### **Consultation**

- 19 Business NZ and the New Zealand Council of Trade Unions (NZCTU) have been consulted in relation to the RIS and the drafting of the Bill. The alternative options identified above have been discussed with Business NZ and the NZCTU who support the amendment and consider that the costs of time delay and uncertainty need to be addressed immediately. Business NZ and the NZCTU have indicated their support for the preferred option.

- 20 State Services Commission, the Treasury, Ministry of Economic Development, Ministry of Social Development, Ministry of Women's Affairs and the Ministry of Pacific Island Affairs have been consulted about the contents of this paper.