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PRELIMINARY REPORT OF THE

**HOLIDAYS ACT
ADVISORY GROUP**

TO THE MINISTER OF LABOUR

May 2001

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1 EXECUTIVE SUMMARY

(a) *General:*

This report addresses the fifty-one issues that the Group has identified in its review of the *Holidays Act 1981* (“the Act”). These issues cover public holidays, annual holidays and special leave. In respect of each issue this report provides:

- a policy recommendation; or
- a position taken by the Employer members of the Group (“Employers”) and a position taken by the Union members of the Group (“Unions”).

In total there are 15 issues on which policy recommendations are made and 36 issues where Employers and Unions have put separate positions.

In general, Employers want to continue with the current level of entitlements. On most other issues, including technical issues, Employers have generally favoured a position which allows an employer and employee to agree to alternative arrangements on the basis that this is the best means to ensure the necessary flexibility. Employers assert that this is to accommodate the wide variation in working patterns that exist in different enterprises.

In general, Unions want an increase in the level of entitlements. On most other issues, including technical issues, Unions have generally favoured a position where the minimum entitlement is fixed by the legislation as opposed to one which allows an alternative arrangement by agreement. Unions assert that this is appropriate for minimum code legislation and provides the best protection for those employees who are vulnerable to exploitation and/or do not have sufficient bargaining power.

The positions taken by Employers and Unions on key issues can be summarised as follows:

(b) *Public holidays:*

(i) Entitlement to public holidays (see 4.1 below):

- Employers consider that an employee should be entitled to a paid public holiday where the public holiday falls on a day that would otherwise be a working day for the employee (current position under the Act).
- Unions consider that in general, an employee should be entitled to a paid public holiday regardless of whether the public holiday falls on a day that would otherwise be a working day for the employee (Unions recognise that there are issues of proportionality in respect of less than full-time employees, e.g. a one day a week employee should not get all 11 paid public holidays).

(ii) Observance of Christmas and New Year public holidays (see 4.3 below):

- Employers consider that where the Christmas and New Year public holidays fall in the weekend they should be automatically transferred to the Monday/Tuesday of the following week unless the employment

agreement provides that they are to be observed on some other day (current position under the Act).

- Unions consider that the Christmas and New Year public holidays should be by default observed on the days they fall for employees who normally work on the weekend and transferred to the following Monday/Tuesday for employees who do not normally work on the weekend.

(iii) Day in lieu for working on Waitangi Day/ANZAC Day (see 4.5 below):

- Employers consider that where an employee works on Waitangi Day or ANZAC Day, the employee should only be entitled to a day in lieu if he or she is paid ordinary rates of pay (current position under the *Waitangi Day Act 1976* (“the WDA”) and the *ANZAC Day Act 1966* (“the ADA”)).
- Unions consider that if an employee works on Waitangi Day or ANZAC Day, the employee should be entitled to a day in lieu irrespective of the pay he or she receives.

(iv) Rate of pay for working on a public holiday (see 4.8 below):

- Employers consider that the rate of pay for any employee who works on a public holiday should be determined by agreement between the employer and employee (current position under the Act for the majority of employees, i.e. those employees not in “factories” and “undertakings”).
- Unions consider that:
 - (1) any employee who works on a public holiday should receive a minimum payment of double the employee’s ordinary rate of pay; or
 - (2) alternatively, if no minimum rate of pay is prescribed, the default penal rate provisions for working on a public holiday for employees in “factories” and “undertakings” should be extended to cover all employees.

(c) *Annual holidays:*

(i) Entitlement to annual holidays (see 5.1 below):

- Employers consider that an employee should be entitled to 3 weeks annual holidays (current position under the Act).
- Unions consider that an employee should be entitled to 4 weeks annual holidays.

(ii) Payment of annual holiday pay periodically in advance (see 5.10 below):

- Employers consider that an employer and employee should be able to agree to the payment of annual holiday pay as an identifiable component of the employee’s hourly/weekly rate.
- Unions consider that:

- (1) in no circumstances should annual holiday pay be paid periodically in advance to an employee. All employees should be paid their annual holiday pay at the time the holiday is taken; or
- (2) alternatively, an employer and employee may agree to the payment of annual holiday pay periodically in advance where the employee is employed for less than 12 months. If the employment continues for 12 months or more the agreement is cancelled (therefore if the employee takes annual holidays the employer will be required to pay holiday pay for those annual holidays, effectively paying holiday pay twice).

(d) *Special leave:*

- (i) Entitlement to special leave (see 6.1-6.3 below):
 - Employers consider that an employee should be entitled to “one week” special leave (apportioned on the basis of the number of days worked each week).
 - Unions consider that an employee should be entitled to 10 days sick/domestic leave and 3 days bereavement leave for each bereavement (assumes a split into different types of leave).

2 INTRODUCTION

2.1 Composition of the Advisory Group

The members who comprised the Advisory Group and the other individuals with whom it consulted are listed at Appendix One (see 9.1 below).

2.2 Terms of Reference

The Terms of Reference of the Advisory Group are set out in full at Appendix Two (see 9.2 below).

2.3 Structure of the report

The structure of this report reflects the deliberations of the Group and is designed to provide policy recommendations to the Minister of Labour.

Preliminary to the Group's deliberations, the Group was provided with a paper entitled "Holidays Act Advisory Group: A Guide to the Issues" by the Department of Labour. The aim of that paper was to define the issues that have arisen out of the Act, set out the current position in respect of each of those issues and capture briefly the surrounding considerations, sub-issues and options. The paper also included how each issue had been addressed in the Holidays Bill drafted in 1998 under the previous Government ("the Bill"). The paper was used by the Group as a basis for its deliberations. This preliminary paper is available to the Minister.

The Group evaluated the various solutions for each issue. On some issues the Group agreed upon a policy recommendation and on the remainder two positions are reported, an Employer position and an Union position. Sections four to seven of this report list each of the issues considered by the Group, the current position on each of those issues, and either the agreed policy recommendation or the Employer and Union positions.

2.4 Policies of the Government Coalition Partners

The Group was advised of the core policies of both the Government Coalition Partners in respect of public holidays, annual holidays and special leave. It is not the policy of either Coalition Partner to allow an employer and employee to agree to trade public holidays (including days in lieu for working on public holidays) or annual holidays for cash. Therefore the Group did not consider tradability in its deliberations or as a possible policy recommendation.

However, Employers advocate that tradability of public holidays (but not annual holidays) should be revisited by the Government Coalition Partners. An employee should be given the ability to choose between a day in lieu or an additional day's pay if he or she works on a public holiday. This would bring the position more in line with that which existed prior to 1991. It would also provide flexibility and allow those employees who value an additional day's pay over a day in lieu to take the extra cash.

Unions assert that an employer and employee should not be able to agree to trade public holidays (or any of the minimum holidays and leave entitlements) for cash. If an employee works on a public holiday he or she should receive a day in lieu and be paid double his or her ordinary rate of pay.

3 DIFFICULTIES WITH THE CURRENT LEGISLATION

The difficulties with the Act are as a result of four factors:

- (a) The Act was designed to accommodate a labour force that predominantly worked an 8 hour day in a Monday to Friday working week.
- (b) The Act was passed under a different labour market regime and did not receive adequate amendment when that regime changed.
- (c) The Act's provisions are complicated and are difficult to apply and understand.
- (d) The Act's provisions are supplemented by numerous judicial decisions which are not evident to a person reading the Act.

The Group noted that there is inconsistency in the Act in its expression of entitlements. The Group recommends that in drafting any new legislation, Parliamentary Counsel seek to obtain consistency throughout the legislation in respect of provisions which define:

- minima which can be exceeded by agreement;
- default provisions - where agreement can be reached to the contrary;
and
- prohibitive rules which cannot be altered by agreement.

4 PUBLIC HOLIDAYS

(a) *Objective of public holidays:*

The Group agreed that the basic objective of public holidays is to provide common days of celebration on days of special significance due to national, cultural or religious reasons. However, beyond that there is a divergence of views between Employers and Unions. These underlie their respective positions on the entitlement to public holidays.

(b) *Employer position:*

Employers consider that public holidays are not primarily provided as days of rest and recreation as that is the objective of annual holidays. In order for the community to celebrate public holidays sufficiently employees should be entitled to a paid day off from their employer only if that day would otherwise be a working day for the employee. An employee should not be financially disadvantaged due to the fact that the community has deemed the day to be significant and therefore a holiday. It follows that if the employee would not otherwise have worked that day, then the employee will not suffer any financial disadvantage and will be able to enjoy a day of special significance on the day it falls.

Employers further consider that the right to public holidays is a minimum entitlement but that it should be able to be varied by agreement. This provides flexibility in order to accommodate the operational needs of the employer, the personal and cultural needs of the employee, and the wide variation in working patterns that exist in different enterprises.

(c) *Union position:*

Unions consider that the right to public holidays is an accepted part of the social and cultural fabric of New Zealand. Although each of the public holidays have their origin in the observance of a particular event of national, cultural or religious significance they have evolved into occasions which are valued also for the coming together of families and friends which occurs on those days. Public holidays are therefore as equally important for family and social reasons as they are for national and religious reasons. The traditional observance of them is also important and forms part of each employee's minimum entitlements. For example, the traditional right to 4 days off around Christmas and Boxing Day is not only a religious celebration but allows people the opportunity to come together and celebrate with family and friends. In this way the right to public holidays and the way in which they are observed forms part of the employee's "cultural capital". They are valued by working people as providing a minimum entitlement before any additional entitlements may be offered by an employer.

Unions also consider that because paid public holidays are a minimum entitlement they are provided specifically for those employees who are vulnerable to exploitation and/or do not have sufficient bargaining power to negotiate a paid day off. Under the current legislation an employee is only entitled to a paid public holiday when the public holiday falls on a day that would otherwise be a working day. This allows an employer to take advantage of an employee, especially if the employee is vulnerable and/or does not have sufficient bargaining power. For example, an employer may manipulate the work roster so that an employee is

unable to prove that the day on which a public holiday falls would otherwise be a working day. Therefore in order to protect those employees and ensure that they receive their entitlement, all employees should be provided with paid public holidays, regardless of whether they fall on a day that would otherwise be a working day.

4.1 Should an employee get a paid public holiday regardless of whether the public holiday falls on a day that would otherwise be a working day for the employee?

(a) Current position under the Act:

- An employee is entitled to a paid public holiday where the public holiday falls on a day that would otherwise be a working day for the employee: s 7A(1).

(b) Employer position:

- Continue with the current position.
 - employers would be faced with a significant increase in costs if they were required to pay all employees for 11 public holidays regardless of whether they were otherwise working days.
 - it is unfair to require employers to pay for public holidays when an employee would not otherwise have worked or been paid.
 - it would be a fundamental change in policy, particularly with the effect on part-time employees and/or 7 day a week enterprises.

(c) Union position:

- In general, an employee should be entitled to a paid public holiday regardless of whether the public holiday falls on a day that would otherwise be a working day for the employee.
 - Unions recognise and acknowledge that there are issues of proportionality in respect of less than full-time employees (e.g. a one day a week employee should not get all 11 paid public holidays). Further work needs to be done so that the entitlement is fair to everyone. However, the number of paid public holidays an employee is entitled to should be dependent upon how many days the employee works per week, not how many hours the employee works per week.

4.2 What mechanism should govern the days on which the 11 public holidays are observed?

(a) Current position under the Act:

- Unless an employer and employee agree otherwise, the public holidays to be observed by default are Christmas Day, Boxing Day, New Year's Day, 2 January, Good Friday, Easter Monday, ANZAC Day, Labour Day, Queen's Birthday, Waitangi Day, and the local provincial anniversary day: s 7A(2).

(b) Employer position:

- Continue with the current position.

- the current position provides flexibility and recognises the operational needs of the employer or the cultural or religious beliefs of the employee.

(c) *Union position:*

- Continue with the default public holidays, but an employer and employee should only be able to agree to observe a public holiday on an alternative day where the agreement is recorded in a collective agreement, or the alternative observance is by reason of the employee's cultural or religious beliefs.
 - by placing a fetter on the ability of an employer and employee to agree, the employer is prevented from using its bargaining strength to take advantage of the employee by either:
 - (1) forcing the employee to agree to an alternative list of public holidays which do not reflect the religious, cultural or national significance of the traditional public holidays (e.g. requiring the employee to observe Good Friday on 3 September); or
 - (2) denying the employee the ability to observe one or more of the 11 public holidays on dates which are more important to him or her for religious or cultural reasons (e.g. Christmas and Easter are Christian holidays and may not be significant to a non-Christian employee).

4.3 Should the observance of the Christmas and New Year public holidays be automatically transferred into the Monday to Friday working week when those days fall in the weekend (i.e. "Mondayised")?

(a) *Current position under the Act:*

- If the Christmas and New Year public holidays fall in the weekend they are automatically transferred to Monday/Tuesday of the following week (i.e. "Mondayised") unless the employment agreement provides that they are to be observed on some other day: s 9 and *Barrycourt Motel & Tourist Flats v Mitchell* [1996] 1 ERNZ 158 (CA).

(b) *Employer position:*

- Continue with the current position.
 - it ensures observance of the Christmas and New Year public holidays for Monday to Friday employees. However, it also allows those employees who normally work in 7 day a week enterprises to agree with their employer to observe the Christmas and New Year public holidays on the days they actually fall.
 - any extension of the current position will result in increased costs to employers.

(c) *Union position:*

- Enact the proposal in the Bill: the Christmas and New Year public holidays are by default observed on the days they fall for employees who normally

work on the weekend and transferred to the following Monday/Tuesday for employees who do not normally work on the weekend.

- an employee who normally works on a weekend should by default receive the benefit of the Christmas and New Year public holidays and should not have to agree to an alternative arrangement with his or her employer. Otherwise, the employer may use its bargaining strength to deny the employee the Christmas and New Year public holidays.
- the traditional right to 4 days off around Christmas (and 4 days off around New Year) is not only a religious celebration but allows employees the opportunity to come together and celebrate with family and friends.

4.4 Should an employer and employee be able to agree to observe Waitangi Day and/or ANZAC Day on alternative days?

(a) *Current position under the WDA and the ADA:*

- Any transfer of the observance of Waitangi Day and/or ANZAC Day from 6 February or 25 April respectively is void and of no effect: s 5(2) of the WDA and s 4(2) of the ADA (see 4.5 below).

(b) *Policy recommendation:*

- Waitangi Day and ANZAC Day be observed on the days they fall (i.e. not “Mondayised”) but the employer and employee may agree to observe them on alternative days.

4.5 Where an employee works on Waitangi Day or ANZAC Day, should the employee’s entitlement to a day in lieu be lost if the employer pays the employee more than ordinary rates of pay?

(a) *Current position under the WDA and the ADA:*

- Where an employee works on Waitangi Day or ANZAC Day, the employee is only entitled to a day in lieu if he or she is paid ordinary rates of pay: s 5(3) of the WDA and s 4(3) of the ADA (see 4.4 above).

(b) *Employer position:*

- Continue with the current position.
 - any extension of the current position will result in increased costs to employers.

(c) *Union position:*

- If an employee works on Waitangi Day or ANZAC Day, the employee should be entitled to a day in lieu irrespective of the pay he or she receives.
 - this would bring Waitangi Day and ANZAC Day into line with the other 9 public holidays.
 - the current position allows employers to pay only marginally more than ordinary rates of pay to avoid granting an employee a day in lieu (e.g. \$1 more).

4.6 What rate of pay should an employee be paid for a public holiday (where the employee does not work on that public holiday)?

(a) *Current position under the Act:*

- An employee is granted 11 public holidays “on pay”: s 7A(1).
- “On pay” interpreted in *Ports of Auckland Ltd v NZ Waterfront Workers’ Union Inc* [1996] 3 NZLR 268 (CA):
 - an employee must be paid for a public holiday what he or she would receive for an “ordinary working day”.
 - the enquiry is not what the employee would have received if he or she had worked that particular public holiday, but what is payable for an “ordinary working day”. That is a matter of construction of the particular employment agreement.
 - anything which is clearly payable only in defined circumstances or at defined times is excluded (e.g. overtime payments, bonuses, allowances, and productivity and incentive based payments).
- An employee employed in a “factory” or “undertaking” is entitled to proportionate shares from his or her previous and current employers of the employee’s wages for an “ordinary working day” but no more than “one ordinary day’s wages”: s 25 (see 4.18 below).

(b) *Employer position:*

- An employee should be paid the employee’s “ordinary pay” for a public holiday (taken from “Holidays Act 1997” drafted by the New Zealand Employers’ Federation Inc (“the NZEF Bill”)) and attached to its submission to the Select Committee considering changes to legislation at that time:
 - “The term ‘ordinary pay’, in relation to any employee, means the remuneration for the ordinary number of hours of work for which the employee is paid at the ordinary time rate of pay, or, in the case where daily rates apply, the ordinary time rate of pay for a day, and, where the employee is provided with board and lodging by the employer, includes the cash value of that board or lodging. Ordinary pay shall not include any penal or overtime rates of pay, or any allowances, bonuses, commissions or incentive payments payable to any employee.”
 - “Where:
 - (1) no ordinary time rate of pay is fixed for any employee’s work under the terms of the employee’s employment [agreement]; or
 - (2) no normal number of hours of work is fixed for any employee under the terms of the employee’s employment [agreement],the rate or number, as the case may be, shall be such as is agreed by the employer and employee, or, failing such agreement, be based on the average of ordinary pay received and/or ordinary hours worked over the immediately preceding 6 month period of the employee’s employment, whichever is the lesser.”

- “Where an employee is provided with board or lodging by the employer, the cash value of that board or lodging shall, for the purpose of calculating ordinary pay, be an amount fixed by the employer.”
- in enabling the parties to agree to an ordinary time rate of pay it overcomes any problems relating to commission or piece-rate based systems.

(c) *Union position:*

- The method of calculating what an employee should be paid for a public holiday should be the same as the methods used for calculating the pay for days in lieu, annual holidays, sick/domestic leave and bereavement leave (see 4.15(c), 5.9(c) and 6.7(c) below).
 - this will avoid the confusion that currently exists in having different methods of calculation for different types of holidays and leave.
- The method of calculation for a public holiday (and all other types of holidays and leave) should be similar to that which is contained in the Bill for annual holidays. The employee should receive the greater of:
 - the employee’s “ordinary pay” as at the beginning of the public holiday; or
 - the employee’s “average earnings” in respect of the 12 months immediately before the beginning of the public holiday.
 - for the definitions of “ordinary pay” and “average earnings” see 5.9(c) below.

4.7 When should an employee be paid for a public holiday?

(a) *Current position under the Act:*

- An employee is paid for a public holiday at the time the public holiday is taken: s 7A(1) and *Ashcroft v Ansett NZ Ltd* [1993] 2 ERNZ 891 (EC) (see 4.16 below).

(b) *Policy recommendation:*

- An employer must make a payment in respect of a public holiday in the pay that relates to the period in which the public holiday occurs.

4.8 What rate of pay should an employee be paid for working on a public holiday (in addition to a day in lieu)?

(a) *Current position under the Act:*

- The rate of pay for an employee who works on a public holiday, but who is not employed in a “factory” or “undertaking”, is determined by agreement between the employer and employee.
- An employee who works on a public holiday, but who is employed in a “factory” or “undertaking”, is entitled to penal rates unless those rates are

negated or varied by the employment agreement: s 25(7)-(9) (see 4.18 below).

- the employee is entitled to payment for the public holiday and double the employee's ordinary rate of pay for time worked (effectively triple time).
- if the employee is employed in a "dairy factory" or "creamery", he or she is entitled to payment for the public holiday and either:
 - (1) double the employee's ordinary rate of pay for time worked (effectively triple time); or
 - (2) 2 whole holidays in lieu at such times as the employer may determine being not later than one month after the close of the season in which the holiday occurred.

(b) *Employer position:*

- The rate of pay for any employee who works on a public holiday should be determined by agreement between the employer and employee.
 - the current distinction for employees in "factories" and "undertakings" is unwarranted and out of date (see 4.18(f)-(h) below).

(c) *Union position:*

- (i) Any employee who works on a public holiday should receive a minimum payment of double the employee's ordinary rate of pay.
 - public holidays are not just about marking a day of significance but are also paid time off forming part of an employee's "cultural capital". If an employee works on a public holiday then they have forgone the opportunity to celebrate the day with their family and friends and this should be compensated for by the payment of penal rates, in addition to a day in lieu. A day in lieu may compensate for the holiday itself but it does not give the employee another chance to celebrate a significant day with family and friends.
 - by providing a prescribed minimum rate of pay the default penal rate provisions for working on a public holiday for employees in "factories" and "undertakings" can be removed (see 4.18(f)-(h) below).
- (ii) Alternatively, if no minimum rate of pay is prescribed, the default penal rate provisions for working on a public holiday for employees in "factories" and "undertakings" should be retained and extended to cover all employees (see 4.18(f)-(h) below).
 - this allows the distinction between types of employees to be removed while ensuring that employees in "factories" and "undertakings" do not lose their current entitlement to default penal rates on public holidays.
 - the Group has not been provided with any information which identifies the number of employees in "factories" and "undertakings" who benefit from the default penal rate provisions in the exiting Act and, in the absence of such information, and having regard to the equity consideration of ensuring fair compensation for working on an public

holiday the Unions consider that the default penal rate provisions should be extended to all employees. The Unions also consider that the hours of work issues raised in Part 8 of the report should be considered further in relation to this issue.

4.9 Should an employee who works on a public holiday, but who cannot show that it would otherwise be a working day, be entitled to a day in lieu?

(a) Current position under the Act:

- An employee is only entitled to a day in lieu if the employee works on a public holiday that would otherwise be a working day: *Strauchon v NZ Society for the Intellectually Handicapped Inc* [1994] 2 ERNZ 226 (EC).

(b) Employer position:

- Codify the current position.
 - whether a day is ordinarily a working day is decided on a case by case basis. Labour Inspectors may look at the pattern of work over a period of time and make a recommendation in each particular case.

(c) Union position:

- (i) An employee who works on a public holiday should be entitled to a day in lieu (regardless of whether the day would otherwise be a working day).
 - follows from the position that in general, an employee should be entitled to a paid public holiday regardless of whether the public holiday falls on a day that would otherwise be a working day for the employee (see 4.1 above).
 - ensures that an employee, who has difficulty in identifying whether a day is otherwise a working day due to an irregular work pattern, receives a day in lieu.
 - eliminates the ability of an employer to manipulate its rosters to deny its employees a day in lieu and thus reduce its liabilities.
- (ii) Alternatively, an employee who works on a public holiday should be entitled to a minimum payment of double the employee's ordinary rate of pay (see 4.8(c) above). The employee would also receive a day in lieu if he or she could show it would otherwise be a working day.

4.10 If an employee works on any part of a public holiday should he or she be entitled to a day in lieu?

(a) Current position under the Act:

- If an employee works on any part of a public holiday he or she is entitled to a day in lieu: *NZ Harbour Workers' Union v Lyttleton Port Co Ltd* [1995] 2 ERNZ 177 (EC).

(b) *Employer position:*

- Where an employee's work day falls within one calendar day (i.e. between 12am and 12pm) and the employee works on any part of a public holiday, then the employee should be entitled to a day in lieu.
- Where an employee's work day straddles 2 calendar days, the employee's entitlement to a day in lieu should be dependent upon whether the greatest number of hours from the employee's work day fall on the public holiday (taken from the NZEF Bill):
 - "Employees whose working day straddles 2 calendar days shall be entitled to [a day in lieu] only where the work performed on the public holiday falls within the definition of that employee's 'day' of work, as provided in his or her [employment agreement]. Where the [employment agreement] provides no definition of an employee's day of work, that day, ... shall be the day on which the employee works the greater number of hours. Where an equal number of hours is worked by the employee on each calendar day, the day of work shall be the day on which work commences."

(c) *Union position:*

- Codify the current position.
 - easy to apply and understand.
- In addition, it should be prescribed that if an employee's shift straddles 2 public holidays then the employee is entitled to 2 days in lieu (e.g. an employee who works from 8pm on New Years Day to 4am on 2 January would get 2 public holidays).
 - reflects the current law.
 - it could be a lengthy shift that encroaches on both days (e.g. a 12 hour shift from 6pm to 6am).
 - shift workers should get the benefit of the situation as they are working the unusual hours.
- However, if an employee finishes a shift on a public holiday but starts a new shift with the same employer on the same public holiday then the employee should only be entitled to one day in lieu (e.g. an employee who finished work at 4am on Good Friday but started again with the same employer at 10pm on Good Friday would only be entitled to one day in lieu).

4.11 Should an employee who is on-call on a public holiday but who is not called out be entitled to a day in lieu?

(a) *Current position under the Act:*

- There is no express provision dealing with an employee who is on-call but who is not called out.
- In *O'Brien v Guardian Alarms (Auckland) Ltd* [1995] 2 ERNZ 170 (EC) it was held that an employee who is on-call on a public holiday but who is not called out is not entitled to a day in lieu. However, the Court left the matter

open for a possible different conclusion in situations in which the restriction on the employee's freedom of action is so great that, for all practical purposes, the employee has not had a whole holiday because of a requirement to be ready, willing and able to return to work at short notice.

(b) *Employer position:*

- An employee who is on-call on a public holiday but who is not called out and does not actually perform any work, should not be entitled to a day in lieu.

(c) *Union position:*

- An employee who is on-call on a public holiday but who is not called out should be entitled to a day in lieu.
 - recognises that if an employee is on-call on a public holiday his or her freedom will be restricted in some way.

4.12 Who should determine when a day in lieu is taken?

(a) *Current position under the Act:*

- Unless the employment agreement provides when a day in lieu is to be taken, or the employer and employee subsequently agree, it is the employee's choice when to take it, taking into account the employer's views as to its convenience: *NZ Harbour Workers' Union v Lyttleton Port Co Ltd* [1995] 2 ERNZ 177 (EC).

(b) *Employer position:*

- A day in lieu should be taken by agreement between an employer and employee. Failing agreement it should be the employee's choice when to take it subject to the following restrictions:
 - the employee must take a day in lieu within 12 months of the entitlement accruing;
 - the employee must give 14 days notice to his or her employer of his or her intention to take a day in lieu; and
 - if the employee does not take a day in lieu within 12 months of the entitlement accruing, the employer may direct the employee to take the day in lieu on 14 days notice.

(c) *Union position:*

- Codify the current position.
 - the current position provides flexibility as it enables the issues raised in (b) above and the individual needs of enterprises to be addressed in employment agreements.
 - this issue is also related to the issue of an employer cancelling an employee's annual holidays at short notice (see 5.7 below). An employee who has their annual holidays cancelled may choose to take accrued days in lieu instead.

4.13 Should days in lieu accumulate if not taken within a specified period of time of them accruing?

(a) Current position under the Act:

- A day in lieu should be taken within a year of the entitlement accruing but the right to a day in lieu does not lapse if not taken. Therefore days in lieu may accumulate: *Labour Inspector v Telecom Networks & Operations Ltd* [1992] 3 ERNZ 993 (EC).

(b) Employer position:

- Days in lieu should be allowed to accumulate but subject to the restrictions on when they should be taken set out in 4.12(b) above.

(c) Union position:

- Days in lieu should be allowed to accumulate indefinitely.
 - any restrictions on when a day in lieu should be taken may be addressed in an employment agreement or may be subsequently agreed to by an employer and employee (see 4.12(c) above).

4.14 Should the time period that an employee takes off on a day in lieu reflect the actual time period worked on the public holiday?

(a) Current position under the Act:

- The time period that an employee takes off on a day in lieu does not reflect the actual time period worked on the public holiday. The employee is entitled to a whole day off regardless of the actual time period worked on the public holiday (e.g. if an employee works for one hour on a public holiday the employee is entitled to a whole day off on the day taken as the day in lieu, even if the employee would normally work 8 hours that day).

(b) Policy recommendation:

- Codify the current position.
- Note: the agreement of Employers to this policy recommendation should be read in conjunction with the Employer position on issue 4.10 above.

4.15 What rate of pay should an employee be paid for a day in lieu?

(a) Current position under the Act:

- The rate of pay for a day in lieu is the same as for a public holiday (see 4.6(a) above).

(b) Employer position:

- An employee should be paid the employee's "ordinary pay" for a day in lieu.
 - for the definition of "ordinary pay" see 4.6(b) above.
- A day in lieu should be taken by an employee within 12 months of the entitlement accruing (see 4.12(b) above).

- this allows the calculation of an employee’s “ordinary pay” for the day in lieu to be as close as possible to what the employee would have received for the public holiday.

(c) *Union position:*

- The method of calculating what an employee should be paid for a day in lieu should be the same as the methods used for calculating the pay for public holidays, annual holidays, sick/domestic leave and bereavement leave (see 4.6(c) above, 5.9(c) and 6.7(c) below).
 - this will avoid the confusion that currently exists in having different methods of calculation for different types of holidays and leave.
- The method of calculation for a day in lieu (and all other types of holidays and leave) should be similar to that which is contained in the Bill for annual holidays. The employee should receive the greater of:
 - the employee’s “ordinary pay” as at the beginning of the day in lieu; or
 - the employee’s “average earnings” in respect of the 12 months immediately before the beginning of the day in lieu.
 - for the definitions of “ordinary pay” and “average earnings” see 5.9(c) below.

4.16 When should an employee be paid for a day in lieu?

(a) *Current position under the Act:*

- An employee is paid for a day in lieu at the time the day in lieu is taken: *Ashcroft v Ansett NZ Ltd* [1993] 2 ERNZ 891 (EC) (see 4.7 above).

(b) *Policy recommendation:*

- An employer must make a payment in respect of a day in lieu in the pay that relates to the period in which the day in lieu occurs.

4.17 What provision should be made for days in lieu not taken upon termination of employment?

(a) *Current position under the Act:*

- As set out in *NZ Harbour Workers’ Union v Lyttleton Port Co Ltd* [1995] 2 ERNZ 177 (EC):
 - where the employment is terminated due to either justifiable summary termination, a resignation without notice amounting to constructive dismissal, or the effluxion of time or completion of a task then a payment in lieu of the day off is made.
 - where the employment is terminated on notice by either party, “...the employee can be told that because of the availability of lieu days, while payment will continue throughout the notice period, the requirement to be present at work would be reduced by the number of working days to which a public holiday entitlement still extends.”

- The position is unclear where employment is terminated with a payment in lieu of notice.

(b) *Employer position:*

- Where the employment of an employee is terminated on notice by either party the employer may require the employee to take accrued days in lieu during the notice period.
- Any accrued days in lieu owing on the date of termination (for whatever reason) should be paid out to the employee but if a payment in lieu of notice is made the payment may be deemed to include the days in lieu.

(c) *Union position:*

- An employee should be able to take accrued days in lieu at any time up until the date of termination (including during any notice period) but should not be compelled to do so.
- Any accrued days in lieu owing on the date of termination (for whatever reason) should be paid out to the employee separate from any other payments (including a payment in lieu of notice).

4.18 Should all employees, regardless of where they are employed, be covered by the same rules, or should the provisions dealing separately with employees employed in a “factory” or “undertaking” remain as they presently stand?

(a) *Separate provisions for employees employed in a “factory” or “undertaking”:
Current position under the Act:*

- Separate provisions apply to employees employed in a “factory” (see (d) to (n) below).
- The provisions apply to employees employed in an “undertaking” unless the employment agreement provides otherwise.
- The definitions of “factory” and “undertaking” are set out in Appendix Three (see 9.3 below).

(b) *Separate provisions for employees employed in a “factory” or “undertaking”:
Employer position:*

- The provisions should be removed (but there should continue to be special provision for “night workers in a newspaper factory” (see (l)-(n) below)).
 - there should be no distinction between employees in a “factory” or “undertaking” and other employees.
 - estimate that only a low proportion (less than 10%) of the labour force are employed in a “factory”.
 - the operative definitions are so archaic they are irrelevant in the modern work environment.
 - any issue regarding default penal rates for working on a public holiday (see (f)-(h) below) or on a Sunday (see (i)-(k) below) should be determined by agreement in any type of enterprise.

(c) *Separate provisions for employees employed in a “factory” or “undertaking”:
Union position:*

- (i) The provisions should be removed but an employee who works on a public holiday should receive a prescribed minimum rate of pay (see (f)-(h) below).
- (ii) Alternatively, if no minimum rate of pay is prescribed, the definitions should be removed but the default penal rate provisions for working on a public holiday for employees in “factories” and “undertakings” retained and extended to cover all employees (see (f)-(h) below).

(d) *Proportionate payment for a public holiday: Current position under the Act:*

- An employee in a “factory” or “undertaking” is entitled to a proportionate payment for a public holiday (the “one-tenth” rule): s 25(1)-(6).
 - if an employee starts or finishes employment in a factory in the fortnight immediately before the public holiday, the employee must be paid 1/10 of a day’s ordinary wages for each day worked during the fortnight (e.g. an employee who starts work on the Monday prior to Easter will receive 4/10 of a day’s pay from the new employer and 6/10 from the old employer for Good Friday).
 - if an employee’s employment in a factory ends in the fortnight before a public holiday and the employee does not work elsewhere during that fortnight, the previous employer must pay that employee a whole day’s pay for the holiday.
 - an employee who starts work in the fortnight before the public holiday, and has not been employed in another factory during that 2 week period, is entitled to payment for the whole holiday from the new employer.
 - no employee is entitled to receive payment for more than the equivalent of one ordinary day’s wages for a public holiday.
 - casual employees employed for the purpose of baking/preparing food to meet public demand resulting from a public holiday are not entitled to any proportionate payment for the public holiday.

(e) *Proportionate payment for a public holiday: Policy recommendation:*

- The proportionate payment provisions should be removed.
- This is subject to codification of the rule that on termination of employment, an employee should be paid for a public holiday which falls during the period of any unused annual holidays added to the date of termination (see 5.16 below).

(f) *Default penal rates for public holidays: Current position under the Act:*

- An employee in a “factory” or “undertaking” who works on a public holiday is entitled to payment for the public holiday and double the employee’s ordinary rate of pay for time worked (effectively triple time): s 25(7).

- An employee employed in a “dairy factory” or “creamery” who works on a public holiday is entitled to payment for the public holiday and either: s 25(8):
 - double the employee’s ordinary rate of pay for time worked (effectively triple time); or
 - 2 whole holidays in lieu at such times as the employer may determine being not later than one month after the close of the season in which the holiday occurred.
- Both provisions may be negated or varied by the employment agreement: s 25(9).

(g) *Default penal rates for public holidays: Employer position:*

- The provisions providing for default penal rates for working on a public holiday should be removed.
- The rate of pay for any employee who works on a public holiday should be determined by agreement between the employer and employee (see 4.8(b) above).

(h) *Default penal rates for public holidays: Union position:*

- (i) The provisions providing for default penal rates for working on a public holiday should be removed but any employee who works on a public holiday should receive a prescribed minimum payment of double the employee’s ordinary rate of pay (see 4.8(c) above).
- (ii) Alternatively, if no minimum rate of pay is prescribed, the default penal rate provisions for working on a public holiday for employees in “factories” and “undertakings” should be retained and extended to cover all employees (see 4.8(c) above).
 - this allows the distinction between types of employees to be removed while ensuring that employees in “factories” and “undertakings” do not lose their current entitlement to default penal rates on public holidays.
 - the Group has not been provided with any information which identifies the number of employees in “factories” and “undertakings” who benefit from the default penal rate provisions in the existing Act and, in the absence of such information, and having regard to the equity consideration of ensuring fair compensation for working on a public holiday the Unions consider that the default penal rate provisions should be extended to all employees. Unions also consider that the hours of work issues raised in Part 8 of the report should be considered further in relation to this issue.

(i) *Default penal rates for Sundays: Current position under the Act:*

- An employee in a “factory” or “undertaking” who works on a Sunday is entitled to be paid at double the employee’s ordinary rate of pay but this may be negated or varied by the employment agreement: s 27.

- (j) *Default penal rates on Sundays: Employer position:*
- The provisions providing for default penal rates for working on a Sunday should be removed.
 - The rate of pay for an employee who works on a Sunday should be determined by agreement between the employer and employee.
- (k) *Default penal rates on Sundays: Union position:*
- The Group has not been provided with any information which identifies the number of employees in “factories” and “undertakings” who benefit from the default penal rate provisions relating to Sunday work in the present Act and the Unions recommend that further research be undertaken to enable a policy position to be determined on an informed basis. The Unions also consider that the hours of work issues raised in Part 8 of the report should be considered further in relation to this issue.
- (l) *Special provision for “night workers in a newspaper factory”: Current position under the Act:*
- “Sunday” and “holiday” are defined as being from 12pm to 12am: s 28.
- (m) *Special provision for “night workers in a newspaper factory”: Employer position:*
- Continue with the current position.
- (n) *Special provision for “night workers in a newspaper factory”: Union position:*
- The special provision for “night workers in a newspaper factory” should be removed.
 - Any special provision should be determined by agreement between an employer and employee.

5 ANNUAL HOLIDAYS

(a) *Objective of annual holidays:*

The Group agreed that the objective of paid annual holidays is to allow an employee time off for rest and recreation which has benefits for both employers and employees.

5.1 **Should there be any change to the current entitlement of 3 weeks annual holidays?**

(a) *Current position under the Act:*

- Employees are entitled to 3 weeks annual holidays: s 11.

(b) *Employer position:*

- Continue with the current position.
 - any increase is a direct tax on employers.

(c) *Union position:*

- Increase the entitlement to 4 weeks annual holidays.
 - adequate rest and recreation is necessary in the stresses and demands of the modern work environment.
 - employees need adequate rest to ensure sufficient standards of health and safety in the workplace are maintained.
 - if employees are not well rested then their performance may suffer. It is therefore a benefit to employers to have a well rested workforce as this can result in increased productivity.

5.2 **Should the entitlement to annual holidays be based on “weeks” or should some other basis be used?**

(a) *Current position under the Act:*

- The entitlement to annual holidays is based on “weeks”: s 11.

(b) *Policy recommendation:*

- Continue with the current position.

5.3 **Should there be a qualifying period before an employee becomes entitled to annual holidays and if so, what period?**

(a) *Current position under the Act:*

- An employee becomes entitled to annual holidays after 12 months employment: s 11.

(b) *Policy recommendation:*

- Continue with the current position.

- the 12 month qualifying period ensures that an employee has enough leave to take a portion of his or her annual holidays in a 2 week block or if the employer has a closedown period.

5.4 Should provision be made to ensure that an employee is able to take a portion of his or her entitlement to annual holidays in one block?

(a) Current position under the Act:

- An employer shall allow an employee at least 2 uninterrupted weeks of annual holidays, commencing within 6 months of becoming entitled, and shall allow any balance to the employee within 12 months: s 12(1).

(b) Employer position:

- Unless otherwise agreed, an employer shall allow an employee at least 2 uninterrupted weeks of annual holidays, commencing within 6 months of becoming entitled, and shall allow any balance to the employee within 12 months.

(c) Union position:

- Continue with the current position.

5.5 Should an employee be required to take annual holidays within a specified time of them accruing and if so, should the employee forfeit those annual holidays not taken?

(a) Current position under the Act:

- An employer shall allow an employee his or her annual holidays within 12 months of the entitlement accruing: s 12(1).
- If an employer fails to allow an employee to take his or her annual holidays within 12 months of the entitlement accruing, the entitlement will remain in force until it is allowed: s 12(1A).

(b) Employer position:

- Continue with the current position.

(c) Union position:

- An employer must allow an employee to take his or her annual holidays within 12 months of the entitlement accruing.
- If an employee does not take his or her annual holidays then they accumulate.
 - underpinned by an employer's right to direct an employee to take his or her annual holidays in the absence of agreement.

5.6 What period of notice should be given when an employer requires an employee to take annual holidays at a particular time?

(a) Current position under the Act:

- If an employer and employee cannot agree on when the employee is to take annual holidays, the employer must give the employee at least 7 days notice of the date upon which the employee is required to take annual holidays: s 19.

(b) Employer position:

- In the absence of agreement, an employer should have to give 14 days notice.
 - generally this will only be a fallback position if agreement cannot be reached.
 - the operational needs of an employer dictate that it should have the ability to direct an employee to take annual holidays on appropriate notice.

(c) Union position:

- In the absence of agreement, an employer should have to give 28 days notice.
 - 7 or even 14 days is not sufficient to allow an employee to make travel and other arrangements for annual holidays.

5.7 Should restrictions be placed on an employer's ability to cancel an employee's annual holidays?

(a) Current position under the Act:

- There is no express provision restricting an employer's ability to cancel an employee's scheduled annual holidays.
- If annual holidays are cancelled an employee may bring an action against his or her employer for breach of the duty to act in a fair manner: *Vinning v Air NZ* (unreported, Colgan J, 26 May 1995, AEC 41/95) or to act in good faith under the *Employment Relations Act 2000* ("the ERA").

(b) Policy recommendation:

- Continue with the current position.

5.8 How should periods of authorised unpaid leave (including parental leave, personal leave, ACC and sick leave) affect the entitlement to annual holidays?

(a) Parental leave: Current position under the Act:

- Where an employee takes parental leave then annual holidays continue to accrue. However, the employee's holiday pay is calculated using only the employee's "average weekly earnings" (i.e. the employee will only earn holiday pay for actual time worked): s 42(2) of the *Parental Leave and Employment Protection Act 1987*.

- (b) *Parental leave: Employer position:*
- An employee should not accrue annual holidays when he or she is on parental leave for more than one week.
- (c) *Parental leave: Union position:*
- Continue with the current position.
- (d) *Unpaid leave for personal reasons: Current position under the Act:*
- Where an employee takes unpaid leave for personal reasons, unless the employer and employee agree otherwise, the entitlement to annual holidays and holiday pay continues to accrue while the employee is off work, and when the annual holidays are taken they have to be on pay.
- (e) *Unpaid leave for personal reasons: Employer position:*
- An employee should not accrue annual holidays when he or she is on unpaid leave for personal reasons for more than one week.
- (f) *Unpaid leave for personal reasons: Union position:*
- The employer and employee may agree that the entitlement to annual holidays should not accrue while the employee is on unpaid leave for personal reasons.
- (g) *ACC or unpaid sick leave: Current position under the Act:*
- Where an employee is on ACC or unpaid sick leave the entitlement to annual holidays and holiday pay continues to accrue while the employee is off work, and when the annual holidays are taken they have to be on pay.
- (h) *ACC or unpaid sick leave: Employer position:*
- An employee should not accrue annual holidays when he or she is on ACC or unpaid sick leave for more than one week.
 - an employee is not providing any services so should not accrue annual holidays.
 - an employer may be more inclined to dismiss an employee on long term ACC to avoid an annual holiday liability, rather than work with the employee towards his or her rehabilitation and return to work.
- (i) *ACC or unpaid sick leave: Union position:*
- Continue with the current position.
 - ACC is a no fault system so the employee should not be further penalised.

5.9 How should annual holiday pay be calculated in various circumstances?

- (a) *Current position under the Act:*
- (i) Where annual holidays are taken after the entitlement accrues.

- an employee is paid either at the rate of the employee’s “average weekly earnings” during the year in which the entitlement relates or at the rate of “ordinary pay” at the time of taking the annual holiday, whichever is the greater.
 - where an employee takes his or her annual holidays in more than one period the employee’s holiday pay for each period is divided by the proportion of annual holidays taken in that period.
 - for the purposes of this calculation an employer may set a cut-off date for the calculation of annual holiday pay other than an employee’s anniversary date of employment.
- (ii) Where annual holidays are taken in advance of the entitlement accruing.
- if an employee has completed more than 3 weeks of employment the employee is paid either 6% of his or her “gross earnings” during the period prior to taking the annual holiday (proportionate to the period of annual holidays taken in advance) or at the rate of “ordinary pay” at the time of taking the annual holiday, whichever is the greater.
 - if an employee has not completed 3 weeks of employment the employee is paid 6% of his or her “total ordinary pay” during the period prior to taking the annual holiday less any annual holiday pay already paid.
 - when an employee becomes entitled to annual holidays the employer shall calculate the amount that would have been payable had the holidays not been taken in advance. If the entitlement to holiday pay is greater than the amount actually paid in advance, the employer must make up the difference.
- (iii) Where annual holidays have accrued but have not been taken on termination of employment.
- an employee is paid the balance of his or her annual holidays for the holidays not taken (calculated in accordance with (i) above).
- (iv) Where the employment period concerned is less than 12 months (including an employee who has previously become entitled to annual holidays but his or her employment is terminated prior to accruing further annual holidays).
- if an employee has completed more than 3 weeks of employment the employee is paid 6% of his or her “gross earnings” from the date of commencement of employment or from the date on which the employee became entitled to his or her last annual holiday, to the date of termination, less any annual holiday pay paid in advance.
 - if the employee was off work because of sickness or accident for a complete week or more, the “gross earnings” figure is adjusted to account for the complete weeks off. The adjustment is done by adding the “ordinary pay” the employee would have received for the complete weeks off, less any sick pay received, to the “gross earnings” figure.
 - if an employee has not completed 3 weeks of employment the employee is paid 6% of his or her “total ordinary pay” from the date of

- commencement of employment or from the date on which the employee became entitled to his or her last annual holiday, to the date of termination, less any annual holiday pay paid in advance.
- (v) Where the employer requires its employees to take their annual holidays due to a closedown (see 5.11 below).
- where an employee has not become entitled to annual holidays the employee is paid 6% of his or her “gross earnings” from the date of commencement of employment to the date when the business is closed, less any annual holiday pay paid in advance.
 - where an employee receives holiday pay on closedown the anniversary date of his or her employment is deemed to be the commencement date of the closedown.
 - if the employee was off work because of sickness or accident for a complete week or more, the “gross earnings” figure is adjusted to account for the complete weeks off. The adjustment is done by adding the “ordinary pay” the employee would have received for the complete weeks off, less any sick pay received, to the “gross earnings” figure.
 - for the purposes of this calculation an employer may set a cut-off date for the calculation of annual holiday pay other than an employee’s anniversary date of employment.
- (vi) “Average weekly earnings” means 1/52 of an employee’s gross earnings (the divisor of 52 is reduced by the number of complete weeks during which the employee is unable to work due to sickness or injury or is absent from work while on protected voluntary service or training).
- (vii) “Gross earnings”:
- means in respect of any specified period, the total remuneration payable by way of salary, wages, allowances, or commission (whether in cash or otherwise), any holiday pay and the cash value of any board or lodging provided by the employer.
 - does not include any sum (including a bonus, gratuity, or other lump sum special payment) that the employer is not bound to pay, nor any sick pay or pay in respect of any protected voluntary service or training (for complete weeks only).
- (viii) “Ordinary pay” means the remuneration for the employee’s normal weekly number of hours of work calculated at the ordinary time rate of pay, and the cash value of any board or lodging provided by the employer. Where:
- no ordinary time rate of pay is fixed; or
 - no normal weekly number of hours of work are fixed,
- the rate or number shall be agreed, or, failing such agreement, as determined by a Labour Inspector.
- (ix) The cash value of board or lodging provided by an employer shall be:
- its cash value as fixed by or under any Act, award, or agreement;

- its cash value as assessed for the purposes of s 72 of the *Income Tax Act 1976*; or
- calculated at the rate of \$10 a week for board and \$6.50 a week for lodging, or as ordered by the Governor-General.

The value of any board or lodging paid because the work done is in such a locality as to necessitate the employee sleeping elsewhere than at his or her genuine place of residence, or because of any other special circumstances shall not be included.

(b) *Employer position:*

- This area needs to be simplified to reflect the reality of employers needing to understand and apply a realistic payment regime and employees needing to understand that they have received their correct entitlement. We would refer to the NZEF Bill for specific clauses.

(c) *Union position:*

- (i) The method of calculating what an employee should be paid for annual holidays should be that which is contained in the Bill and should be the same as the methods used for calculating the pay for public holidays, days in lieu, sick/domestic leave and bereavement leave (see 4.6(c) and 4.15(c) above and 6.7(c) below).
 - this will avoid the confusion that currently exists in having different methods of calculation for different types of holidays and leave.
- (ii) Where annual holidays are taken after the entitlement accrues an employee must be paid the greater of:
 - the employee’s “ordinary pay” as at the beginning of the annual holidays being taken; or
 - the employee’s “average earnings” in respect of the 12 months immediately before the beginning of the annual holidays being taken.
- (iii) Where annual holidays are taken in advance of the entitlement accruing an employee must be paid the greater of:
 - the employee’s “ordinary pay” as at the beginning of the annual holidays being taken; or
 - the employee’s “average earnings” in respect of:
 - (1) the 12 months immediately before the beginning of the annual holidays being taken if the employee has worked for not less than 12 months; or
 - (2) the period of employment before the beginning of the annual holidays being taken, if the employee has worked for less than 12 months.
- (iv) Where annual holidays have accrued but have not been taken on termination of employment an employee must be paid the greater of:
 - the employee’s “ordinary pay” as at the date of termination; or

- the employee’s “average earnings” during the 12 months immediately before the date of termination.
- (v) Where the employment period concerned is less than 12 months (including an employee who has previously become entitled to annual holidays but his or her employment is terminated prior to accruing further annual holidays) the employee must be paid 6% of the employee’s “gross earnings” since the commencement of employment (or the anniversary date of his or her employment) less any holiday pay paid in advance.
- (vi) Where the employer requires its employees to take their annual holidays due to a closedown.
 - if an employee has become entitled to annual holidays, or has been employed for not less than 12 months, the employee must be paid in accordance with (ii) above.
 - if an employee has been employed for less than 12 months the employee must be paid 6% of the employee’s “gross earnings” during the period of employment to the beginning of the closedown.
- (vii) “Ordinary pay” means the ordinary daily pay or the ordinary weekly pay (as the case may be) that the employee receives.
 - “ordinary daily pay” means the pay that the employee normally or regularly receives for an ordinary working day.
 - “ordinary weekly pay” means the pay that the employee normally or regularly receives for an ordinary working week.
 - An employee’s ordinary pay is the amount:
 - (1) agreed to by an employer and employee; or
 - (2) in the absence of such agreement, determined by a Labour Inspector.
 - the ordinary pay of an employee does not include any payment of an irregular or special nature that is paid or payable only in special circumstances or at special times.
 - the ordinary pay of an employee includes the value of any board or lodgings provided by an employer to the employee:
 - (1) as agreed by the employer and employee; or
 - (2) as determined by a Labour Inspector if the employer and employee cannot agree on the cash value.
 - the ordinary pay of an employee does not include the cash value of any board or lodgings provided by an employer to the employee:
 - (1) if the work done by the employee is in such a locality as to require the employee to stay overnight elsewhere than at the employee’s genuine/normal place of residence; or
 - (2) if the board or lodgings are provided because of special circumstances.

- A determination by a Labour Inspector may be reviewed by the Employment Court or the Employment Relations Authority (“the Authority”) in proceedings in which the determination is relevant.
- (viii) “Average earnings” means average weekly earnings or average daily earnings or average hourly earnings, as the case may be.
 - an employee’s average weekly earnings are to be calculated:
 - (1) if the employee has been employed for not less than 12 months, by dividing the employee’s annual gross earnings for the immediately preceding 12 months by 52; or
 - (2) if the employee has been employed for less than 12 months, by dividing the employee’s total gross earnings for the completed weeks of employment by the number of those weeks.
 - an employee’s average daily earnings or average hourly earnings are calculated by dividing the employee’s average weekly earnings by the appropriate number of days or hours, as required, having regard to the normal or average number of days or hours that the employee works in a week, as the case requires.
- (ix) “Gross earnings”, in relation to a specified period:
 - means the total amount of remuneration payable by the employer to the employee for the specified period, including:
 - (1) salary or wages;
 - (2) allowances;
 - (3) commission (whether in cash or otherwise);
 - (4) pay for annual holidays or public holidays or sick/domestic leave or bereavement leave taken by the employee during the specified period;
 - (5) the cash value of any board or lodgings provided by the employer;
 - (6) any payment by the employer to the employee paid under the employee’s employment agreement.
 - but does not include any payment by the employer to the employee to reimburse the employee for costs incurred by the employee on behalf of the employer.

5.10 Should an employer be able to pay annual holiday pay to an employee periodically in advance rather than at the time of taking the annual holiday and if so, in what circumstances?

(a) Current position under the Act:

- An employer may agree with an employee of less than 12 months that the payment of annual holiday pay be paid to the employee periodically in advance (i.e. loaded into the employee’s hourly/weekly rate): *Drake Personnel (NZ) Ltd v Taylor* [1996] 1 ERNZ 324 (CA).

- An employer may pay an employee's annual holiday pay due on termination of employment periodically in advance: *Gladstone Milkbar Ltd v Henning* [1998] 1 ERNZ 296 (CA).

(b) *Employer position:*

- An employer and employee should be able to agree to the payment of annual holiday pay as an identifiable component of the employee's hourly/weekly rate.
 - the proposal contained in the Bill (see (c)(ii) below) allows an employee to be paid annual holiday pay twice if the employee is employed for more than 12 months - "double dipping". This may act as a disincentive for an employer to offer employment for longer than 12 months to an employee who has been employed for say 8 months and has had their holiday pay paid to them periodically in advance.

(c) *Union position:*

- (i) In no circumstances should annual holiday pay be paid periodically in advance to an employee. All employees should be paid their annual holiday pay at the time the holiday is taken.
- (ii) Alternatively, the proposal contained in the Bill contains a reasonable compromise position. It allows the payment of annual holiday pay periodically in advance to employees of less than 12 months. If the employment continues for 12 months or more the agreement is cancelled.
 - annual holiday pay must only be paid when the annual holidays are taken or when the employment comes to an end.
 - however, an employer may pay annual holiday pay before holidays are taken, where:
 - (1) the employee is employed to work for less than 12 months;
 - (2) the employee agrees;
 - (3) it is paid as an identifiable element of the employee's ordinary pay; and
 - (4) it is paid at a rate of not less than 6% of the employee's gross hourly or weekly earnings, as the case requires.
 - the agreement must be recorded in the leave record and any annual holiday pay paid must be recorded in the leave record and in any pay advice/slip.
 - if the requirements are not complied with any annual holiday pay paid in advance is treated as gross earnings.
 - if the employment continues for 12 months or more the agreement is treated as having been cancelled at the end of the 12 month period (therefore if the employee takes annual holidays the employer will be required to pay the employee holiday pay for those annual holidays, effectively paying the employee holiday pay twice - "double dipping").

5.11 Should the provisions that contemplate an employer's ability to closedown its business be continued and if so, should they be changed?

(a) Current position under the Act:

- There is provision for the calculation of holiday pay "where work ceases periodically" for employees who have not yet become entitled to annual holidays: s 18.
 - the calculation provisions apply where it is customary for an employer to allow annual holidays to its employees during a period in each year when the business is closed or the work of the employee(s) is discontinued.
 - for the calculation of annual holiday pay on closedown see 5.9(a) above.

(b) Employer position:

- Continue with the current position. In addition, an employer should be expressly allowed to have two closedowns but with only one cut-off point for the purpose of holiday pay calculations.
 - for the Employer position on the calculation of annual holiday pay on closedown see 5.9(b) above.

(c) Union position:

- Continue with the current position.
 - more than one closedown penalises an employee with limited service by forcing two periods of at best, part paid annual holidays.
 - for the Union position on the calculation of annual holiday pay on closedown see 5.9(c) above.

5.12 Should an employer be able to require an employee who is sick or injured, or whose dependant is sick or injured, or who suffers a bereavement to take the period off work as annual holidays?

(a) Current position under the Act:

- An employer cannot require an employee who is prevented from working by reason of sickness or injury to take the period off work as annual holidays: s 14.
- There is no express provision that prevents an employer from requiring an employee whose dependant is sick or injured, or who suffers a bereavement to take the period off work as annual holidays, where the employee's special leave has come to an end.

(b) Employer position:

- Continue with the current position in respect of an employee who is sick or injured.

- An employer should be able to require an employee whose dependant is sick or injured, or who suffers a bereavement to take the period off work as annual holidays where the employee's special leave has come to an end.

(c) *Union position:*

- Continue with the current position in respect of an employee who is sick or injured and extend it to cover an employee whose dependant is sick or injured, or who suffers a bereavement.

5.13 Should an employee who is sick or injured, or whose dependant is sick or injured, or who suffers a bereavement be able to request, and his or her employer be able to allow the employee, to take the period off work as annual holidays?

(a) *Current position under the Act:*

- An employee who is prevented from working by reason of sickness or injury may not take the period off work as annual holidays: s 14.
- There is no express provision that prevents an employee who takes time off work because a dependant is sick or injured, or because of a bereavement to take the period off work as annual holidays.

(b) *Policy recommendation:*

- An employee who is sick or injured, or whose dependant is sick or injured, or who suffers a bereavement should be able to request, and his or her employer should be able to allow the employee, to take the period off work as annual holidays.

5.14 Should an employee who is sick or injured, or whose dependant is sick or injured, or who suffers a bereavement while on annual holidays be able to take that period as special leave?

(a) *Current position under the Act:*

- An employee cannot extend his or her annual holiday by a period equivalent to the length of any sickness or injury suffered while on holiday: *Inspector of Awards v Winstone (Northland) Ltd* [1980] ACJ 127.
- This position would apply in respect of an employee whose dependant was sick or injured, or who suffered a bereavement while on annual holidays.

(b) *Policy recommendation:*

- An employee who is sick or injured, or whose dependant is sick or injured, or who suffers a bereavement while on annual holidays is not able to take that period as special leave, unless otherwise agreed.

5.15 Where an employment relationship is terminated and annual holidays are owing, should the employment relationship cease at the date of termination, or should it be deemed to continue until the annual holidays expire?

(a) Current position under the Act:

- The employment relationship ceases at the date of termination and is not extended to the end of the unused annual holiday entitlement: *Parker v Auckland Regional Council* [1993] 1 ERNZ 152 (EC).

(b) Policy recommendation:

- Codify the current position.

5.16 On termination of employment, should an employee be paid for a public holiday which falls during the period of any unused annual holidays added to the date of termination?

(a) Current position under the Act:

- If a public holiday falls within the period of unused annual holidays added to the date of termination then the employee is entitled to be paid for the public holiday: *Northern Hotel etc IUOW v Dominion Breweries Ltd* [1988] NZILR 810 (LC).

(b) Policy recommendation:

- Codify the current position.

6 SPECIAL LEAVE

(a) *Objective of special leave:*

The objective of special leave is to provide an employee with insurance against loss of income when the employee is unable to work due to sickness or injury, or a person dependant on the employee is sick or injured or when the employee has suffered a bereavement.

6.1 **Should there be any increase to the current entitlement of 5 days special leave?**

(a) *Current position under the Act:*

- An employee is entitled to 5 days special leave: s 30A(1).

(b) *Employer position:*

- The entitlement to special leave should be expressed as “one week” (see 6.3(b) below).
 - this will result in a decrease in the entitlement for employees who work less than 5 days a week and an increase in the entitlement for employees who work more than 5 days a week.

(c) *Union position:*

- An employee should be entitled to 10 days sick/domestic leave and 3 days bereavement leave for each bereavement.
 - this assumes splitting special leave into different types of leave (see 6.2(c) below).
 - the current level of entitlement is too low. On a practical analysis 5 days may be used very quickly in any given year as it covers three separate situations.

6.2 **Should the entitlement to special leave be split up into types of leave such as sick leave, domestic leave and/or bereavement leave (or Tangihanga leave) with separate entitlements for each?**

(a) *Current position under the Act:*

- An employee is entitled is to 5 days special leave which covers sick leave, domestic leave and bereavement leave: s 30A(1).

(b) *Employer position:*

- Continue with the current position but the entitlement should be expressed as “one week” (see 6.3(b) below).
 - special leave is an insurance policy which covers a range of situations that may occur in a person’s life. By allowing the entitlement under one head the employee has the option of using it for whatever situation might arise.

(c) *Union position:*

- Special leave should be split into sick/domestic leave and bereavement leave.
 - this should be coupled with an increase in the entitlement (see 6.1(c) above).

6.3 Should the entitlement to special leave be expressed in “days” or “week(s)”?

(a) *Current position under the Act:*

- The entitlement to special leave is expressed in “days”: s 30A(1).

(b) *Employer position:*

- The entitlement should be expressed as one “week” rather than 5 “days” and apportioned on the basis of the number of days worked each week.
 - prevents the present inequity in that a 5 day a week employee has a special leave entitlement to one working week where a part-time employee working one day each week has an effective entitlement of 5 weeks. This is an additional cost to business.

(c) *Union position:*

- Continue with the current position.

6.4 Should there be a qualifying period before an employee is entitled to special leave and if so, what period?

(a) *Current position under the Act:*

- An employee must be employed for 6 months before he or she becomes entitled to special leave: s 30A(1).

(b) *Employer position:*

- Continue with the current position.

(c) *Union position:*

- There should be no qualifying period so that an employee becomes entitled to sick/domestic leave and bereavement leave on the commencement of employment.

6.5 On what grounds should an employee be entitled to take special leave?

(a) *Current position under the Act:*

- An employee may take special leave when: s 30A(2):
 - the employee is sick;
 - the spouse of the employee is sick;
 - a dependent child or dependent parent of the employee or of the spouse of the employee is sick; or

- the employee suffers a bereavement.
- The reference to “sick” includes “injury”: *Kelcold v O’Brien* [1999] 2 ERNZ 70 (CA).
- An employee suffers a bereavement: s 30A(7):
 - on the death of his or her spouse, parent, child, brother/sister, grandparent or father-in-law/mother-in-law; or
 - on any other occasion on which the employer accepts that, by reason of the death of any person, the employee has suffered a bereavement.
- “Husband” includes a man with whom a woman has entered into a relationship in the nature of marriage although not legally married to him; and “wife” has a corresponding meaning: s 30A(8).
- “Spouse” means the husband or wife of the employee: s 30A(8).

(b) *Policy recommendation (subject to exceptions – see (c) and (d) below):*

- Enact the proposal in the Bill. It codifies the current position in respect of “sickness” including “injury” and ensures compliance with the *Human Rights Act 1993*. The Bill provides:
 - that an employee may take special leave when:
 - (1) the employee is sick or injured;
 - (2) the employee’s spouse is sick or injured;
 - (3) a person who depends on the employee for care is sick or injured; or
 - (4) the employee suffers a bereavement.
 - that an employee suffers a bereavement:
 - (1) on the death of his or her spouse, parent, child, brother/sister, grandparent or spouse’s parent; or
 - (2) on the death of another person, if the employer accepts, having regard to relevant factors, that the employee has suffered a bereavement as a result of that death.
 - “relevant factors” in assessing whether an employee has suffered a bereavement on the death of another person include:
 - (1) the closeness of the association between the employee and the deceased person;
 - (2) whether the employee has to take significant responsibility for all or any of the arrangements for the ceremonies relating to the death;
 - (3) any cultural responsibilities of the employee in relation to the death.
 - the definition of “spouse” includes same-sex couples.

(c) *Employer exceptions to the proposal in the Bill:*

- Employers only agree to the proposal in the Bill if the current level of entitlement is not increased and it is expressed as “one week” (see 6.1(b) and 6.3(b) above).

(d) *Union exceptions to the proposal in the Bill:*

- An employee should also be able to take sick/domestic leave when a person becomes dependent on the employee because they are sick or injured.

6.6 Within what period of time, of the usual time of starting work, should an employee be required to give notice of his or her intention to take special leave?

(a) *Current position under the Act:*

- The employee must notify the employer before the day on which the employee wishes to take special leave or not later than 4 hours after the usual start time on that day: s 30A(5).

(b) *Policy recommendation:*

- The employee must notify the employer before his or her scheduled start time or as soon as practicable thereafter.

6.7 What rate of pay should an employee be paid for a day taken as special leave?

(a) *Current position under the Act:*

- An employer shall pay to an employee, for each day on which the employee takes special leave, an amount equivalent to the pay at the ordinary time rate of pay for the normal number of hours that that employee normally works on that day: s 30A(4).

(b) *Employer position:*

- An employee should be paid the employee’s “ordinary pay” for a day taken as special leave.
 - for the definition of “ordinary pay” see 4.6(b) above.

(c) *Union position:*

- The method of calculating what an employee should be paid for a day taken as sick/domestic leave or bereavement leave should be the same as the methods used for calculating the pay for public holidays, days in lieu and annual holidays (see 4.6(c), 4.15(c) and 5.9(c) above).
 - this will avoid the confusion that currently exists in having different methods of calculation for different types of holidays and leave.
- The method of calculation for a day taken as sick/domestic leave or bereavement leave (and all other types of holidays and leave) should be similar to that which is contained in the Bill for annual holidays. The employee should receive the greater of:

- the employee’s “ordinary pay” as at the beginning of the day taken as sick/domestic leave or bereavement leave; or
- the employee’s “average earnings” in respect of the 12 months immediately before the beginning of the day taken as sick/domestic leave or bereavement leave.
- for the definitions of “ordinary pay” and “average earnings” see 5.9(c) above.

6.8 Should an employer be able to require an employee, who takes or wishes to take special leave, to produce proof of the employee’s entitlement to it and if so, in what circumstances?

(a) Current position under the Act:

- There is no express provision allowing an employer to require an employee to produce proof of the employee’s entitlement to special leave.

(b) Employer position:

- An employment agreement should be able to require an employee to provide proof of the employee’s entitlement to special leave.
 - would cover proof for sickness, domestic and bereavement leave.
 - would enable an employer and employee to agree to practical outcomes such as requiring a medical certificate only after a stated period of time.

(c) Union position:

- Continue with the current position.

6.9 Should an employee be able to accumulate any unused special leave for use in any subsequent leave period?

(a) Current position under the Act:

- Special leave not taken within 12 months of it accruing may not be accumulated for use in any subsequent leave period: s 30A(3).

(b) Employer position:

- An employee should not automatically be able to accumulate any unused special leave for use in any subsequent leave period but may do so by agreement with his or her employer.

(c) Union position:

- An employee should be able to accumulate unused sick/domestic leave for use in any subsequent leave period.
 - assumes that special leave is split into sick/domestic leave and bereavement leave. Bereavement leave will not accumulate as an employee only becomes entitled to bereavement leave when he or she suffers a bereavement (see 6.1 and 6.2 above).

- a cap may be placed on the level of accumulation. The size of the cap being dependent on the level of the entitlement (i.e. if the entitlement remains at 5 days the cap should be higher than if the entitlement is increased (see 6.1 above)).

6.10 Should the entitlement to special leave be in addition to any other special leave type entitlements agreed to by an employer and employee?

(a) Current position under the Act:

- The entitlement to special leave is in addition to any other special leave type entitlements agreed to by an employer and employee (e.g. if an employment agreement grants an employee 10 days special leave then the employee's special leave entitlement is 15 days): s 30A(1).

(b) Policy recommendation:

- The entitlement to special leave should not by default be in addition to any other special leave type entitlements agreed to by an employer and employee.
 - where an employer agrees to provide more favourable entitlements, it is not usually intended that these will be in addition to the minimum entitlements.

7 GENERAL AND ENFORCEMENT

7.1 Should the Crown be bound by holidays legislation?

(a) Current position under the Act:

- Only the provisions of the Act relating to public holidays and holidays in factories and undertakings bind the Crown (except for the Armed Forces): s 7.

(b) Policy recommendation:

- The trend in recent years has been to align the State sector and the private sector under common employment legislation. Therefore the Crown should be bound by holidays legislation, provided that:
 - there are clear grounds for some specific exemptions (e.g. sworn members of the Police and the Armed Forces).
 - the extension of the legislation to the Crown should not of itself affect existing entitlements in the State sector.
 - there may need to be a transition period to enable State sector employers to comply with any new legislation (e.g. 12 months).

7.2 Should “homeworkers” (and any other groups that do not fall within the usual definition of “employee” but are deemed by legislation to be “employees”) be covered by holidays legislation?

(a) Current position under the Act:

- The definition of “employee” contained in the ERA, which includes “homeworkers”, applies in respect of the Act.

(b) Employer position:

- “Homeworkers” should not be covered by holidays legislation until more consideration is given to the practical implications affecting the various arrangements that exist. In particular we note the difficulty in this area where employers have no control over the time or day on which work is actually performed.

(c) Union position:

- Continue with the current position.

7.3 Where an employer dismisses an employee but re-employs the employee within one month (or some other period), should the employee’s employment be deemed continuous in respect of one or more of the entitlements to public holidays, annual holidays and/or special leave?

(a) Current position under the Act:

- An employee’s employment is deemed continuous for the purposes of annual holidays if his or her employer dismisses the employee but re-

employs him or her within one month, unless a Labour Inspector certifies that the employer acted in good faith and not for the purpose of evading any obligation under the Act: s 20.

(b) *Employer position:*

- An employee's employment should not be deemed continuous.
 - difficulties arise with genuine casual employees who may finish an assignment and begin another with the same employer within one month.
 - it is unrealistic for an employer to obtain a certificate from a Labour Inspector. The employer is more likely to employ a different employee.

(c) *Union position:*

- Enact the proposal in the Bill: an employee's employment is presumed continuous for the purposes of public holidays, annual holidays and sick/domestic leave or bereavement leave if his or her employer dismisses the employee but re-employs him or her within one month. The presumption is rebutted if a Labour Inspector certifies that the employee's employment is not to be regarded as continuous.
 - extends the current position to include public holidays and sick/domestic leave or bereavement leave as well as annual holidays.

7.4 Where employers wish to provide for more favourable entitlements than the prescribed minimum, should the entitlements be measured on a comparison of specific provisions or on a package basis?

(a) *Current position under the Act:*

- Annual holidays are measured on a package basis: where an employee is entitled to any benefit that is "not less favourable" than the overall benefits provided by ss 11-15 taken together (the entitlement provisions) or by the benefits provided by any of ss 16-19 or s 21 (the calculation provisions), those sections or that section shall not apply to the employee: s 23(1).
- Public holidays and special leave are not expressly provided for other than the overriding requirement that "any right, power, privilege or other benefit" provided for cannot be contracted out of: s 33(1).

(b) *Employer position:*

- The entitlements offered by an employer should be measured against each of the statutory entitlements (public holidays, annual holidays and special leave) on a package basis.

(c) *Union position:*

- Enact the proposal in the Bill: an employment agreement has no effect to the extent that it excludes or restricts a statutory entitlement.

7.5 Should holidays legislation set out examples to show how the provisions are to be applied to different situations in different workplaces?

(a) Current position under the Act:

- No examples are provided.

(b) Employer position:

- Holidays legislation should not provide examples.
 - examples may be provided in educative material provided by the Department of Labour.

(c) Union position:

- Examples may be useful and would reduce compliance costs. They should appear in an appendix to the legislation.
- Standard clauses setting out an employee's entitlements may also be included as an appendix to the legislation (see 7.6(c) below).

7.6 Should an employer be under an obligation to supply information to its employees on their holiday and leave entitlements?

(a) Current position under the Act:

- An employer is not under any obligation to supply information to its employees on their holiday and leave entitlements.

(b) Employer position:

- Employers should not be under any statutory obligation to supply general information on Holidays Act entitlements as to do so is a significant compliance issue for small employers. However, employers do recognise the practical need to provide information to individuals on their actual entitlement.

(c) Union position:

- An employer should have to provide information to its employees on their holiday and leave entitlements.
 - this is particularly important to young employees who are most vulnerable as they often do not know what their entitlements are.
 - may reduce compliance costs.
 - basic information could be produced by the Department of Labour for use by employers and may be contained on the Department of Labour's website.
- Standard clauses setting out an employee's entitlements may be included as an appendix to the legislation. They could be produced in a form that allowed the clauses to be inserted directly into employment agreements.
 - may reduce compliance costs.

- the main provisions of the legislation could be reproduced as standard clauses.
- the standard clauses may be contained on the Department of Labour's website for downloading by employers, employees and their representatives.
- this issue may be looked at by the Employment Rights Unit (if established) to help reduce compliance costs.

7.7 In what ways can the entitlements to holidays and leave be enforced?

(a) Current position under the Act:

- Holiday books: s 31.
 - an employer must keep a holiday book, which details for each employee, certain prescribed information relevant to each employee's holiday entitlements.
 - may be inspected by Labour Inspectors who may require verification of the entries by statutory declaration.
- Offences: s 34(1).
 - to act in contravention of or fail to comply with any provision of the Act.
 - with intent to deceive, make any false or misleading statement or any material omission in any holiday book or in any communication with or application to the Minister of Labour or any Labour Inspector or other person (whether in writing or otherwise) for the purposes of the Act.
 - resist, obstruct, or deceive any person who is exercising or attempting to exercise any power or function under the Act.
- Penalties: s 34(2) and (3).
 - maximum penalty is \$500. If the offence is a continuing one, a further penalty may be imposed of a maximum of \$100 per day for every day during which the offence continues.
 - a Labour Inspector may commence a penalty action in the Authority for the recovery of a penalty.
- Proceedings: s 35.
 - a Labour Inspector or an employee may take civil proceedings in the Authority for the recovery of any money payable under the Act.
- Demand notices: ss 224-227 of the ERA.
 - if an employee complains, or a Labour Inspector believes on reasonable grounds, that an employee has not received holiday pay then the Labour Inspector must give the employer 7 days to comment on the complaint.

- if the Labour Inspector is satisfied that the complaint is established and that payment will not be made the Labour Inspector may serve the employer with a demand notice.
- if the employer does not lodge an objection to the demand notice with the Authority within 28 days the demand notice becomes prima facie evidence of the debt and may be enforced by compliance order or as a judgment debt.
- where an objection is filed the Authority determines whether the money claimed is due to the employee.
- where the Authority determines the money is payable, the determination is enforceable as a judgment debt.
- where proceedings are commenced by a Labour Inspector to recover holiday pay, the Labour Inspector must not serve a demand notice in respect of the same holiday pay.
- Powers of Labour Inspectors: s 229 of the ERA.
 - may enter workplaces and question any occupants, employees or employers.
 - may inspect and copy wage and time records, any holiday book and/or any other document recording the remuneration of an employee.
 - may require an employer to supply a copy of the wages and time record or employment agreement of an employee.
 - may question an employer about compliance with the Act.
- Proceedings against insolvent companies: s 234 of the ERA.
 - where a Labour Inspector commences proceedings against a company for holiday pay, and establishes that the amount claimed is unlikely to be paid because the company is in receivership, liquidation or has insufficient assets, the Authority may authorise that Labour Inspector to bring an action against any officer, director or agent of the company who authorised the default in payment of the holiday pay.
 - where a Labour Inspector proves that the officer, director or agent of the company authorised the default in payment of holiday pay, the officer, director or agent is jointly and severally liable with the company.

(b) *Employer position (based on the Bill):*

- (i) Only an employee or a Labour Inspector can enforce an employee's statutory entitlement. Non-statutory entitlements may only be enforced by an employee.
 - a union should only be involved as a representative of the employee.
- (ii) A Labour Inspector may take proceedings on behalf of an employee. Any action initiated by a Labour Inspector may be completed by another Labour Inspector.

- (iii) Only an employee or a Labour Inspector may apply to the Authority to recover holiday pay not paid to the employee which, if successful, may be enforced as a debt (once a Labour Inspector has commenced an action he or she cannot serve a holiday pay demand notice).
 - (iv) Only a Labour Inspector may apply to the Authority for a compliance order if an employer has not provided an employee with his or her holiday entitlements or the employer has not complied with its obligation to keep a leave record.
 - (v) An employer who does not comply with the Act is liable to a maximum penalty of \$500. If the offence is a continuing one, a further penalty may be imposed of a maximum of \$100 per day for every day during which the offence continues. Penalties may be awarded to any person the Authority specifies.
 - this is a continuation of the current level of penalties. They should not be increased as the focus should be on simplification and education.
 - (vi) Only a Labour Inspector may commence a penalty action.
 - the function of Labour Inspectors is to ensure compliance with the Act so they should be the only party capable of bringing enforcement type actions.
 - (vii) A “leave record” must be kept that contains certain prescribed information. Only an employee or a Labour Inspector may gain access to the employee’s leave record and may obtain copies of it.
 - (viii) The Authority may find that an employer’s failure to keep a leave record has prevented an employee or a Labour Inspector from bringing an accurate claim for the recovery of holiday pay (or to enforce an entitlement). If so, the Authority may accept as proved, in the absence of evidence to the contrary, claims in respect of the holiday pay paid to the employee and the holidays taken by the employee.
 - (ix) Interest may be awarded on holiday pay.
 - (x) Continue with the provisions in respect of demand notices, powers of Labour Inspectors and proceedings against insolvent companies contained in the ERA.
- (c) *Union position (based on the Bill):*
- (i) An employee, an union or a Labour Inspector can enforce an employee’s statutory entitlement. Non-statutory entitlements may only be enforced by an employee or an union.
 - by allowing unions to bring actions in their own name, an employee is prevented from being exposed to his or her employer which may have repercussions in the workplace.
 - (ii) A Labour Inspector may take proceedings on behalf of an employee. Any action initiated by a Labour Inspector may be completed by another Labour Inspector.
 - (iii) An employee, an union or a Labour Inspector may apply to the Authority to recover holiday pay not paid to the employee which, if successful, may be

enforced as a debt (once a Labour Inspector has commenced an action he or she cannot serve a holiday pay demand notice).

- (iv) An employee, an union or a Labour Inspector may apply to the Authority for a compliance order if an employer has not provided the employee with his or her holiday entitlements or the employer has not complied with its obligation to keep a leave record.
- (v) An employer who does not comply with the Act is liable to a penalty. Maximum penalty of \$5,000 for an individual and \$10,000 for a company. Penalties may be awarded to any person the Authority specifies.
 - the level of penalties should be the same as those in the ERA.
- (vi) An employee, an union or a Labour Inspector may commence a penalty action.
- (vii) A “leave record” must be kept that contains certain prescribed information. An employee, an union or a Labour Inspector may gain access to the employee’s leave record and may obtain copies of it.
- (viii) The Authority may find that an employer’s failure to keep a leave record has prevented an employee, an union or a Labour Inspector from bringing an accurate claim for the recovery of holiday pay (or to enforce an entitlement). If so, the Authority may accept as proved, in the absence of evidence to the contrary, claims in respect of the holiday pay paid to the employee and the holidays taken by the employee.
- (ix) Interest may be awarded on holiday pay.
- (x) Continue with the provisions in respect of demand notices, powers of Labour Inspectors and proceedings against insolvent companies contained in the ERA.

8 HOURS OF WORK

(a) *Terms of Reference:*

The Terms of Reference do not provide for a discussion on hours of work so the issue was not substantively addressed by the Group. However, the following views were expressed.

(b) *Employer position:*

Employers reiterated that the Terms of Reference do not provide for a discussion on hours of work. Accordingly, Employers have not consulted with their wider constituency on this issue. However, Employers consider that the current situation where an employer and an employee may agree to hours of work, taking into account individual circumstances of both the employer and the employee and the needs of the enterprise, is the appropriate way to deal with the issue.

(c) *Union position:*

Unions observed that the Terms of Reference contemplate consideration of the Act in the context of contemporary society and labour markets and international standards and conventions.

The original *Annual Holidays Act* was introduced in 1944 in recognition of the need to ensure proper rest for health and safety reasons, and as an acknowledgement of the value of work. The current Act is a consolidation of the 1944 Act, the *Public Holidays Act* 1955 and the statutory holiday provisions of the *Factories Act* 1946. The Act was amended in 1991 in conjunction with the introduction of the *Employment Contracts Act* 1991.

During the past decade enforcement of the Act has been inadequate. As a consequence, entitlements provided by the Act have not been enjoyed by many employees to the extent intended. In addition, changes in the labour market, and in employment conditions, have meant that there has been an intensification of work and a lengthening of hours for some employees while other workers are unable to secure as many hours of work as they would like. Emerging from this situation is a widespread concern about the negative impact of long and intensive hours of work on health and safety standards and family and community life.

Unions also noted the expressions of concern by the International Labour Organisation Committee of Experts in their current report on conventions which have been ratified by New Zealand:

- That there is a need for the Government to ensure full compliance with the requirements of ILO Convention 14 on Weekly Rest (Industry) that every employee be entitled to an uninterrupted weekly rest period of not less than 24 consecutive hours with compensatory periods of rest where authorised exceptions are made.
- That the Government ensure full compliance with ILO Convention 47 on the Forty-Hour Week by taking or facilitating such measures as may be necessary to ensure that the 40-hour week principle is applied to various classes of employment.

Unions tabled for discussion a proposal containing possible legislative provisions which address the above concerns, including those raised by the ILO Committee of Experts. Unions recommend to the Minister that the following provisions be included in any new holidays legislation and that the legislation should also incorporate the existing 40-hour week section in the *Minimum Wage Act 1983*, and should be renamed the *Hours of Work and Leave Entitlements Act*.

“Reasonable Hours of Work

- (1) *An employer must not require an employee to work unreasonable hours of work.*
- (2) *Without limiting the generality of paragraph (1), the following are to be considered in determining what are unreasonable hours of work:*
 - (a) *the total number of hours that exceed the ordinary, or in the case of part-time employees the agreed hours of work;*
 - (b) *the total number of hours worked on any particular day or shift;*
 - (c) *the total number of hours worked over an extended period;*
 - (d) *the total number of hours worked without a break;*
 - (e) *the time off between shifts;*
 - (f) *the risk of fatigue;*
 - (g) *the rostering arrangements;*
 - (h) *the extent of night work;*
 - (i) *an employee’s workload;*
 - (j) *work intensification resulting from understaffing, and the ability of workers to meet targets while working reasonable daily hours;*
 - (k) *the time required to achieve remuneration in accordance with performance based pay schemes;*
 - (l) *the exposure to occupational health and safety hazards;*
 - (m) *an employee’s social or community life; or*
 - (n) *an employee’s family responsibilities.*

Reasonable Overtime

An employee may refuse to work hours in excess of ordinary hours on a particular day for reasons which may include, but not be limited to, the employee’s family responsibilities or the employee’s pre-arranged personal commitments.

Rest Breaks after Extreme Working Hours

If an employee works:

- (a) *an average of 60 hours per week over a 4 week period; or*
- (b) *26 days over a 4 week period; or*
- (c) *an average of 54 hours per week over an 8 week period; or*
- (d) *51 days over an 8 week period; or*
- (e) *an average of 48 hours per week over a 12 week period; or*

(f) 74 days over a 12 week period,

then it is an implied term of the employee's employment that he or she will have a 2 day rest break during which time he or she is paid. This rest break must be taken within 7 days of the entitlement having accrued."

9 APPENDICES

9.1 Appendix One: Composition of the Advisory Group

(a) *Chair:*

Peter Chemis, Partner, Buddle Findlay.

(b) *Members:*

Anne Knowles, Chief Executive, New Zealand Employers Federation Inc.

Tim Cleary, Solicitor, Meat Industry Association of New Zealand.

- alternate for meeting on 29 March 2001: Mike Brooks, Executive Officer – Human Resources, Meat Industry Association of New Zealand.

Nigel Hillind, Employment Relations Manager, AMP.

- alternate for meeting on 29 March 2001: Cliff Daly, Industrial Consultant, Retail Merchants Association of New Zealand Inc.

John Rapley, Acting Corporate Human Resources Manager, State Services Commission.

Ross Wilson, President, New Zealand Council of Trade Unions.

Maxine Gay, Secretary, Clothing, Laundry and Allied Workers Union.

Joanne Watson, Solicitor, Public Service Association.

Tony Wilton, General Counsel, New Zealand Engineering, Printing and Manufacturing Union.

(c) *Support:*

Sherridan Cook, Consultant, Employment Relations Service, Department of Labour.

Belinda Greene, Policy Advisor, Employment Relations Service, Department of Labour.

(d) *Other individuals consulted:*

The Group also consulted with Gaele Deighton (Chief Executive Officer, Enterprising Manukau), Linda Holt (Union Official, National Distribution Union) and Tali Williams (Student). Each of these individuals were nominated by the following respective groups: Maori Business Network, Ministry of Pacific Island Affairs and the Youth Union Movement. The Group considered their views, where they were made known.

9.2 Appendix Two: Terms of Reference

(a) *Purpose of the Advisory Group:*

The Advisory Group will advise the Government on the current situation and possible future policy options for amending the Act to:

- ensure that the Act is both robust and appropriate to accommodate increased diversity in working patterns;
- review entitlements to balance the needs of employers and employees with a view to increasing productivity; and
- note the manifesto statements and any subsequent policy statements by the Government Coalition Partners in relation to the Act.

The Group will conduct its work in two phases:

- information identification and gathering;
- assessment of policy options.

(b) *Information identification and gathering:*

The Advisory Group will identify what information it requires to carry out its functions. Without limiting the Advisory Group, the Government will ask that consideration be given to:

- the existing arrangements in employment agreements for annual leave, statutory holidays, leave for bereavement or for the sickness of the employees or their dependants, and any other options for leave;
- international practice and international standards and conventions in relation to annual leave, statutory holidays and leave for bereavement or for the sickness of the employees or their dependants;
- the needs of employers in relation to the provision of leave for their employees;
- the needs of specific groups of employees for particular types of leave under the Act; and
- the problems that occur in relation to the present application of the Act.

(c) *Assessment of policy options:*

Following the information gathering phase, the Advisory Group will be asked to consider and make recommendations on ways to ensure that:

- entitlements under the holidays legislation are appropriate in contemporary society and labour markets;
- the entitlements balance the needs of employers and employees; and
- the entitlements reflect and promote increased productivity.

In assessing possible future interventions, the Group will be expected to give consideration to:

- the Government's wider objectives for the labour market and for a growing and dynamic economy;
- the costs and benefits of alternative policy interventions; and
- any likely implications of those interventions, including effects on employment or income distribution.

(d) *Reporting:*

The Chair will be responsible for ensuring that the Minister of Labour is kept informed of the progress of the Advisory Group.

Within a month of being appointed, the Advisory Group will meet to:

- confirm their terms of reference;
- design a work programme, including proposals for a research programme;
- have the terms of reference and the work programme approved by the Minister of Labour; and
- establish a programme of monthly reports to the Minister on progress.

The final report of the Advisory Group shall contain policy recommendations to the Minister.

9.3 Appendix Three: Definitions of “factory” and “undertaking”

The definitions of “factory” and “undertaking” are contained in s 2(1) of the *Factories and Commercial Premises Act 1981* (repealed).

The following summarises these definitions; note that it is not a full transcription of the Act.

“‘Factory’, subject to subsections (2) to (6) of this section, means a place where more than one person is engaged, or where any person is employed, directly or indirectly, in the business of any handicraft, or in the business of preparing or manufacturing goods for trade or sale; and (whatever number of persons is engaged or employed therein) includes-

- (a) A bakehouse:
- (b) A place where steam or other mechanical power or appliance is used for the purpose of preparing or manufacturing goods for trade or sale, or packing goods for transit:
- (c) A place where electrical energy is generated or transformed as an illuminant or a motive power, for trade or sale, or where any form of gas is produced for like purposes:
- (d) A laundry (whether or not the persons employed in it receive payment):
- (e) A place (not being a place on a farm) where the business of pasteurising milk is carried on:
- (f) An abattoir within the meaning of the *Meat Act 1964*:
- (g) A place where any noxious handicraft, noxious process, or noxious employment, is carried on:
- (h) A place where there is carried on-
 - (i) The business of spray-coating with a noxious or flammable substance;
 - (ii) The business of the manufacture of fibre-reinforced plastic products; or
 - (iii) Any business involving a process or manufacture using asbestos.”

Subsection (2) provides that, except for the purposes of the *Holidays Act 1981*, certain listed places are not to be deemed “factories” by virtue only of being a place where certain activities are carried out. Subsections (3) to (5) relate to energy and mining. Subsection (6) provides that, except for the purposes of the *Holidays Act 1981*, certain listed places are not to be deemed “factories”.

“‘Undertaking’ means a place-

- (a) That is a bakehouse, a cinema, a commercial depot, ... a hotel, a laundry, a laboratory, a mailroom, an office, a restaurant, a shop, a store, a theatre, a telegraph office, a telex office, or a warehouse; or
- (b) Where for pecuniary gain motor vehicles are repaired, serviced, or tested; or
- (c) Where food is prepared or cooked, and sold in a form ready for immediate human consumption elsewhere than in that place.”