

In Confidence

Office of the Minister for Workplace Relations and Safety



Chair, Cabinet Economic Development Committee

## Holidays Act 2003 Review – Terms of Reference

### Proposal

- 1 This paper seeks Cabinet's approval to a review of the Holidays Act 2003 (the Act) on the basis of the Terms of Reference attached in Annex One.

### Executive Summary


- 2 The Holidays Act 2003 (the Act) provides minimum entitlements to annual holidays, public holidays and sick and bereavement leave to promote balance between work and other aspects of employees' lives.
- 3 Systemic compliance issues with the Act first came to light in 2012 and since then it has become apparent that non-compliance is widespread, with a large number of employers struggling to meet their obligations under the Act and a large number of employees not receiving their correct entitlements. This situation has arisen because there are problems both with the implementation of the Act in payroll systems, and with the Act itself. 
- 4 Over the last three years, the Ministry of Business, Innovation and Employment (MBIE ) has delivered a payroll strategy led by the Labour Inspectorate to address the implementation issues, but this alone has not been sufficient. I consider that only a broad review of the Act will provide an enduring solution.
- 5 I propose that a tripartite working group be convened to review the Act and make recommendations for change to Government within 12 months. I seek the Committee's agreement to appoint Gordon Anderson, a law professor at Victoria University, as an independent Chair of the Group. Key objectives of the review will be to develop options that:
  - 5.1 make the provision of, and payment for, entitlements to holidays and leave simpler and more readily applicable to the range of working arrangements in the labour market
  - 5.2 provide clarity and certainty to employers and employees so that employees receive their correct entitlements and employers' indirect compliance costs are reduced
  - 5.3 aim to protect the overall entitlements to employees
  - 5.4 are easy to systematise and implement in payroll systems.

- 6 The Group will be expected to convene appropriate technical experts to robustly test options to ensure that this objective is met and any adverse consequences are identified. The lack of such rigorous testing was a significant failing of previous reviews.
- 7 The review must be forward looking, and consideration of the issue of remediation of underpayments under the current Act is out of scope of the review. However, I acknowledge that this issue is of significant concern to a number of private and public sector entities, particularly those that may currently be considering investment in new payroll systems.
- 8 The obligation of employers to remediate employees for historical underpayments remains, as does their obligation to ensure compliance with the current Act until new legislation is passed. It is likely to be a minimum of two years until new legislation is passed and I anticipate that there will be a significant implementation period following that to allow service providers to develop new products to deliver on the changes.
- 9 In the meantime, the Labour Inspectorate will continue to work to support employers to remediate employees and amend systems to be compliant with the current Act.

### **The Holidays Act 2003 provides minimum entitlements to holidays and leave ...**

- 10 The purpose of the Act is to promote balance between work and other aspects of employees' lives by providing minimum entitlements to annual holidays, public holidays, sick leave and bereavement leave. The Act provides a number of calculations for determining pay when holidays or leave are taken.
- 11 The Act also covers a number of issues such as annual closedowns for businesses, transferring of public holidays and 'cashing up' one week's holiday. The enforcement provisions follow those in the Employment Relations Act 2000 and, as with other minimum entitlements, permits both employees and labour inspectors to take cases.
- 12 While the Act provides for certain levels of minimum entitlements, it does not prescribe how these are to be provided. For a standard five day, 40 hour working week, this is straightforward, but in other situations it is not obvious, such as when employees work unpredictable hours. In these situations the Act relies on employers and employees reaching agreement as to how entitlements will be met or taken.
- 13 There is some prescription around determining pay for holidays and leave – for example, pay can be based on an averaging formula if it is not possible to work out what the employee would have been paid if they had worked – but there remains a high degree of ambiguity in situations when remuneration arrangements are complex (for example, including commission or incentive payments).

### **... but there is compelling evidence of widespread non-compliance with the Act**

- 14 These challenges with the Act itself, combined with poor implementation in payroll systems and the business processes that support them, have led to widespread non-compliance with the legislation.
- 15 Out of Scope, s 9(2)(g)(i)  


- 16 Concerned that this might be indicative of wider compliance issues with the Act, MBIE engaged with a number of key payroll providers and employers in 2014. This engagement indicated that problems with implementing the Act were likely to be widespread.
- 17 Using research data available at that time as proxies for variable hours and pay, MBIE estimated that between 10 per cent and 40 per cent of the workforce could be affected, with employees owed, on average, between \$250 and \$500 per year, and with a total cost to the economy (taking into account the potential for six years' back pay) of between \$292 million and \$2.29 billion. The wide range is a result of the choice of proxy data used to quantify the issue.
- 18 A targeted review of the Act was proposed in April 2015. However, the previous Government did not proceed on the basis that some employees and employers were likely to be worse off. For example, if a yearly averaging approach to pay for annual holidays is taken, then employees whose current pay is greater than their yearly average would lose out. Instead, MBIE was asked to look for solutions within the current legislative framework.
- 19 The Labour Inspectorate initiated a Payroll Strategy in 2015 that included a programme of proactive audits and investigations (and, subsequently, a number of 'watching briefs' in which MBIE supports employers to undertake their own audits) to identify issues with payroll systems and remediate employees.
- 20 The Inspectorate's proactive audit programme initially focused on the 100 largest employers in New Zealand. As of 31 December 2017, 137 audits/investigations (including 53 proactive audits) had been completed. All of these involved some degree of non-compliance. Of these 137 cases, 48 have finished calculating and paying arrears. These payments totalled \$5.8 million to 16,600 employees (not including NZ Police – see below). Average pay outs to employees in each case ranged from \$29 to \$1,300, and were under \$500 in 36 out of the 48 cases.
- 21 s 9(2)(g)(i)
- 22 Two high profile examples in the public sectors are NZ Police and MBIE. NZ Police have paid out approximately \$39 million to its staff (and there are more payments to come). The breaches related to issues such as payment for public holidays and alternative holidays and the inclusion of allowances in relevant daily pay. s 9(2)(g)(i)
- MBIE's payroll review project is still underway and so the extent of the remediation is not yet known, but the breaches relate to issues such as calculation of relevant daily pay, failure to compare ordinary weekly pay and average weekly earnings, and record keeping obligations.
- 23 The outstanding liability across the state sector is not known. The NZ Police payment is by far the largest to date. Three other agencies have made pay outs, but these were very small in comparison (the largest was around \$5,000). However, there are many remediation projects underway (such as MBIE's) and the extent of underpayments of these will not be known until they are completed.

***There are issues with both the implementation of the legislation ...***

- 24 MBIE's 2014 engagement work with payroll providers and employers concluded that there are three broad reasons underlying the poor implementation of the legislation:
  - 24.1 There is limited capability, effort and resources applied to comply with the Act; for example:
    - 24.1.1 payroll systems not correctly configured to support compliance
    - 24.1.2 employers taking a 'set and forget' approach to their payroll systems, not recognising that systems will often require manual intervention
    - 24.1.3 an underskilled and undervalued payroll profession
  - 24.2 Employer practices, employment arrangements and the Act are not well aligned; for example:
    - 24.2.1 poor record keeping practices
    - 24.2.2 poor business processes meaning that payroll does not necessarily have all of the relevant information from across the business needed to comply
    - 24.2.3 there is increasing flexibility in work and pay arrangements in the labour market and the Act is more complex to apply when these are complex and/or variable
  - 24.3 Adequate information and guidance is not readily available to assist employers, employees and payroll providers.
- 25 Poor record keeping and inaccessible records also mean that employees struggle to understand their entitlements or detect non-compliance. A result of this is that there is relatively little case law on Holidays Act interpretation issues.

***... and the legislation itself***

- 26 The Act itself is generally straightforward to apply when work and pay arrangements are consistent and predictable; for example, same hours and days each week for the same pay. This is because, despite amendments designed to cater for non-standard working arrangements, the fundamental design of the legislation is predicated on a standard five day, 40 hour working week.
- 27 The Act is more difficult to apply when hours are variable or unpredictable from week to week, and when remuneration arrangements are complex (for example, when they include bonuses, commissions, or other incentive payments). This is primarily because the Act is based on two key principles relating to entitlements and pay:
  - 27.1 that entitlements are determined in relation to the work pattern at the time the leave is taken (so that entitlements are not affected by changes in work pattern)
  - 27.2 that employees should not be financially disadvantaged by taking leave, that is, they should be paid (at least) what they would have earned had they worked.

- 28 This requires a number of judgements to be made based on the specific facts of an employee's working and remuneration arrangements, and often the agreement of the employee is required. In situations in which it is not clear how the entitlement is to be provided, the Act does not provide any prescription. It is simply left to the employer and employee to reach agreement and this is rarely done. Instead, either the employer makes a determination, or the payroll system relies on available information which may no longer be accurate. The requirements for employers to use judgement or reach agreements with their employee are difficult to systematise and payroll systems are often configured around assumptions or agreements which later shift.
- 29 An example of this difficulty is defining a 'week' for the purpose of the annual holidays entitlement when it is not obvious (for example, if employees work on a roster pattern that does not fit a weekly cycle, or they work variable hours from week to week). The Act provides no guidance on how to achieve this, relying instead on employers and employees reaching agreement on 'what genuinely constitutes a working week' for the employee at the time the leave is taken.
- 30 Further complexity arises from the units for holidays and leave entitlements in the Act and the number of different calculations for holidays and leave pay. The Act uses weeks and days as units for the entitlements it provides, but most payroll systems use hours as the fundamental unit. It is therefore common practice to calculate leave in hours and convert to the other units. There are significant issues with the conversion taking place accurately when circumstances change. And there are seven different pay calculations in the Act. In some cases it is unclear which calculation should be used, and many employers are not using the correct calculations at the correct times.
- 31 The combined effect of these issues is that:
- 31.1 many employees are not receiving their correct entitlements (in many cases they are receiving less than the statutory minima)
  - 31.2 employers and employees do not have certainty regarding the provision of, and payment for, entitlements
  - 31.3 employers, particularly those with large numbers of employees on variable work and pay arrangements, can incur relatively high compliance costs to comply with the Act
  - 31.4 the Act cannot be readily systematised in a payroll system
  - 31.5 many employers are carrying a liability on their books that cannot be readily quantified (and may change significantly when employees change their work patterns).

### **Previous attempts to resolve the problem have not resulted in an enduring solution**

- 32 The most significant recent reviews of the Holidays legislation have been the 2001 review that resulted in the 2003 Act, and the 2009 review that resulted in a series of amendments in 2010. The 2003 Act replaced the Holidays Act 1981 which had also been subject to a number of reviews.
- 33 These reviews had similar objectives, namely to make the legislation easier to understand and apply and to make it more applicable to a wider range of working

patterns beyond the standard five day, 40 hour working week. It is fair to say that both of these reviews failed to meet these objectives.

- 34 There appear to be three key reasons why these reviews failed:
- 34.1 employer and employee representatives held fundamentally different views on the possible outcomes of a review and could not reach agreement
  - 34.2 policy options were never tested in payroll systems with real payroll data to determine how easy it would be to implement them in those systems and to identify adverse consequences (that is, service design and delivery people were not adequately involved in the policy design process)
  - 34.3 the compliance costs of requiring employers and employees to agree matters – often each time an employee requests leave – were not adequately considered.
- 35 In addition, the second review was constrained by its terms of reference (it could only look at payment for holidays and leave, not how the entitlements were provided).
- 36 Aside from these reviews, the main intervention to date has been the Labour Inspectorate's Payroll Strategy referred to above. This was designed to address the issues relating to implementation of the current Act. In addition to the programme of audits and investigations, the Strategy involved:
- 36.1 an extensive stakeholder engagement/co-design programme to better equip businesses to comply
  - 36.2 a proactive information and education programme.
- 37 This Payroll Strategy work is now complete, though a small team focusing on audits and investigations remains within the Inspectorate. An example of this work is the publication of revised guidance on compliance with the Act produced in collaboration with employer and employee representatives, payroll and other business service providers and employment law experts. Stakeholders have reported that this guidance is proving useful but that it also highlights ongoing difficulties with the Act.
- 38 Any improvements resulting from the Payroll Strategy will remain constrained by the problems with the legislation and the difficulty of systematising entitlements and payments in a payroll system. Many stakeholders, while acknowledging the work undertaken to date, remain unhappy with the current situation as uncertainty about exactly what is required to be compliant persists.
- 39 I consider that a proper resolution of these issues will only be achieved through legislative change.

### **The time is right for a review of the Act**

- 40 There are several reasons why the time is right for a review:
- 40.1 both employers and employees are 'feeling the pain' of current widespread non-compliance and the difficulty of actually complying with the Act and are calling for change

40.2 we have a deeper understanding of the issues with the legislation – and a good understanding of why past reviews have failed – as a result of the work undertaken over the last few years

40.3 we have developed good relationships with a wide range of stakeholders as a result of the Payroll Strategy and can draw on these to develop a piece of legislation that will endure.

41 In December 2017, I received a joint letter from Business New Zealand (Business NZ) and the New Zealand Council of Trade Unions (NZCTU) acknowledging that both employers and employees were affected by the problems with the Act and seeking a meeting to discuss how to establish a process to review the Act.

42 This meeting took place in February 2018 and it was agreed that a workshop would be held, along with officials from MBIE, to discuss the outline of a terms of reference for a review. The workshop took place in March 2018 and the positions agreed form the basis of the terms of reference discussed in this paper and attached as Annex One. These terms of reference outline the objectives, scope, and timing for the review.

43 However, if we approach this review as simply fixing the current framework of the Act, I am concerned that we increase the risk of failure to make things better. We need to be aiming for a new, or significantly amended, piece of legislation that is easier to use and designed with the current and future labour market in mind.

***The Working Group will be tripartite with an independent Chair***

44 I propose that the Review be carried out by a tripartite Working Group led by an independent Chair with the power to commission work, and intend to invite Business NZ and NZCTU to each nominate three to four people to sit on the group in addition to the Government representatives. I will also make it clear that it will be important that the interests of small businesses are represented on the group.

45 I recommend Gordon Anderson, a professor of law at Victoria University as the Chair of the Group. Professor Anderson has extensive experience in employment law, both as an academic and a barrister. He has served as the Asian Vice-President of the International Society for Labour and Social Security Law and is a member of the Advisory Committee of the Labour Law Research network and President of the New Zealand Labour Law Society. Professor Anderson has the support of both the Council of Trade Unions and Business New Zealand. As the Chair of the Working Group, he will be paid in accordance with the Cabinet fees framework for members appointed to bodies in which the Crown has an interest.

46 The Government representatives on the Group will be senior officials from MBIE, the State Services Commission and Inland Revenue. MBIE will provide secretariat support to the Group and will also ensure appropriate structures are in place for agencies to be kept informed of, and input into, the work of the Group.

***The Review must demonstrate that the objectives can be met***

47 I propose that the objectives of the review be options for change that:

47.1 continue to promote the existing purpose of the Holidays Act 2003

- 47.2 provide clarity and certainty for employers and employees so that employees receive their correct entitlements
  - 47.3 are simpler than the current Act in relation to provisions of, and payment for, entitlements to holidays and leave
  - 47.4 are readily implementable in a payroll system
  - 47.5 minimise compliance costs for employers
  - 47.6 minimise perverse incentives on employers and employees
  - 47.7 ensure the balance of decision-making between employers and employees when it comes to requests for holidays and leave is appropriately calibrated
  - 47.8 are readily applicable to the full range of working and remuneration arrangements in the labour market both now and in the future
  - 47.9 aim to protect overall entitlements for employees.
- 48 While some of the objectives are broadly the same as previous reviews, I consider it critical to the success of a review that options are designed and tested by end users (for example, employers, employees, payroll providers and professionals). It is important that the ease of implementation of options in a payroll system is given high priority.
- 49 I therefore anticipate that some form of technical reference group will be established as part of the review, consisting of people such as payroll providers (and their software developers), business rules experts (such as those employed at Inland Revenue for the development of tax legislation) and service design and delivery experts to support them with both the design and testing of options. I will expect to see quantitative analysis of different options tested with real payroll data to support the working group's recommendations.
- 50 I cannot rule out the possibility that some options might leave some employers and employees worse off than now. However, a blanket criterion that no employer or employee be worse off will overly constrain the Review and, given the inherent uncertainty of the current Act in some situations, be hard to determine in all cases. It is important however that the review aims to protect overall entitlements for employees and minimises compliance costs for employers.

***The Review must be broad enough to allow for new solutions ...***

- 51 The scope of the Review must be sufficiently broad to generate fundamentally new ways of providing for entitlements and pay, while retaining the purpose of the current Act and (at least) the current levels of entitlement.
- 52 Full consideration must also be given to the issue of designing an Act that works equally well for the ever increasing range of different working and pay arrangements that we see in the labour market. This may include consideration of the place of the standard working week in the holidays' legislation.
- 53 The review will also have the scope to consider any other matters relating to the Act that it sees fit, other than those relating to the provision of entitlements and pay. This may include holidays and leave entitlements modified by other Acts (such as the Parental Leave and Employment Protection Act 1987). I expect the group to consult widely to get



a comprehensive understanding of the issues with the current legislation, and to draw on examples from overseas jurisdictions.

***... but will not include the issue of remediation of historical underpayments***

54 The scope of the Review will not include the issue of remediation of historical underpayments of holiday and leave pay. However, it will be important to provide clear communications around this issue when a review is announced. This issue is addressed further in the 'Risks' section below.

***Indicative timing and reporting***

55 The Group will report back to me with their recommendations within 12 months. This timeframe will give the Group sufficient time to commission work and undertake robust testing of options.

56 The Group will also provide an interim report after six months, so that I can update Cabinet – and the New Zealand public – on the Group's progress.

***There are a number of risks associated with a review***

*The Group may be unable to reach consensus on its recommendations*

57 Past reviews have shown that it can be difficult to achieve consensus on recommendations to change or amend the holidays' legislation. While employers and employees appear close together on the need for, and scope of, a review it is quite possible that when it comes to making detailed recommendations, their representatives may be unable to reach consensus (or may leave the hard decisions to Ministers).

58 Past reviews, however, have been conducted by independent Ministerial Advisory Groups involving just employers and employees. I intend that for this review Government will be an equal partner on this tripartite working group putting it in a stronger position to influence the development of options. Furthermore, given all that is now known about the compliance issues with the current Act, there is a high level of commitment from all parties to find an enduring solution.

*Involving payroll providers and other private sector organisations in policy design*

59 Concern may be raised that the involvement of payroll providers and other private sector organisations in the design and testing of options may give those entities an unfair market advantage when changes to the legislation are implemented.

60 I do not consider this too significant a concern as these organisations will not know what the shape of any final legislative change will be until Parliament passes these changes. In addition, there will be a suitable implementation period following passage of any legislative change for service providers to develop new products to reflect these changes. Conflict of interest management, confidentiality and regular communication from the Group about its activities and progress could assist in allaying any concerns that do remain.

*Employers may be reluctant to address current payroll issues*

61 Regardless of any changes to the Act, employers retain an obligation to remediate employees for historical underpayments of holiday and leave pay and to pay employees

correctly until a new piece of legislation is in place. However, employers may be reluctant to put too much further resource into correcting current issues with their payroll systems if they know they are likely to have to change them in the future.

- 62 It will be important to clearly communicate to employers that this obligation remains. It is likely to be a minimum of two years before new legislation is passed, and this will be followed by a suitable implementation period for employers to update/replace their payroll systems.
- 63 Employers, particularly those that are currently considering purchasing new payroll systems (or making substantive changes to their current ones) will need to consider how best to meet their obligations given the likelihood of legislative change in two to three years' time. Some employers may find that managing the issues with their payroll systems with manual fixes may be the most effective approach, but, for others, implementing a new system now may be an integral part of correctly remediating employees.
- 64 In the meantime, the Labour Inspectorate will continue to support employers to remediate employees for historical underpayments (such as through their recently published practice note on estimating arrears), and will continue with their programme of audits and investigations.

### **Consultation**

- 65 The Department of Prime Minister and Cabinet (Policy Advisory Group); State Services Commission; Treasury; Ministries of Education, Justice, Health, and Social Development; Ministries for Primary Industries, Women, and Pacific Peoples; Inland Revenue; Department of Internal Affairs; Te Puni Kokiri; and New Zealand Police have been consulted on this Cabinet paper.
- 66 The New Zealand Council of Trade Unions and Business New Zealand participated in a workshop (along with MBIE) to outline the key elements of the Terms of Reference in Annex One and have also been consulted on this paper.

### **Financial Implications**

- 67 I propose that MBIE will meet any costs associated with the review (anticipated to be up to \$0.5 million) by transferring an anticipated underspend of \$0.5 million in the Labour Market Policy Advice and Related Outputs Multi-Category Appropriation in the current financial year to the 2018/19 financial year. I am seeking delegated authority for the Minister of Finance and I to jointly agree the final amount to be transferred.
- 68 The likely costs are expected to relate to fees for the Chair, and any costs associated with work that the Chair might commission (including research or legal advice that MBIE agrees to undertake). MBIE will also consider requests to contribute to reasonable travel and accommodation costs for out of town members where these are consistent with the Cabinet Fees Framework. Costs may also arise from any processes established as part of the review to robustly test options to ensure that they are practical and any adverse consequences are identified (for example, this could include developing a web tool that payroll experts can use to test proposed options with payroll data). Any public consultation undertaken as part of the review will also have cost implications.

69 I do not anticipate that the costs associated with the review will be greater than \$0.5 million but if they are, then I may need to seek additional funding to complete the work.

### **Human Rights**

70 This proposal has no human rights implications.

### **Legislative Implications**

71 This proposal has no legislative implications. However, a review is expected to lead to recommendations for legislative change.

### **Regulatory Impact Analysis**

72 Regulatory Impact Analysis requirements do not apply to this proposal, but will be carried out when options for change are brought back to Cabinet.

### **Gender Implications**

73 This proposal has no gender implications.

### **Disability Perspective**

74 This proposal has no disability implications.

### **Publicity**

75 If approved by Cabinet, I intend to announce the establishment of the Holidays Act Working Group shortly after. I will publish this paper and the Terms of Reference on the MBIE website, subject to consideration of any deletions that would be justified if the information had been requested under the Official Information Act 1982.

### **Recommendations**

The Minister for Workplace Relations and Safety recommends that the Committee:

- 1 **Note** that there is compelling evidence of widespread non-compliance with the Holidays Act 2003
- 2 **Note** that this non-compliance is due both to poor implementation of the Act and to issues with the Act itself
- 3 **Note** that MBIE's three year payroll strategy was focused on addressing the first reason, but that only a review of the legislation can provide an enduring solution to the non-compliance issues
- 4 **Agree** to establish a tripartite Holidays Act Working Group to make recommendations to the Government on options for the provision of, and payment for, holiday and leave entitlements, and on any other matters relating to the Act that the Group sees fit to address, that meet the objectives in the Terms of Reference
- 5 **Agree** to the Terms of Reference for the Holidays Act Working Group attached as Annex One

- 6 **Note** that membership of the Group will consist of three to four Government representatives from the Ministry of Business, Innovation and Employment, State Services Commission and Inland Revenue, along with three to four people nominated by each of Business New Zealand and the Council of Trade Unions
- 7 **Agree** to the appointment of Professor Gordon Anderson as Chair of the Group
- 8 **Authorise** the Minister for Workplace Relations and Safety to make minor amendments to the Terms of Reference
- 9 **Agree** that the estimated cost of the review, \$0.5m, be met by an in-principle expense transfer to 2018/19 of an anticipated 2017/18 underspend in the Vote Labour Market Multi-Category Appropriation: Labour Market Policy Advice and Related Outputs, subject to confirmation of the amount of the expense transfer by joint Ministers (Minister of Finance and Minister for Workplace Relations and Safety) in the October baseline update
- 10 **Invite** the Minister for Workplace Relations and Safety to report back to Cabinet on the Government response to the Group's recommendations within 12 months.

Authorised for lodgement

Hon Iain Lees-Galloway

Minister for Workplace Relations and Safety

## Holidays Act 2003 Review – Terms of Reference

### Purpose

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

### Background

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

### Objectives

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

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

### **Scope and parameters**

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

### **Membership and Process**

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

concerned will ensure the new attendee/s have been well briefed on previous discussions and progress.

18. The parties will each ensure that their constituents/stakeholders have appropriate opportunity to have input into development of options, through the parties' internal governance arrangements. MBIE will ensure that appropriate cross-agency structures in place for senior government officials to be kept informed of, and have input into, the work of the Group.
19. MBIE will provide secretariat support to the Group and information and research that the Group identifies is required to facilitate its discussions.

### **Rules of engagement**

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

### **Timing and reporting**

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