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10 October 2018

Holidays Act Review
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington, 6140

By email: holidays.act.review@mbie.govt.nz

Re: Holidays Act 2003 Review – Issues Paper

1. Introduction

1.1. The New Zealand Law Society welcomes the opportunity to comment on the *Holidays Act 2003 Review – Issues Paper* (Paper) released by the Holidays Act Taskforce (Taskforce). The purpose of the review is to "make recommendations to Government for a clear and transparent set of rules for providing entitlements to, and payment for, holidays and leave."[1] The Paper clearly sets out the Taskforce's understanding of the key issues that employers, employees and payroll providers face in trying to implement the Holidays Act 2003 (the Act), and seeks comments as to the current workability and structure of the Act, and how it can be improved.

1.2. The Law Society's submission responds to questions which identify further issues for consideration by the Taskforce to ensure any review and subsequent amendment of the Act provides sufficient clarity for those directly affected by its application and remains workable in practice.

2. Q1, 2: Have we accurately captured the broad range of business arrangements that can contribute to difficulties with the Act? Are there other specific types of business arrangements for which compliance with the Act is more difficult?

2.1. Yes, the Paper succinctly captures the fact that a wide range of New Zealand businesses find compliance with the Act difficult. The Law Society considers that any recommendations to Government need to ensure the Act remains workable in practice. As noted in the paper, "any potential solutions need to be applicable to the full range of current and expected future working arrangements."[2]

2.2. The Taskforce may wish to give further consideration to the following additional types of business arrangements that encounter compliance difficulties:

(a) Businesses which remunerate their employees with variable payments, including piece rates, commission, incentives and bonuses, particularly where the payment period for

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1 Holidays Act 2003 Review, issues paper, at [1].
2 Ibid, at [30].

the relevant remuneration differs from the period over which that remuneration was earned.

(b) Employers whose remuneration arrangements are a medley of fixed remuneration (like salary) and variable remuneration (like commission), incentives and bonuses, and where those two parts of their remuneration are earned and paid over different time periods.

(c) Businesses where significant unrostered overtime is performed. These can include those sectors listed in the Paper as having irregular hours (such as retail, hospitality and health),[3] but also transport, shipping, fishing, agriculture, manufacturing and many public-sector industries, for example.

2.3. The Law Society agrees that "any solution recommended by the Taskforce must be simple enough to be understood easily by all employers and employees, able to be systemised in a way that is implementable for most employers who use payroll systems and cover the wide variety of working arrangements while ensuring employees receive their minimum entitlements."[4]

2.4. The businesses that have encountered compliance difficulties with the Act are wide-ranging. Even businesses that largely have a Monday to Friday salaried workforce, often have small pockets of workers with arrangements that differ, such as call centres, IT support or a mobile sales force. These working arrangements are discussed further in questions 3 and 4 below.

3. Q3, 4 – Have we accurately captured the broad range of working arrangements that can contribute to difficulties with the Act? Are there other specific types of working arrangements which raise particular difficulties in terms of compliance with the Act?

3.1. The Paper outlines the difficulties in applying the Act that affect a wide range of employees, and that different employees within the same business may be affected in different ways. As the paper notes, "a common problem for many employees is the uncertainty about entitlements and payments that is associated with working irregular hours, shift work or changing hours."[5]

3.2. Additional types of working arrangements that appear to give rise to difficulties with the application of the Act include:

(a) Employees with salary smoothing arrangements where an employee's salary is smoothed into an even daily/weekly payment (irrespective of the hours actually worked during the pay period) and, accordingly, does not correspond to the variability in their working pattern.

(b) Employees whose work is informed by the availability of work, and who are required by their employer to work if asked to do so, but not otherwise. For these employees, issues arise as to whether it is clear if a particular day would or would not otherwise be a working day for them.

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3 Ibid, at [35].
4 Ibid, at [36].
5 Ibid, at [37].

(c) Shifts that do not fit well over the course of a 'calendar' day, including sleepover shifts that span midnight and potentially attract different rates of pay for different parts of the shift.[6]

(d) Employers who roster their employees to work "days", with no fixed hours of work, and also pay them daily, can encounter difficulties with record keeping, minimum wage compliance, and the "knock-on" effect on holiday pay and holiday entitlements.

(e) Seasonal working variations (including agricultural workers and students), which cause issues both in terms of payments and in calculating an annual leave entitlement.

(f) Guaranteed minimum hours arrangements with hours top ups if the employee has not been rostered on for the requisite period.

4. Q5, 6 – Do you have anything further to add about the role of the Labour Inspectorate as a regulator of the Holidays Act? What role do you think the Labour Inspectorate or any other government agency or institution should have in relation to any future holidays legislation?

4.1. The Taskforce may wish to consider the proposed amendments to the Labour Inspectorate's role under the Regulatory Systems (Workforce) Amendment Bill,[7] and whether these have any implications when reviewing the Act.

Dispute Provisions

4.2. Currently under the Act, where a dispute arises as between a Labour Inspector and an employer as to an employee's minimum entitlements (say, for example, where an overtime payment regime means that payments under it are "regular" and should be included in OWP or not), there is no clear option in the Act available to the employer, or the Inspector to refer to the Employment Institutions a "dispute" over that issue.[8] There is a case currently before the Employment Court, where the employer and inspector have agreed to refer a dispute over how to interpret the Act (on the basis it is a dispute about the interpretation of an entitlement under the employment agreement), and the Court has proceeded on this basis. But where there is no such agreement, jurisdictional issues may arise for an employer or inspector taking that approach. The Act could contain its own "dispute" resolution procedure, and disputes could be resolved in accordance with Part 10 of the Employment Relations Act. Section 161 of the Employment Relations Act could also clarify this by expressly including within the Authority's jurisdiction, disputes referred by an employer or Labour Inspector about how to interpret entitlements under the Act.

4.3. If that "dispute" option were available, then – as is the case with disputes over the interpretation of an employment agreement - the employer could (if the dispute determined

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6 Section 44A of the Act currently recognises the difficulty with such shift working patterns, allowing an employer and employee to agree to redefine a 24-hour period for the purposes of public holiday entitlements.

7 Regulatory Systems (Workforce) Amendment Bill, clause 5.

8 Currently section 74 of the Act says the Act can only be enforced by an employee, their representative (including a union), an employer or a Labour Inspector. It does not include a dispute provision like catered for in section 129 of the Employment Relations Act 2000 about interpreting and applying employment agreements (which a Labour Inspector has no ability to enforce).

it had to include the payment) comply with the outcome of that dispute, and therefore avoid the more dramatic outcomes available to the Inspector of issuing Improvement Notices or proceedings where a declaration of breach and claim for penalties may be sought.

4.4. This approach would seem consistent with the Inspectorate trying to assist employers to meet their obligations. Also, it would make enforceable undertakings easier to negotiate, as they could be conditional on the outcome of the disputed interpretation.

4.5. Consideration could therefore be given by the Taskforce to including "dispute" provisions to apply to "Holiday" disputes by or with the Labour Inspector, either in the Employment Relations Act and/or Holidays Act.

5. Q7, 8, 9 – Do you agree with the description of the cross-cutting issues set out above? If not, why not? Are you aware of other cross cutting issues with the design of the current Act? If so, what are they? In your opinion what are the main reasons that make the Holidays Act difficult to comply with for employers?

5.1. The Law Society agrees that a "lack of specific prescription in the Act, the complexity of the Act and the lack of clarity in relation to specific terms in the Act,"[9] are the cause of many of the problems faced by employers, employees and professional service providers in applying the Act. Further issues that the Taskforce may wish to take into account are set out below. Where appropriate, we have used the headings set out in Annex Two of the Paper to identify the nature of the relevant issues.

<u>Meaning of 'regular' in relation to payments</u>

5.2. The Law Society agrees that the meaning of "regular" in the context of the Act is currently unclear and creating difficulties in practice.[10] This is both in terms of what payments should be included in the Ordinary Weekly Pay (OWP) amount, and the time period to which the earning of those payments relate. For example, when computing OWP for a variable pay employee, it is not clear whether commission payments earned and paid daily, weekly, monthly, quarterly, are included in the formula in section 8(2) of the Act.[11]

5.3. It is also not clear what sort of frequency an overtime payment has to be earned by an employee to be "regular" (compared with "irregular" payments).

5.4. In particular, the Taskforce may wish to consider whether it is acceptable to categorise different instances of the same payment in different ways. For example, if an employee works overtime and some of that overtime relates to 'regular' work overruns (which would be included), but other overtime relates to irregular weather-related events, could these two types of overtime could be coded and treated separately for the purposes of inclusion in OWP or does "overtime" need to be treated as one form of payment?

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9 Above n 1, at [47].

10 The Law Society understands the Employment Court is shortly to consider the meaning of "regular" in the context of commission payments under section 8(2) of the Act and whether they are included in employees' ordinary weekly pay.

11 Section 8(2) sets out the meaning of ordinary weekly pay.

What payments are included in 'gross earnings'

5.5. In addition to the examples set out in Annex Two, the Taskforce may wish to consider the treatment of other payments that fit less obviously into the definition of 'gross earnings' in section 14 of the Act, including:

(a) Non-taxable reimbursing allowances (particularly where the link to actual cost was established some time ago and overtime the allowance has risen at the same rate as other wage increases);

(b) Treatment of equity benefits provided, for example, under employee share schemes;

(c) Payments made directly to employees but attributed to other benefits for example medical benefits, retiring allowances;

(d) Cashing up of leave in addition to the statutory week i.e. additional contractual leave;

(e) Redundancy compensation payments required under an employment agreement; and

(f) Payments in lieu of notice.

Definition of 'otherwise working day'

5.6. Section 12 of the Act sets out the determination of what would otherwise be a working day. The criteria in section 12 apply only when it is not "clear" whether a day would otherwise be a working day for the employee. Ascertaining whether a working arrangement is "clear" or not should be able to be resolved in an employment agreement, but this may not always be the case. If it is unclear whether a day would otherwise be a working day, this creates further uncertainty when applying the criteria.

5.7. When considering the adequacy of the current criteria to determine whether a period is an 'otherwise working day', as well as looking at shift patterns and irregular working arrangements, for rostered employees on public holidays, the Taskforce may wish to take into account as part of an examination of the criteria in section 12, whether the roster reflects what would have happened had the day not been a public holiday. For example, whether a restaurant is busier/less busy so they have more/fewer employees working on a public holiday than an "ordinary" day and whether transport operations running a "Sunday schedule" on a public holiday are employing less people than would otherwise have been employed

Definition of 'ordinary working week'

5.8. The Law Society agrees that the definition of 'ordinary working week' needs clarification. When considering what constitutes an ordinary working week, the Taskforce may wish to give some thought to:

(a) The way in which Guaranteed Minimum Hours fit into the definition (particularly where there is a contractual ability to depart from those hours by a particular percentage) and whether Guaranteed Minimum Hours should be treated in a different way to "profiled hours";[12] and

[12] The Law Society understands that in many payroll systems a profile of the employee's working hours is created (usually based on their contractual hours) upon which a number of payroll decisions are made.

(b) The degree of departure that can be tolerated before a pattern of work becomes "not ordinary" (i.e. extraordinary).

Employers/payroll systems calculating entitlements in hours rather than week or days

5.9. The Taskforce may wish to consider the following additional issues that affect employers calculating entitlements in hours rather than days or weeks:

(a) The use of a 4/52 method for accruing leave, which effectively accrues leave on an average of the hours worked, as this can cause issues where working patterns change during the year if the portion of the entitlement taken is calculated at the time the leave is taken; and

(b) Payroll systems that accrue leave on one basis and then deduct from the accrual on another (for example, accruing based on profiled hours but deducting based on an average of hours worked).

6. Q10, 11 – Do you agree with the description of the issues relating to annual holidays here and in Annex Two? If not, why not? Are you aware of any other issues relating to annual holidays? If so, what are they?

6.1. In general, the Law Society agrees with the description of annual leave issues set out in section 4.2 of the Paper and in Annex Two. The Taskforce may wish to consider the following additional issues. Where appropriate, we have used the headings set out in Annex Two of the Paper to identify the nature of the relevant issues.

Determining what payments are included in the OWP calculation

6.2. In addition to the difficulties with the meaning of "regular", the meaning of "one-off" or "exceptional payments" in section 8(1)(c) of the Act (which impacts on the calculation of OWP in section 8(1)(2)) is unclear. Further, the relationship between Gross Earnings and OWP (calculated under section 8(1) of the Act) is also unclear. For example, it is not clear whether regular reimbursing payments (which are explicitly excluded from Gross Earnings and therefore from OWP calculated under section 8(2), but are not explicitly excluded from OWP under section 8(1)) need to be included, or whether the Gross Earnings definition effectively forms an entry hurdle to OWP.

Inconsistency in the calculation of Average Weekly Earnings

6.3. Annex Two of the Paper identifies an inconsistency between sections 5 and 21 of the Act when calculating the average weekly earnings (AWE). Practical difficulties can also arise for employers as payroll systems that pay on a weekly or fortnightly basis cannot split pay periods to calculate 12 months' Gross Earnings accurately. This can leave employers with a 26 fortnight/52 week calculation and a risk of non-compliance or a 27 fortnight/53 week calculation and an overpayment.

Annual holiday pay across multiple pay periods (difference between OWP and AWE)

6.4. The Law Society understands that many payroll systems split leave between pay periods (so that if an employee takes three days' leave, but two days fall in one pay period and one day in the next pay period), the system will perform two separate leave calculations, and in doing so will use two different Gross Earnings figures to calculate AWE. This creates a

practical risk of non-compliance with the Act. The Taskforce may also wish to consider whether a period of annual leave split by a public holiday or sick leave is to be treated as two periods of leave or one for the purposes of determining the calculation dates.

Additional issues

6.5. The Law Society is aware of the following additional issues that have caused problems for several employers. These include the treatment of back pay and the calculation of the 12-month period of continuous employment when an employee has taken leave without pay.

(a) When calculating back pay (for example a salary increase that is backdated), the Act is unclear as to whether employers are required to go back and recalculate all leave entitlements between the initial period when the payment took effect and the date of the actual back payment, or whether the back payment should simply be added to Gross Earnings for the 52 weeks going forward, which may artificially inflate that figure.

(b) Where an employee takes unpaid leave for a period in excess of a week (other than sick or bereavement leave), then the employer is required to move that employee's anniversary date or, with the employee's agreement, reduce the divisor for the AWE calculation to account for the unpaid leave in excess of a week.[13] There is a lack of clarity in the Act around whether periods of unpaid leave during a rolling 12-month period are treated separately or continuously (for example, if an employee takes two week's unpaid leave and then a further period of a week's unpaid leave four months later). The inability to reduce the divisor in respect of sick and bereavement leave may have the effect of disadvantaging employees taking this leave, as compared with employees taking unpaid leave for other reasons. In addition, many employers may not be aware of the requirement in the Act to obtain employee agreement prior to reducing the divisor (as opposed to changing the anniversary date) and in many cases, an automatic reduction in the divisor is built into the payroll software.[14]

7. Q12, 13 – Do you agree with the description of the issues relating to BAPS[15] leave set out on pages 18-19 and in Annex Two? If not, why not? Are you aware of other issues relating to BAPS leave? If so, what are they?

7.1. In general, the Law Society agrees with the description of BAPS leave issues set out in section 4.3 of the Paper and in Annex Two. The Taskforce may wish to consider the following additional issues. Where appropriate, we have used the headings set out in Annex Two of the Paper to identify the nature of the relevant issues.

Certainty of variable payments for relevant daily pay

7.2. The Act does not currently specify the degree of certainty required in respect of calculating the amount that an employee would have earned had they worked on that particular day. For example, if an employee very rarely works overtime, does an employer need to be 100%

13 See section 16 of the Act.

14 See section 16 of the Act.

15 Bereavement leave, alternative holidays, public holidays, sick leave.

certain that no overtime would have been worked on that day? There is currently a lack of clarity as to what the appropriate test is in these circumstances.

Determining what additional payments need to be included in relevant daily pay calculations

7.3. In addition to the issues raised in the Paper at 4.3, the Act in its current form is not clear as to whether reimbursing allowances need to be included in the calculation for relevant daily pay if the cost to which the reimbursing allowance relates is not incurred but would have been incurred had the employee worked that day. Another area where the Act creates uncertainty is whether reimbursing allowances (and other allowances not strictly related to time worked) need to be paid at time and a half when the employee is working on a public holiday.

Determining 'what is a day'

7.4. Similarly, to the calculation of a "week" for annual leave purposes, determining a "day" for the purposes of making a deduction from a sick leave or bereavement leave entitlement, can cause difficulties when an employee's working hours vary from day to day or where a shift straddles midnight. For example, if an employee works from 9pm to 7am and is sick for their shift, is one day or two days' sick leave deducted, or is it seen as two part days? Similar issues can arise if an employee takes only a few hours off work as sick leave and not a full day. The Act could clarify whether an employer can divide a day of leave to account for this.

8. Q14, 15 – Do you agree with the description of other issues in Annex Two? If not, why not? Are you aware of any further issues you believe should be considered? If so, what are they?

8.1. In general, the Law Society agrees with the description of other issues set out in section 4.3 of the Paper and in Annex Two. The Taskforce may wish to consider the following additional issues. Where appropriate, we have used the headings set out in Annex Two of the Paper to identify the nature of the relevant issues.

Coverage of bereavement leave list

8.2. In addition to considering whether the current categories of person for the purposes of bereavement leave under section 69(2) of the Act are relevant, the Taskforce may wish to consider the potential impact of the Holidays (Bereavement Leave for Miscarriage) Amendment Bill (currently awaiting its first reading). This bill proposes amendments to bereavement leave entitlements following the death of a foetus. Potential issues for consideration may include the question of multiple births and how the proposed legislative change interacts with the provisions in the Parental Leave and Protection of Employment Act 1987 around stillbirth (and the difference between a miscarriage and a stillbirth). Further, the consequent entitlement to parental leave may have some implications, as well as the interaction between a miscarriage and sick leave when the employee is suffering from a physical or mental health issue as a result of the miscarriage. Consideration may also need to be given to the way in which surrogacy arrangements affect bereavement leave under the Act.

Holidays Act override in Parental Leave and Employment Protection Act

8.3. In addition to the issue raised in respect of payment for annual holidays to which an employee becomes entitled during and directly following parental leave, the Law Society notes that many payroll systems can not differentiate between leave to which the employee became entitled prior to going on parental leave (which must be calculated at the usual rate) and leave to which the employee became entitled either during parental leave or in the 12 months following their return to work.

Closedowns

8.4. In addition to the issues raised in the Paper, the definition of "closedown period" in the Act[16] creates some uncertainty as to whether an "informal closedown" or "partial closedown", where a skeleton staff is retained but others are required to take leave, meets the definition under the Act. Section 31 of the Act enables an employer to have different closedown periods for each separate part of the business but does not define whether "separate" could capture informal or partial closedowns. The Act also does not currently provide for employees to take some unpaid leave during the closedown and save some of their entitlement for a later date.

9. Conclusion

9.1. This submission has been prepared with assistance from the Law Society's Employment Law Committee. If you wish to discuss the submission, please contact the committee convenor, Maria Dew, via the committee secretary Amanda Frank at amanda.frank@lawsociety.org.nz / (04) 463 2962.

Yours sincerely

Kathryn Beck
President

[16] See section 29 of the Act.