



BRIEFING

Interim Report from the Holidays Act Taskforce

Date:	14 December 2018	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2081 18-19

Action sought		
	Action sought	Deadline
Hon Iain Lees-Galloway Minister for Workplace Relations and Safety	Agree to the proposed two-month extension to the timeframe with the Taskforce reporting to you in July 2019	25 January 2019

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Gerard Clark	Employment Standards Policy Manager	04 901 8590		✓
Jon Saunders	Principal Analyst, Employment Standards	04 897 7651		

The following departments/agencies have been consulted

Minister's office to complete:

- ☐ Approved
☐ Noted
☐ Seen
☐ See Minister's Notes

- ☐ Declined
☐ Needs change
☐ Overtaken by Events
☐ Withdrawn

Comments



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Interim Report from the Holidays Act Taskforce

Date:	14 December 2018	Priority:	Medium
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Purpose

1. This is the Interim Report from the Holidays Act Review Taskforce (the Taskforce) which you established in May 2018 to review the Holidays Act 2003 (the Act) and make recommendations for change.

Executive summary

2. The Taskforce is making good progress and is currently identifying and developing possible solutions to address the issues with the current Act. The Taskforce expects to be in a position to report back to you with recommendations for change that have been robustly tested in July 2019. This is a slight extension to the anticipated report back date of May 2019 to allow the Taskforce to conduct some additional targeted consultation on its recommendations prior to reporting to you.
3. To date, the Taskforce has published an Issues Paper and received almost 90 submissions on issues with the Act and ideas for change. The Taskforce has considered a number of options for change and has identified two main alternative options for determining and paying leave entitlements. It now intends to test these options with an independent payroll advisor.
4. In addition to its detailed testing with a specialist payroll advisor, the Taskforce also intends to conduct targeted confidential consultation with key stakeholders including a broader group of payroll providers in the first half of 2019. This will ensure that the Taskforce can be confident that its final recommendations are credible, implementable and will meet the objectives of the review (outlined in Annex One).

MBIE view on the proposed extended timeframe

5. MBIE supports the Taskforce's request for a two-month extension to the timeframe and recommends that you agree to it. The additional consultation that the extension would allow for will mean that the Taskforce's recommendations are better informed, better understood by key stakeholders and more likely to resolve current issues without creating any unintended consequences.
6. If the Taskforce did not undertake this additional consultation it is likely that MBIE would seek to do so after the Taskforce reported. The impact on the overall timeframe for making policy decisions on changes to the Act is therefore likely to be minimal. MBIE considers that the two-month extension to the timeframe is justified.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** the attached interim report from the Holidays Act Taskforce

Noted

- b **Agree** to a two-month extension to the review timeframe to allow for additional targeted consultation with the Holidays Act Taskforce reporting to you with its final recommendations in July 2019.



Gerard Clark
Manager, Employment Standards Policy
Labour and Immigration Policy, MBIE

14 / 12 / 18
..... / /



Hon Iain Lees-Galloway
Minister for Workplace Relations and Safety

17 / 12 / 18
..... / /

Agree/Disagree

Background

7. On 29 May 2018, following Cabinet agreement earlier in May, you announced the establishment of a Taskforce to review the Act.
8. The Taskforce comprises BusinessNZ, the New Zealand Council of Trade Unions (NZCTU) and government (MBIE, the State Services Commission and Inland Revenue are all represented) and is chaired by Professor Gordon Anderson, an employment law specialist from Victoria University. MBIE provides the Secretariat to the Taskforce.
9. The Taskforce had its first meeting in July 2018 and has met monthly since then. The Taskforce's Terms of Reference are included as Annex One.

As part of Stage One of the review the Taskforce published an Issues Paper in August 2018

10. At its first meeting the Taskforce agreed to the following three-stage process for the review:
 - Stage One - Understanding the full range of issues with the current Act (including the publication of an Issues Paper to seek feedback from key stakeholders)
 - Stage Two - Identifying and testing possible solutions (including robust testing of the impact of alternative options on different forms of working arrangements, employers and sectors)
 - Stage Three - Confirming the preferred option and drafting the Taskforce's recommendations and final report.

The Issues Paper set out a number of key issues that employers, employees and payroll providers experience with the Holidays Act...

11. In late August 2018 the Taskforce published an Issues Paper on MBIE's website which set out its understanding of the key issues employers, employees and payroll providers face in trying to implement the Act. The Issues Paper sought feedback from key stakeholders on whether:
 - the issues set out in the Issues Paper were described accurately?
 - stakeholders had experienced any other issues working with the Act that were not captured in the paper?
 - stakeholders had any suggestions or proposals for change?
12. In recent years a number of issues have been identified with the Act that have made it difficult to implement in practice. In addition to a range of specific issues relating to specific parts of the Act (for example, determining entitlements and payments for annual holidays), there are also some more fundamental, cross-cutting issues. These cross-cutting issues relate to the design of the Act itself and are the cause of many of the perceived problems employers, employees and professional service providers (including payroll providers) face in working with the Act. The main issues in this category are:
 - *the lack of specific prescription in the Act.* For example, the Act does not define a 'week' for the purpose of the annual holidays entitlement, which causes difficulties when it is not obvious (for example, if employees work on a roster pattern that does not fit a weekly cycle, or they work variable hours and days from week to week).
 - *the complexity of the Act.* There are a number of different calculations for different parts of the Act. Often employers are unclear which calculations should be used and many

employers are not using the correct calculations at the correct times (or are carrying out the calculations incorrectly).

- *the lack of clarity.* For example, there is insufficient guidance provided to ensure a common understanding of terms such as 'regular' between all parties. It is also unclear how to translate the hours generally used as the base unit of time by payroll systems into the days and weeks as required by the Act, especially when an individual's working arrangements change.

13. In addition to these cross-cutting issues there are a range of specific issues related to those sections of the Act that deal with:

- *the entitlements to, and payments for, annual holidays.* For example, determining what 'a week' is when it is not clear from the working pattern, knowing which method to use to determine payments for annual holidays and how to use it correctly, and using the Pay As You Go provisions inappropriately.
- *the entitlements to, and payments for, bereavement leave, alternative holidays, public holidays and sick leave (BAPS leave).* For example, determining an 'otherwise working day' and determining what payments are included in an employee's 'relevant daily pay' and when 'average daily pay' can be used instead.

14. The Issues Paper set out the issues noted above in some detail and asked for feedback from stakeholders on a number of specific questions.

...and stakeholders generally felt the Issues Paper captured the main issues they experience in working with the Act.

15. The Taskforce received a good response to the Issues Paper with 87 substantive submissions received. The submissions covered a wide range of issues, ranging from a focus on a single specific issue, to comments relating to many aspects of the Act and suggestions for new systems to replace the existing Act.

16. The 87 substantive submissions comprised:

- 41 submissions from employers
- 13 from payroll practitioners or providers
- 14 from individuals
- 19 from other groups or organisations (such as law and accounting firms submitting based on their clients' experiences).

17. NZCTU is seeking the input and views of individual trade unions through its own internal consultation process throughout the review. NZCTU then represents the views of these unions in discussions at Taskforce meetings. This process explains the lack of responses from individual trade unions to the consultation on the Issues Paper.

18. The vast majority of submissions (80) felt that the Issues Paper accurately captured the main issues with the current Act.

Many suggestions for change were received with some consistent key themes

19. Many of the responses to the Issues Paper made suggestions about how the system could be improved. While there were many detailed submissions with specific proposals, there were a number of key themes that emerged from the submissions. The 'headline' messages that came through from the submissions in relation to any potential changes were:

- strong support for a more prescriptive approach (whatever shape this took)
- strong support for a simplified system with fewer calculations

- strong support for an accrual-based system (similar to the Australian system)
- strong support for a system based on hours.

20. A more detailed summary of the submissions received is attached as Annex Two.

The Taskforce is now considering options to address the issues with the current Act

Two main options are currently being considered...

21. While the Taskforce has considered a wide range of options for change it is currently considering two main options. Both involve a simplified system for how the payment for all forms of leave should be calculated with alternative systems for calculating an individual's leave entitlement.
22. The first option that is being considered would retain the existing entitlement-based system whereby an employee becomes eligible for 4 weeks of annual leave after 12 months of work but would provide greater clarity about how to calculate leave entitlement for those with unpredictable work patterns.
23. The second option would be based on an accrual system whereby an employee accrues leave from their first day of employment up to the existing entitlement of 4 weeks.
24. Both options would also include a much greater level of prescription about how leave entitlements and payments should be calculated, in particular for those with working arrangements with variable hours and/or pay.
25. The Taskforce has not settled on final versions of these options, and the testing phase will involve assessing a number of sub-options which may produce slightly different results for different types of working arrangements.

...and these options will be rigorously tested with payroll systems and key stakeholders.

26. The Taskforce is conscious that any new system it recommends must protect employee's entitlements while being capable of being implemented in the New Zealand payroll environment (as set out in the Terms of Reference). The Taskforce is planning a robust testing phase to ensure that it fully understands the implications that different options would have on the entitlements received by employees across different working arrangements, employers and sectors.
27. The Taskforce has contracted a specialist provider to conduct detailed payroll testing and provide independent advice to the Taskforce on the implications these options for change would have for employees, employers and payroll systems.
28. This independent advice to the Taskforce will be supplemented by additional targeted consultation with key stakeholders with a significant interest in the outcome of the review. For example, the Taskforce intends to consult, on a confidential basis, with a broader range of payroll providers in 2019. The groups represented on the Taskforce (NZCTU, Business NZ and the government) will also undertake their own consultation with their own networks.
29. Only once this full series of testing has been carried out and the implications of the different options are well understood will the Taskforce consider its final recommendations.

The Taskforce will also make recommendations in relation to a range of other issues with the Act...

30. There are also a range of other more specific issues relating to the Act which the Taskforce will consider and may make recommendations about. Some of the more substantive issues that the Taskforce will consider include:
- *Employees who miss out on public holidays because their work pattern does not include a Monday* - It has been suggested that employees who do not work a regular 5 day week miss out on the full entitlement to public holidays because when a public holiday falls on a weekday that they do not usually work they do not receive a paid day off. They may also not benefit from any public holiday that falls on a Saturday or Sunday being transferred to a Monday.
 - *The Holidays Act override in the Parental Leave and Employment Protection Act (PLEPA)* - The PLEPA overrides the Holidays Act so that a person who returns to work after a period of parental leave is entitled to only average weekly earnings for 12 months. This effectively means that annual holidays taken the moment they return are paid \$0, which gradually increases over the next 12 months. It has been argued that this approach is discriminatory against parents who have taken parental leave (overwhelmingly women), and contrary to the objectives of the PLEPA (to protect the rights of employees during pregnancy and parental leave).
 - *Taking sick leave for part days* - Some employees may only need to be off work for part of a day (e.g. they go home early). The Act is silent on the possibility for part days to be paid as sick leave, but some employers already do this anyway.
 - *Whether a new or revised Act should include requirements in relation to the software to be used for Holidays Act purposes* - Adopting this type of approach would be similar to approaches used by Inland Revenue in relation to tax compliance and could provide greater assurance that employers were complying with the Act. Consideration will need to be given to the compliance costs (for both government and employers) of the accreditation or other regulation of software.
 - *The treatment of existing leave entitlements upon the sale and transfer of a business* - The Act requires employers to pay out any outstanding entitlements to their employees when employment ends (including when a business is sold or transferred). Despite this, industry practice is often for holidays entitlements (e.g. accrued sick leave, or annual holidays) to be retained by an employee when they are transferred from one employer to another. The Act does not currently provide for this practice.

...before the Taskforce reports to you with its final recommendations in July 2019.

31. When it was established the Taskforce was expected to report to you with its final recommendations within 12 months. While the Taskforce initially planned to report to you in May 2019, it now proposes to report to you in July 2019 to allow time for the targeted consultation with key stakeholders outlined above to take place.
32. The Taskforce considers that the benefits of this additional targeted consultation (which would support the credibility and validity of the final recommendations) justify a minor

extension to the timeframe of the review. The extension would mean that while the review of the Holidays Act would take longer than the original timeframe, the Taskforce itself (which held its first meeting in July 2018) would report back within 12 months.

Annex One: Holidays Act Review Taskforce – Terms of Reference

Purpose

1. The purpose of the Holidays Act Working Group (the Group) is to make recommendations to Government for a clear and transparent set of rules for providing entitlements to, and payment for, holidays and leave that can be readily implemented in a payroll system and is applicable to an increasingly diverse range of working and pay arrangements.
2. It is important that a customer-focused approach is taken to this review to ensure that recommendations are readily implementable by employers and their payroll providers.

Background

3. There is widespread non-compliance with the Holidays Act 2003 (the Act) and it is generally accepted that this is due both to issues with the implementation of the legislation in payroll systems and the business processes that support these, and issues with the legislation itself.
4. The Act works well for a standard, five day, 40 hour week, but can be difficult to apply to more diverse working arrangements and complex remuneration packages. This is primarily because the Act is based on two key principles relating to entitlements and pay:
 - a) that entitlements are determined in relation to the work pattern at the time the leave is taken
 - b) that employees should not be financially disadvantaged by taking leave, that is, they should be paid (at least) what they would have earned had they worked.
5. In these situations, the Act relies heavily on employers making judgements as to how the provisions of the Act apply to the specific circumstances of the individual employees, and in some cases agreement with the employee is required. In some cases, these may need to happen each time leave is requested.
6. The result is an Act that does not provide certainty to employers and employees, is difficult for employees and employers to understand and interpret, is hard to systematise in a payroll system, and can incur relatively high compliance costs for employers.

Objectives

7. The Group is required to develop, test and make recommendations to the Government on policy options for the provision of, and payment for, holiday and leave entitlements that:
 - a) continue to promote the existing purpose of the Holidays Act 2003
 - b) provide clarity and certainty for employers and employees so that employees receive their correct entitlements
 - c) are simpler than the current Act in relation to provisions of, and payment for, entitlements to holidays and leave
 - d) are readily implementable in a payroll system
 - e) minimise compliance costs for employers
 - f) minimise perverse incentives on employers and employees
 - g) ensure the balance of decision-making between employers and employees when it comes to requests for holidays and leave is appropriately calibrated

- h) are readily applicable to the full range of working and remuneration arrangements in the labour market both now and in the future
- i) aim to protect overall entitlements for employees.

Scope and parameters

8. The Review will retain the purpose of the current Act (in section 3) and (at least) the current levels of entitlements (such as four weeks' annual holidays, five days' sick leave).
9. The Group will consider:
 - a) options to improve both the provision of, and payment for, entitlements that meet the objectives set out in paragraph 7, and:
 - i. where trade-offs between competing objectives are required, will be explicit about how these are made
 - ii. may include consideration of the place of the standard five day, 40 hour, working week in the Act
 - b) any other matters relating to the Act that it sees fit. This may include holidays and leave entitlements modified by other Acts (such as the Parental Leave and Employment Protection Act 1987).
10. The principles set out in paragraph 4 may also be reconsidered, but options must aim to preserve the intent of these as far as possible.
11. The Group will not, however, consider the complex issue of remediation of historical underpayments of holiday and leave pay.

Membership and Process

12. The Group will consist representatives from MBIE, the State Services Commission and Inland Revenue, along with three to four members each representing workers, employers, led by an independent Chair with the power to commission work.
13. The Group will be chaired by Gordon Anderson, a law professor at Victoria University. The Chair is an independent/neutral party in the Group discussions, whose purpose is to facilitate the parties to reach jointly agreed recommendations to Government.
14. The Group is expected to consult widely to get a comprehensive understanding of the issues with the Act, and draw on international examples of holidays and leave legislation where appropriate.
15. The Group is also expected to work closely with technical experts such as payroll providers, business rules specialists, and service design and delivery specialists to assist with the design and testing of policy options.
16. The Group is required to support their recommendations with quantitative analysis of different options, tested with bona fide payroll data, to ensure that those options are readily implementable and adverse consequences have been identified.
17. The parties agree that consistency of attendees will be important for the Group to achieve its objectives, and will ensure that representatives will not be changed unless this is unavoidable. If any change in representatives is required, the party concerned will ensure the new attendee/s have been well briefed on previous discussions and progress.
18. The parties will each ensure that their constituents/stakeholders have appropriate opportunity to have input into development of options, through the parties' internal governance

arrangements. MBIE will ensure that appropriate cross-agency structures in place for senior government officials to be kept informed of, and have input into, the work of the Group.

19. MBIE will provide secretariat support to the Group and information and research that the Group identifies is required to facilitate its discussions.

Rules of engagement

20. The parties agree that they will:
 - a) work together in good faith, balancing the interests of all parties
 - b) hold discussions in confidence and on a without prejudice basis
 - c) agree any external communications at each meeting.
21. If the parties are unable to reach agreement on recommendations, the Group's final report will outline:
 - a) the areas where the parties have reached agreed recommendations
 - b) the areas of difference.

Timing and reporting

22. The Group will report back to the Minister of Workplace Relations and Safety with their recommendations within 12 months. This timeframe will give the Group sufficient time to commission work and undertake robust testing of options.
23. The Group will also provide an interim report after six months, so that Cabinet – and the New Zealand public – can be informed about the Group's progress.
24. Each party will be responsible for reporting to their constituents/stakeholders, in accordance with any messaging agreed during the Group's discussions and as required by their internal governance mechanisms. In doing so, the parties agree to honour the confidentiality of the Group's discussions.

Annex Two: Summary of submissions on Issues Paper

1. The Taskforce received a good response to the Issues Paper with 87 substantive submissions received. The submissions covered a wide range of issues, ranging from a focus on a single specific issue, to comments relating to many aspects of the Act and suggestions for new systems to replace the existing Act.
2. The 'headline' messages that came through from the submissions were:
 - Strong support for a more prescriptive approach (whatever shape this took)
 - Strong support for a simplified system with fewer calculations
 - Strong support for an accrual based system
 - Strong support for a system based on hours.

Details of submissions

3. 87 substantive submissions on the Taskforce's Issues Paper were received. Of these, 50 were submitted directly to the Secretariat as 'standalone' submissions while 37 were submitted via MBIE's online response form.
4. Along with the 37 substantive online submissions, a further 119 respondents also completed part of the online response form. As these respondents were either duplicates of other submissions or did not provide any comments (apart from their name and contact details) they were excluded from the analysis.

Key themes in submissions

5. The following key themes were raised by submissions on the Issues Paper, with some examples of the specific comments made on each theme.
 - There are a number of reasons why employers have difficulty complying with the Act, including:
 - the Act being overly complex with too many calculations
 - the lack of support or expertise that payroll professionals have
 - the Act is not 'systematisable' as it requires too many judgement calls.
 - The problems with the Act affect many different types of employers and employees, such as:
 - employees who are paid piece rates or commissions, or who work overtime or unpredictable hours
 - employees who change their pay, role or working patterns
 - 'non-standard' workers (e.g. gig workers, shift cycles that are not 7 days).
 - The two broad principles that the Taskforce identified as underpinning the Act (that entitlements should be determined in relation to the work pattern at the time leave is taken, and that employees should not be financially disadvantaged by taking leave) are generally appropriate, although:
 - the principles may no longer be relevant for all workers
 - the principles may not be compatible with simplicity
 - the principles allow employees to 'game' the system and favour the employee over the employer.
 - There are specific issues relating to the provision of annual holidays and BAPS leave, and there are 'cross-cutting' issues that apply to the Act in general, such as:

- terms like 'working week' and 'otherwise working day' being unclear
- closedowns and the sale/transfer of business can cause problems
- the 'Mondayisation' of public holidays can be an issue as employees who do not generally work on Mondays can be seen as missing out on some public holidays
- subjective and/or unclear decisions about when to use various calculations
- the application of leave entitlements to 'casual' employees.
- A number of submissions made comments about the role and function of the Labour Inspectorate, such as:
 - the Inspectorate should provide more guidance and be more accessible to employers who need support with holidays entitlements
 - the Inspectorate should have more responsibility for making consistent binding determinations, but these decisions should be able to be appealed.
- Along with comments about the problems with the current Act, many submitters provided proposals for changes and suggestions for improvements, including:
 - using an accrual system where employees accumulate actual time off, rather than a hypothetical 'week' entitlement
 - providing more guidance on the various terms used in the Act
 - reducing (or eliminating) the subjective decision points in the Act
 - reducing the number of different types of payments and calculations
 - clarifying or simplifying the processes for closedowns, the treatment of casual employees, the transfer of public holidays, alternative holidays and interactions with parental leave
 - requiring (or allowing) payroll providers to have their payroll software accredited as compliant and approved.