



## COVERSHEET

<b>Minister</b>	Hon Michael Wood	<b>Portfolio</b>	Workplace Relations and Safety
<b>Title of Cabinet paper</b>	Government Response to the Report of the Holidays Act Taskforce	<b>Date to be published</b>	23 February 2021

<b>List of documents that have been proactively released</b>		
<b>Date</b>	<b>Title</b>	<b>Author</b>
March 2020	Cabinet Paper: Government Response to the Report of the Holidays Act Taskforce	Office of the Minister for Workplace Relations and Safety
March 2020	Cabinet paper Annex One: Summary of Government response to Holidays Act Taskforce recommendations	MBIE
October 2019	Cabinet paper Annex 2: Holidays Act Taskforce final report (note this documents will also be published separately on the MBIE website when your announcement is made)	Holidays Act Taskforce
March 2020	Regulatory Impact Statement – Improving the Holidays Act 2003	MBIE
11 March 2020	DEV-20-MIN-0035: Government Response to the Report of the Holidays Act Taskforce	Cabinet Office

### **Information redacted**

**YES**

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld due to the free and frank expression of opinion.

In Confidence

Office of the Minister for Workplace Relations and Safety  
Chair, Cabinet Economic Development Committee

## **GOVERNMENT RESPONSE TO THE REPORT OF THE HOLIDAYS ACT TASKFORCE**

### **Proposal**

1. This paper seeks agreement to the recommendations of the Holidays Act Taskforce as the basis for an amended Holidays Act.

### **Executive Summary**

2. The issues with the current *Holidays Act 2003* are well documented. The lack of clarity and certainty associated with the current Act make it difficult to implement for employers and hard for employees to be sure they are receiving their correct statutory entitlements (such as the correct amount of annual holidays, and the pay associated with this).
3. Alongside this legislative ambiguity, implementation of the Holidays Act in payroll systems and associated business processes has been poor. In recent years numerous organisations around the country have had to overhaul their payroll systems to achieve compliance with the current legislation. As at June 2019, around \$90.4 million in remediation payments had been paid to 116,000 employees across numerous organisations – and this figure is expected to grow substantially.
4. To help address the root causes of these issues, Cabinet agreed in May 2018 to establish a Taskforce to review the Act and suggest recommendations for change [CAB-18-MIN-0250 refers]. The tripartite group was comprised of government, union and business representatives, and was chaired by Professor Gordon Anderson, an employment law specialist from Victoria University. The Taskforce was provided with approximately a year to provide its final report.
5. I received the Taskforce's final report in October 2019 (attached as Annex Two). Unlike past reviews of the Act, the Taskforce was able to make unanimous recommendations on a comprehensive package of changes to improve the current legislation. The Taskforce:
  - i. Recommended an improved status quo model for leave and leave pay, where the existing units of entitlement are retained (weeks for annual holidays, days for all other types of leave – e.g. sick leave)
  - ii. Focused its work on addressing known 'pain points' with the current legislation

- iii. Addressed the Terms of Reference set for the review, focusing particularly on enhancing the certainty, transparency, and practicality of the legislative provisions on leave and leave pay.
6. I consider that the Taskforce's recommendations should be adopted in full as the basis for an amended Holidays Act. The proposed amendments (summarised in Annex One, and set out in full on pages 28 to 47 of the Taskforce's report) will provide all regulated parties with much needed certainty, while protecting overall entitlements for employees.
7. I acknowledge that a number of stakeholders (particularly businesses and payroll providers) called for a more radical overhaul of the Act, centring on a simplified accrual methodology for annual holidays. However, no consensus could be achieved among Taskforce members on whether the merits of such a system (simplicity and transparency) outweighed the disadvantages. Adopting the Taskforce's recommendations in full is therefore the only option available to substantially improve the Holidays Act while preserving tripartite consensus.
8. If Cabinet agrees to my recommendation to adopt the Taskforce's recommendations, work will begin immediately on detailed policy design and the legislative drafting process. I have submitted a legislative programme bid for amendments to the Holidays Act with a Category 5 status (instructions to be provided to Parliamentary Counsel Office in 2020).

## **Background**

### ***A tripartite Taskforce was established to suggest improvements to the Holidays Act 2003***

9. The *Holidays Act 2003* (the Act) sets out the minimum entitlements to holidays and leave, and payment for them, that employers are obliged to provide to their employees. Its purpose is to promote balance between work and other aspects of employees' lives by providing minimum entitlements to annual holidays, public holidays, and sick, bereavement and family violence leave.
10. The issues that the Act poses for employers, employees and others are well documented. While it provides some prescription around determining pay for holidays and leave, there remains a high degree of ambiguity in situations when remuneration arrangements are complex. Many employers also have difficulty calculating entitlements as the legislation does not always prescribe how these are to be provided. The result is that current provisions generally work for a standard five day, 40 hour week, but pose a number of issues when applied to more diverse working arrangements and variable pay structures.
11. These challenges with the Act, combined with poor implementation in payroll systems and the business processes that support them, have led to widespread non-compliance with the legislation. As at June 2019, arrears had been calculated in respect of 84 of the 155 completed investigations undertaken by the Labour Inspectorate into non-compliance with the Act. Arrears (which can include underpayments going back several years) have ranged from an average \$29 per affected worker in one organisation, to around \$8,000 per affected worker in another organisation. In total, around \$90.4 million has been paid to 116,000 employees

across numerous organisations. This total remediation figure is expected to grow substantially over time, particularly when payments made by District Health Boards are incorporated.

12. To help address these issues, Cabinet agreed in May 2018 to establish a Taskforce to review the Act and suggest recommendations for change [CAB-18-MIN-0250 refers]. The tripartite group was comprised of government, union and business representatives, and was chaired by Professor Gordon Anderson, an employment law specialist from Victoria University. The Taskforce was provided with approximately a year to provide its final report.

***The Taskforce undertook its review in three distinct phases***

13. Between July 2018 and October 2019, the full Taskforce met for 17 meetings and the Taskforce subcommittee met for 13 meetings. The Taskforce undertook its review in three distinct phases:
  - i. ***Understanding issues with the current Act.*** This included consulting on an Issues Paper in August 2018 which set out the group's understanding of the key issues with the Act and suggestions for improvement. A total of 87 submissions were received from businesses, payroll practitioners and providers, and individuals.
  - ii. ***Developing and testing options.*** This involved developing and testing a number of options for change that were based on the views and proposals put forward by Taskforce members and via the Issues Paper consultation process. The testing was conducted by an external provider with expertise in payroll matters and using bona fide payroll data across a wide range of working arrangements.
  - iii. ***Confirming preferred option and finalising recommendations.*** This involved assessing the options developed by the Taskforce against a range of criteria, consulting with a select group of payroll providers, and confirming the final recommendations in a report.
14. The Taskforce considered the options for change it developed against a range of criteria set out in its Terms of Reference. These criteria set out that the Taskforce's recommendations were expected to:
  - i. continue to promote the existing purpose of the *Holidays Act 2003*
  - ii. provide clarity and certainty for employers and employees so that employees receive their correct entitlements
  - iii. be simpler than the current Act in relation to the provision of, and payment for, entitlements to holidays and leave
  - iv. be readily implementable in a payroll system
  - v. minimise compliance costs for employers
  - vi. minimise perverse incentives on employers and employees

- vii. ensure the balance of decision-making between employers and employees when it comes to request for holidays and leave is appropriately calibrated
  - viii. be readily applicable to the full range of working and remuneration arrangements in the labour market both now and in the future
  - ix. aim to protect overall entitlements for employees.
15. The Taskforce was particularly guided by three key principles: certainty, transparency and practicality. It wanted the recommendations to provide the certainty that employers and employees require, to ensure that employees are fully informed about their leave entitlements, and to work in the real world. It also wanted to ensure that no employee would be worse off under its proposals.
16. The Taskforce was not able to consult widely on its proposed recommendations due to timeframe pressure. Although it consulted on a subset of its recommendations with a small group of payroll providers in September 2019, there are likely to be other interested stakeholders, such as other payroll providers and practitioners, businesses and employment lawyers.

***The Taskforce recommends an improved status quo***

17. The Taskforce submitted its final report to me on 8 October 2019 (attached as Annex Two). The proposed approach is an improved status quo, where the existing units of entitlement are retained (weeks for annual holidays, days for FBAPS<sup>1</sup> leave) and the focus is on addressing known issues with the existing Act. The recommendations were made unanimously.
18. I have included a brief summary of the group's main recommendations below.

*Payment for annual holidays and leave should be based on clear rules*

19. The Taskforce proposed that annual holidays payments should be paid at the greater of a 'short-run' average weekly earnings over the last 4 or 13 weeks,<sup>2</sup> a 'long-run' average weekly earnings over the last 52 weeks, and what the employee would have earned if they had been at work on the day(s) in question (referred to as 'Ordinary Leave Pay'). FBAPS leave payments would be paid at the greater of the average hourly pay over the last 13 weeks<sup>3</sup> or Ordinary Leave Pay.
20. It is also suggested that the definition of 'gross earnings' be amended to mean all cash payments received, except direct reimbursements for costs incurred.

*There should also be clear rules to calculate the amount of leave being used, and whether leave is available*

21. The Taskforce recommends a prescriptive process to determine how much leave needs to be deducted from an employee's entitlement in order for an employee to

<sup>1</sup> Family violence leave, Bereavement leave, Alternative holidays, Public holidays and Sick leave.

<sup>2</sup> The Taskforce did not decide between the two possible reference periods for the 'short-run' average weekly earnings calculation (i.e. four or 13 weeks). I have decided to recommend a 13 week reference period, for reasons set out in paragraph 40.

<sup>3</sup> The Taskforce continued to use the term 'Average Daily Pay' for this approach to FBAPS leave, despite adopting an hours-based formulation ('Average Daily Pay' is defined differently in the current Act).

take a given period of time away from work. For example, if an employee wants to take a paid day off on a Wednesday, what proportion of an employee's annual leave balance (which is held in weeks) does this 'day off' amount to? The prescriptive process agreed by the Taskforce involves using documentation (e.g. an employment agreement) or a prescribed averaging method to determine leave entitlements and deductions. The latter approach would be used only in cases where an employee's working week is highly variable and unpredictable.

22. A prescriptive 'Otherwise Working Day' test is also proposed for determining when a particular day is an 'Otherwise Working Day' for FBAPS purposes. More specifically, employees should be eligible for this type of leave if they were expected to have worked on that day or have worked 50% of the corresponding calendar days in either the last four or 13 weeks.

### *Changes to entitlements*

23. The Taskforce proposes the following amendments to entitlement eligibility and availability:
  - i. Employees should continue to receive their entitlement to four weeks' leave when they have completed 12 months continuous employment, but in their first year of employment the Act should provide the ability to take annual holidays in advance on a pro-rata basis (e.g. they could take two weeks' leave after working for 6 months). However, there should be no ability for the employer to make the employee take any annual holidays prior to formally receiving the entitlement.
  - ii. Employees should become entitled to bereavement leave and family violence leave from their first day of employment. Employees should be entitled to one day of sick leave from their first day of employment, with an additional day per month of employment until the full entitlement of five days is reached after four months.
  - iii. Employees should have the ability to take sick leave and family violence leave in units of less than a day.
  - iv. Bereavement leave should be expanded to cover more family members (e.g. stepfamily, siblings-in-law and children-in-law, cultural family groups, miscarriage, and aunts, uncles, nieces and nephews).
24. The Taskforce also recommended a significant change to how annual holidays payments are calculated for employees returning from parental leave.
25. Currently, the *Parental Leave and Employment Protection Act 1987* overrides the 'payment for annual holidays' provisions in the Holidays Act, and states that for any annual holidays an employee becomes entitled to within 12 months of beginning a period of parental leave, they will only be paid at the rate of their average weekly earnings over the last 12 months.
26. Because the employee's average weekly earnings (from their employer) during parental leave will usually be \$0, and parental leave periods can be up to 52 weeks long, this means that some employees can take their leave but are entitled to be paid

\$0 per week for annual holidays if used immediately following their return to work, and any such leave used in that first year after return will be paid at a lower rate than their ordinary weekly pay. The value of the leave increases during the year, and is at the normal rate 12 months after they have returned from parental leave.

27. The 'parental leave override' has been criticised as discriminating against parents who take time off to care for their young children, and the issue has a disproportionate impact on women.
28. The Taskforce recommended removing the parental leave override, which would mean that, for parents returning from parental leave, any annual holidays they became entitled to while on parental leave (or soon after returning to work) would be paid at the same rate as other annual holidays.

### **I propose to adopt the Taskforce's recommendations in full**

29. For the reasons set out below, I consider that the Taskforce's recommendations, set out in pages 28 to 47 of the Taskforce's report (Annex Two), should be adopted in full as the basis for a substantially amended Holidays Act.

*The recommendations have the Taskforce's unanimous support and meet the objectives of the review*

30. One of the key goals I set the Taskforce was for it to produce a set of recommendations that all of its members supported. The failure of past reviews to achieve consensus, and instead deliver opposing options supported by either employers or employees, is seen by many as the key reason the Act is challenging and why there is widespread non-compliance. With this in mind I consider that there would need to be a very strong case for us to move away from the Taskforce's recommendations and adopt a different approach to reform of the Act.
31. The Taskforce's recommendations meet the objectives of the review that were set out in the Terms of Reference. Importantly, the recommendations will provide the certainty and clarity that both employers and employees require from the Holidays Act while preserving employees' entitlements.
32. The Taskforce's proposals are likely to result in a small increase in the amount paid out by employers in relation to annual holidays and other forms of paid leave (more detail is provided in the 'Financial Implications' section of this paper). However, this additional cost must be considered in the context of the current uncertainty and amount of resources expended by employers on attempting to comply with the current Act. Employers across the New Zealand economy have faced or are still facing expensive remediation bills resulting from their inability to comply with the Act.
33. The Taskforce's proposals have been tested to ensure they can be implemented with a payroll system. There will be some transitional costs and investments associated with establishing a new or amended payroll system. However, once such a system is in place the ongoing costs faced by employers in relation to complying with the Holidays Act should reduce. For organisations that have recently reconfigured their payroll systems to achieve compliance with the current Act, adapting to the Taskforce's 'improved status quo' approach should involve less re-work than would a more radical overhaul of the Act.

*There are other options which would be simpler in some respects but these have drawbacks and do not have consensus support*

34. The Taskforce considered a number of options in the course of its review. One of these options was for an hours-based accrual system for annual holidays. In this type of system an employee's leave balance would automatically accumulate in hours at a set rate (e.g. 8% of each hour) for every hour worked.
35. The employees' leave balance would be held in hours and whenever the employee wished to take annual holidays, they would simply use the appropriate number of hours from their accumulated leave balance.
36. This system would be simple to operate for employers and may be easier for some employees to understand. It was favoured by many respondents to the Taskforce's issues paper. However, it requires a fundamental change to the calculation of payment for leave. Entitlements are currently determined in relation to the work pattern at the time the leave is taken, whereas under this approach they would be based on an employee's arrangements at the time they 'earned' the leave.
37. Under an hours-based accrual system, employees whose hours of work increased over the course of a year would be disadvantaged in comparison to the status quo. A system where the leave balance is held in weeks 'automatically' adjusts when an employee's hours of work increase or decrease (i.e. an employee with two weeks of leave will still have two weeks of leave, it is just that each week will now represent a higher or lower number of hours than before their hours of work changed). An hours-based accrual system does not include this 'automatic adjustment' and so an employee whose hours of work increase may find themselves without enough hours of leave in their accumulated balance to take four weeks of paid leave.
38. The Taskforce did not recommend such a system because of concerns about the disadvantages it could have for some employees and the departure from the principle that annual holidays entitlements are based on the work pattern at the time the leave is taken.

*I seek confirmation of my decisions on two issues where the Taskforce did not make final decisions*

39. There were two outstanding issues from the Taskforce's report where my decisions were required to 'fill in the gaps'. These were:
  - Whether the second or 'short run' reference period for calculating annual holiday payments should be four or 13 weeks.** The Taskforce agreed to a 'greater of three' approach to annual holidays payments that included what the employee would have received if they were at work ('Ordinary Leave Pay'), a short-run average weekly pay (calculated using either the previous four or the previous 13 weeks), and a long-run average weekly pay over the last 52 weeks. The Taskforce could not agree whether the short-run average should be based on the previous four or 13 weeks, and their report refers this decision to me.
  - What rules should apply for commissions or incentive payments when it is unclear what period of time they were 'earned' over.** For instance, should the entire amount be treated as though it was earned within the current pay period, or



spread over a number of pay periods (with potentially significant impacts on the value of leave used in the affected pay periods and the amount of tax paid).

40. For reasons of clarity and simplicity, as well as providing an appropriate balance between minimising cost to employers while protecting entitlements for employees, I propose that the 'short-run' reference period should be 13 weeks and that any commission or incentive payments where it is unclear what period of time the payments were 'earned' over should only be included in the 52 week average payment calculation.

*There are risks in adopting the Taskforce's full set of recommendations, but these can be partly mitigated*

41. It is likely that the Taskforce's recommendations will receive negative feedback, particularly from employers. For example, it is anticipated that employers and payroll providers will be disappointed that an hours-based accrual system is not proposed and will react negatively to the level of complexity in the Taskforce's recommendations.
42. I propose to mitigate this risk by emphasising the support that the Taskforce recommendations received from both business and union representatives on the Taskforce, and highlighting the improvements that the proposed system will provide. I will particularly emphasise that these proposals will allow employers to shift from a highly uncertain and risky regulatory environment where large remediation payments are the norm, to one where they will be able to have confidence they are meeting the regulatory requirements.

### **Further detailed design work will be required to implement the Taskforce's recommendations in legislation**

43. The complexity of the existing and proposed legislation means that further policy decisions will likely be required during the drafting process (for example, to connect the various elements of the Taskforce's proposals, and reconcile them with provisions on which the Taskforce did not make recommendations). I therefore request authorisation to make any changes and decisions during drafting in line with the Taskforce's recommendations.
44. I note that the Better Rules approach will be used to develop the detailed policy and implementation specifications that will be necessary for this next phase of work. Better Rules is a collaboration between multiple government agencies, including the Ministry of Business, Innovation and Employment (MBIE), Inland Revenue and the Parliamentary Counsel Office. The Better Rules approach involves creating a clear concept model, decision trees and rules statements that can then be translated into both written legislation and computer code. This should result in legislation that is clear and, importantly, workable for computerised payroll systems. I note that this approach has been used successfully by Inland Revenue, which also needs to develop rules with payroll systems in mind.

45. Free and frank opinions

Free and frank opinions

46. One recommendation made by the Taskforce was for further work to be undertaken on the design of compliance and enforcement mechanisms to support any revised Act. While this work is yet to be completed, my initial view is that any changes to the existing mechanisms (such as the functions and powers of labour inspectors) are likely to be minor. I will seek Cabinet policy approvals if further work leads me to conclude that a significant departure from existing employment legislation is necessary.

### Consultation

47. The Treasury, State Services Commission, Department of the Prime Minister and Cabinet (Policy Advisory Group), Ministry of Education, Ministry of Health, Ministry of Justice, Ministry of Social Development, Office for Disability Issues, Ministry for Women, Ministry for Pacific Peoples, Inland Revenue, Oranga Tamariki – Ministry for Children, Department of Internal Affairs and Te Puni Kokiri were consulted on this paper.

48. Free and frank opinions

49. The Department of Internal Affairs, on behalf of the All-of-government Payroll Programme working group, relayed concerns that the Taskforce's recommendations do not provide enough certainty, transparency and practicality, and will impose significant costs on employers when updating their payroll systems and complying with new requirements. The working group recommends that further detailed design work, including more comprehensive payroll testing, is conducted before decisions are made by Cabinet regarding legislative change.

50. I disagree with the Payroll Programme working group's recommendation that further testing should occur. The model proposed by the Taskforce was subject to robust testing by an external provider with expertise in payroll matters and using bona fide payroll data across a wide range of working arrangements. The Taskforce's model represents a unanimous recommendation by employer, worker and government representatives. I am confident that the Taskforce considered the need for certainty, transparency and practicality and that their recommendations are a significant improvement on and more readily implementable than the status quo. Any change will have implementation costs. I plan to minimise these through the Better Rules approach discussed in paragraphs 43-46 above.

## Financial Implications

51. The proposals in this paper have financial implications for employers and employees, and for the Employment Relations–Employment Standards (ERES) regulatory system.

### *Impacts on employees and employers*

52. The Taskforce’s recommendations will result in employees receiving slightly more leave pay, on average, than they would under the current Act. Employees that have variable working arrangements and complex remuneration structures are most likely to receive an increase in annual holidays and leave payments. It is estimated that between 60,600 and 580,400 employees, or 3 to 27 per cent of all New Zealand employees, fall within these categories and are most likely to work in the ‘health care and social assistance’, ‘accommodation and food services’ and ‘public administration and safety’ sectors.
53. The majority of employees, particularly those with standard hours and stable earnings, should not see increased payments when compared to the current Act. However, improved clarity and certainty should help address non-compliance issues and many employees may see changes in their holiday and leave pay as a result.
54. Estimates of the direct costs for employers (and corresponding direct benefits for employees) are based on payroll testing undertaken on behalf of the Taskforce by an independent professional services company using real payroll data. By design, the testing sample included a large overrepresentation of employees with varied and unpredictable working arrangements (as these workers are most likely to be affected by changes to the Holidays Act). This meant that a range of assumptions had to be used in order to ‘scale up’ the impacts to the entire workforce.
55. The total additional direct cost to employers of adopting the Taskforce’s recommendations is estimated to be up to \$310.3 million per year (with a corresponding benefit for employees). This represents less than 0.3 per cent of New Zealand’s total 2019 wage and salary bill. The impact is broken down as follows:
- i. For annual holidays, it is estimated that payments could increase across the New Zealand economy by up to \$29.7 million per year. I note that testing of the Taskforce’s recommendations showed that most employees’ holiday pay remained the same as under the status quo. However, 34 per cent of employees in the sample received more holiday pay than they would under the current Act. Around 10 per cent of employees were worse off (most by less than 15 per cent).
  - ii. For FBAPS payments, payroll testing suggested that no employees would be worse off under the Taskforce’s proposals, and most would be better off. The average daily FBAPS leave payment increased by around seven per cent. Taking into account the skewed characteristics of the sample tested, MBIE considers that a reasonable estimate of increased FBAPS payments across the New Zealand workforce is approximately \$186.7 million per year.

- iii. The Taskforce's recommendation to change how annual holidays payments are calculated for employees returning from parental leave is explained in paragraphs 24-28 of this paper. A mid-range estimate of the cost of implementing this approach would be approximately \$42 million per year for employers across New Zealand.
  - iv. It is estimated that making bereavement, sick and family violence leave available from day one will increase costs across the New Zealand economy by around \$51.9 million per year. This figure accounts for tenure and turnover rates in New Zealand and is based on assumptions on the amount of leave likely to be taken.
56. Many of the Taskforce's recommendations will necessitate changes to payroll systems and employers will incur compliance costs in transitioning to the amended Holidays Act. While the projected compliance costs have not been quantified, I note that, for employers that are already compliant with the current Holidays Act, the upfront changes to payroll systems required to implement the Taskforce's recommendations should be relatively minor (as the recommendations amount to an improved status quo). In the longer term, the greater certainty provided by the Taskforce recommendations should see compliance costs reduce for employers.

#### *Implications for the regulator*

57. For the Labour Inspectorate and associated functions within MBIE, implementing the legislative changes effectively would have resourcing implications that could not be met within current baselines (without compromising other regulatory functions). In particular:
- i. The Labour Inspectorate considers that retaining a complex weeks-based entitlement system for annual holidays will require a dedicated team of payroll specialists (labour inspectors) for the long-term. A similar team was established in 2015/16 for a fixed term to undertake targeted compliance work when the extent of non-compliance with the current Act became evident, but funding for this dedicated team is currently scheduled to cease in 2020.
  - ii. Around 90 per cent of existing Holidays Act-related information and education resources will need to be updated, and additional resources will be required to explain, and assist employers to embed, the Taskforce's recommendations (funding for staff time, new products and tools, and promotion).
  - iii. There may be a case for additional resources to support any new compliance approaches that are developed to support implementation of the Taskforce's recommendations. (For example, mechanisms that stipulate expectations around the quality and performance of payroll products, providers, and associated systems).
58. I intend to submit a Budget bid to support the implementation of the Holidays Act amendments.

## *Implications for Government as an employer and funder of contracted services*

59. The State sector disproportionately employs workers in two of the sectors anticipated to be most impacted by the Taskforce's proposals. Approximately 34 per cent of the 'health care and social assistance' workforce and 100 per cent of the 'public administration and safety' workforce are employed in the State sector, compared to the State sector's proportion of the total New Zealand workforce of 16 per cent. It is likely that a greater proportion of the marginal fiscal impacts of the Taskforce's proposals will be apportioned to the Government than the State sector's 16 per cent of the workforce would suggest. There are also likely to be cost pressures for Government funded services provided through private sector employers.

### **Legislative Implications**

60. The proposals in this paper will form the basis of an amended Holidays Act. I have submitted a legislative programme bid for amendments to the Holidays Act with a Category 5 status (instructions to be provided to Parliamentary Counsel Office in 2020).

### **Impact Analysis**

61. The Regulatory Impact Analysis requirements apply to the proposals in this paper and a Regulatory Impact Statement (RIS) has been prepared and is attached.
62. MBIE's Regulatory Impact Analysis Review Panel has reviewed the 'Improving the Holidays Act 2003' RIS and considers that the information and analysis summarised partially meets the Quality Assurance criteria.
63. The reviewers commented: "[the RIS is a partial meets] because the second option (accrual-based system for annual holidays) has not been analysed to the same extent as the first option as it was dismissed relatively early by the Taskforce, despite their early consultation indicating wide support for the second option, particularly by employers. There has been limited time for analysis or consultation post-Taskforce to better understand the impacts of the second option and so it is difficult to compare the options on a like-for-like basis".

### **Human Rights**

64. The amendments to the Holidays Act proposed by the Taskforce appear to be consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

### **Gender Implications**

65. Adopting the Taskforce's recommendation to remove the parental leave 'override' in the *Parental Leave and Employment Protection Act 1987* will have a positive impact on employment rights for parents of young children in general and women in particular (because the 'override' has a disproportionate impact on women). This issue is explained in more detail in paragraphs 24-28 of this paper.

## **Disability Perspective**

66. Amending the Act to make it easier for employers to implement, and easier for employees to be sure they are receiving their correct statutory entitlements, is likely to benefit disabled people. Disabled people are likely to be overrepresented in the group of employees with varied or unpredictable working hours and/or payments that stand to benefit most from the Taskforce's proposals. Once the proposals are implemented, this group of employees should have more certainty about how any periods of paid leave should be calculated and taken.
67. With the Enabling Good Lives demonstrations in Christchurch and Waikato, and the Mid-Central System Transformation prototype, more disabled people are employing their own support staff. The proposed changes to the legislation to provide greater clarification of obligations as employers should therefore reduce the risk of non-compliance with the Act by all employers, including disabled employers.
68. The proposed recommendations, including increased flexibility and clarity, are also likely to benefit support workers across the disability sector. This group of employees may often have irregular or unpredictable work hours and/or payments.
69. The proposals in this paper support the outcomes of the New Zealand Disability Strategy 2016-2026, in particular Outcomes 2: Employment and economic security, 5: Accessibility (of information), and 7: Choice and control.

## **Publicity**

70. I intend to issue a press release announcing the Government's decision to adopt the recommendations of the Holidays Act Taskforce, and publish the Taskforce's report on MBIE's website.
71. As stated above in paragraph 41, some of the recommendations in the Holidays Act Taskforce Report may receive negative feedback, particularly from some employers or payroll providers. The media could focus on the complexity of the recommendations and question why the Government has chosen to endorse all of the Taskforce's proposals.
72. I propose to mitigate this risk by emphasising the support that the Taskforce recommendations received from both business and union representatives on the Taskforce, and highlighting the improvements that the proposed system would provide when compared to the status quo. It will also be made clear that businesses and employers will be given plenty of time and guidance to prepare for any changes.

## **Proactive Release**

73. I intend to proactively release this Cabinet paper on MBIE's website, subject to any appropriate withholding of information that would be justified under the Official Information Act 1982.

## **Recommendations**

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

*Endorse the unanimous recommendations of the Holidays Act Taskforce*

1. **Note** that in May 2018, Cabinet agreed to establish a Taskforce to review the Holidays Act 2003 and suggest recommendations for change [CAB-18-MIN-0250 refers]
2. **Note** that the Holidays Act Taskforce submitted its report to me in October 2019 and has proposed an improved status quo which retains the existing units of entitlement (weeks for annual holidays, days for other types of leave) and focuses on addressing known issues with the Act by providing greater certainty
3. **Agree** to endorse in full the Taskforce's recommendations, as set out in pages 28 to 47 of the Taskforce's report (Annex Two), as the basis for a substantially amended Holidays Act (noting also the summary of recommendations and the proposed Government response at Annex One)
4. **Agree** to refine the Taskforce's recommendations on two issues where the recommendations were incomplete, by specifying that:
  - 4.1. the reference period for the 'short-run' average weekly earnings calculation used for calculating annual holiday payments should be 13 weeks
  - 4.2. any commission or incentive payments where it is unclear what period of time the payments were 'earned' over should only be included in the 52 week average payment calculation
5. **Note** that some of the Holidays Act Taskforce recommendations are likely to receive negative feedback but this risk can be partly mitigated by a communications strategy that focuses on the improvements that the Taskforce's recommendations will provide

*Approve drafting of legislation*

6. **Note** the Minister for Workplace Relations and Safety has submitted a legislative programme bid for amendments to the Holidays Act with a Category 5 status (instructions to be provided to Parliamentary Counsel Office in 2020)
7. **Invite** the Minister for Workplace Relations and Safety to issue drafting instructions to Parliamentary Counsel Office giving effect to the policy decisions in this paper
8. **Authorise** the Minister for Workplace Relations and Safety to make decisions, consistent with the Taskforce's recommendations, on any issues that arise during the detailed policy design and drafting process
9. **Note** the authorisation sought under recommendation 8 includes authority to make decisions on updated compliance and enforcement mechanisms to support the new Holidays Act regime (such as the functions and powers of labour inspectors), provided these do not deviate significantly from mechanisms in current employment legislation
10. **Note** that the Holidays Act 2003 binds the Crown as will any amendments to that Act

*Publicity*

11. **Note** the Minister for Workplace Relations and Safety intends to publicly release the Holidays Act Taskforce Report (Annex 2) alongside a statement signalling the Government's decision to adopt the recommendations in full

Authorised for lodgement

Hon Iain Lees-Galloway

Minister for Workplace Relations and Safety



## Annex One: Summary of Government response to Holidays Act Taskforce recommendations

The table below sets out the Holidays Act Taskforce’s proposals across a number of key themes and compares them with the provisions in the current Act.

Theme/provision		Current Act	Taskforce proposals	Rec #	Government response
Calculation of leave payments	Annual holidays payments	<p>Paid at the greater of:</p> <ul style="list-style-type: none"> <li>• Ordinary Weekly Pay (OWP) (or average weekly earnings over last 4 weeks if OWP cannot be calculated)</li> <li>• Average weekly earnings over last 12 months</li> </ul> <p>For employees that have been on parental leave, only the average weekly earnings over last 12 months is used.</p>	<p>Paid at the greater of:</p> <ul style="list-style-type: none"> <li>• Ordinary Leave Pay</li> <li>• Average weekly earnings over last 4 or 13 weeks (if Ordinary Leave Pay is unclear)</li> <li>• Average weekly earnings over last 52 weeks</li> </ul> <p>The above calculation is also used for those who have been on parental leave (i.e. the ‘parental leave override’ is removed).</p>	1, 5	<b>Accept recommendations</b> , adopting 13 weeks as the reference period for the ‘short-run’ average weekly earnings calculation. The Minister for Workplace Relations and Safety also recommends that commission or incentive payments, where it is unclear what period of time the payments were ‘earned’ over, should only be included in the 52 week average payment calculation.
	FBAPS leave payments	Relevant Daily Pay (RDP) or Average Daily Pay over last 52 weeks (if not possible to calculate RDP or if pay varies within pay period)	<p>Paid at the greater of:</p> <ul style="list-style-type: none"> <li>• Ordinary Leave Pay</li> <li>• Average Daily Pay over last 13 weeks</li> </ul>	1	<b>Accept recommendation</b>
	‘Gross earnings’ definition	Lack of clarity as to what payments are included in ‘gross earnings’ (e.g. what a discretionary payment is).	Clarifies that ‘gross earnings’ means all cash payments received, except direct reimbursements for costs incurred.	8	<b>Accept recommendation</b>
How deduction of entitlement is calculated	Period of annual holidays	Annual holidays entitlement of four weeks, but lack of detail about how to determine entitlements and payments where it is not obvious (e.g. for employee with variable hours and/or pay). Employee and employer agreement about what genuinely constitutes a working week for the employee.	<p>Annual holidays entitlements are calculated, taken, paid and held in weeks or portions of weeks.</p> <p>Use hours from employment agreement or roster. If no hours set out in employment agreement or roster, then use average hours worked over corresponding days in previous 13 weeks.</p>	2, 4	<b>Accept recommendations</b>

	Day of FBAPS leave	Deductions in days (but lack of certainty about how to determine if a day is an Otherwise Working Day).	Deductions in days or part-days (sick and family violence leave can be taken in units of less than a day, at a minimum of a ¼ of a day). Prescribed formula for determining an Otherwise Working Day.	9, 11, 13	<b>Accept recommendations</b>
Taking annual holidays in advance		Employees become entitled to four weeks' leave after 12 months continuous employment. The Act does not specifically provide for leave in advance (i.e. it is at the discretion of the employer).	Employees become entitled to four weeks' leave after 12 months continuous employment, but have the ability to take leave in advance on a pro-rata basis (e.g. could take 2 weeks leave after working for 6 months).	3	<b>Accept recommendation</b>
Pay-as-you-go (PAYG)		There is confusion as to what 'intermittent or irregular' means in relation to employees being eligible to receive annual holiday pay with their pay (instead of being entitled to take paid time off).	Clearer definition of what 'intermittent or irregular' means, and employers required to review PAYG employees every 13 weeks to check eligibility for PAYG. Also removes the ability to pay PAYG for employees on fixed-term contracts of less than 12 months.	6	<b>Accept recommendation</b>
Availability provisions		Silent on how availability provisions interact with leave.	Clarifies how availability provisions and leave interact.	7	<b>Accept recommendation</b>
FBAPS eligibility		Employees are eligible for sick, bereavement and family violence leave after six months continuous employment or if they meet an hours test after six months.	A new eligibility test for sick, bereavement and family violence leave. Bereavement leave and family violence leave are available from day one, and sick leave accrues over four months. Bereavement leave is expanded to cover more family members.	10, 12, 14	<b>Accept recommendations</b>
Transferring public holidays		Employees can transfer a public holiday to another day, but can be left worse off in some circumstances.	Provisions are amended to reduce the chance of employees being disadvantaged by a transfer.	15	<b>Accept recommendation</b>
Closedowns		Closedown provisions are confusing and can disadvantage employees.	Closedown provisions are amended to provide greater transparency and certainty, and reduce negative outcomes for employees.	17	<b>Accept recommendation</b>
Sale and transfer of a business		Employees must have all of their leave entitlements paid out and reset on the sale	Employees have a choice about whether to transfer all of their leave entitlements or have them paid out.	18	<b>Accept recommendation</b>

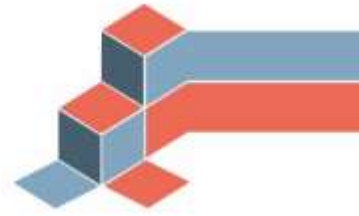
	and transfer of a business. Many employers are unclear on these provisions.			
Record keeping and payslips	Employers must keep relevant records. No requirement to provide a payslip to employees.	Record keeping requirements are updated in line with the general statutory obligation to keep records relating to minimum employment standards, and employers must provide detailed payslips every pay period.	19, 20	<b>Accept recommendations</b>
Compliance and enforcement	A range of information and education tools are available to support employers to comply with the current legislation (including detailed guidance first published in 2017). Labour Inspectors also have a range of compliance tools to address non-compliance, ranging from enforceable undertakings and infringement notices, to seeking penalties through the employment institutions for more serious breaches.	The Taskforce recommended further work be undertaken to develop appropriate compliance and enforcement mechanisms to support implementation of a revised Holidays Act.	21	<b>Accept recommendation,</b> noting an initial view that any changes required to these mechanisms are likely to be minor and consistent with the general framework of current employment legislation
Going above the minimum standards	Although employers and employees can agree to different arrangements as long as they meet the minimum, this could be made clearer.	The Act explicitly states that different arrangements can be agreed as long as entitlements can be demonstrated to at least meet the minimum standards.	22	<b>Accept recommendation</b>

# HOLIDAYS ACT TASKFORCE

Final Report

OCTOBER 2019





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## Glossary of terms

**Annual holidays entitlement:** Also known as annual leave, this is an employee's legal right to not less than four weeks of paid annual holidays each year after working for an employer for 12 months (Sections 15 to 20 of the Holidays Act 2003 (the Act)).

**Average Daily Pay ('ADP'):** The daily average of an employee's gross earnings over the previous 52 weeks. This is worked out by adding up the employee's gross earnings for the period, and dividing this by the number of whole or part days the employee either worked, or was on paid leave or holidays for, during that period. An employer may use an employee's ADP for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, family violence or bereavement leave if it is not possible or practicable to determine Relevant Daily Pay or daily pay varies within the pay period when the leave falls (Sections 9A, 49, 50, 52, 53, 60 and 71 of the Act).

**Average weekly earnings ('AWE'):** AWE is one method for calculating annual holiday payment rates (the other being Ordinary Weekly Pay). It is 1/52 of the employee's gross earnings for the 12 months immediately before the end of the last pay period before the annual holiday (Sections 16, 21, 22, 24 and 71 of the Act).

**Cashing up leave:** See "paying out some of the annual holiday entitlement" below.

**'Casual' employee:** Employment legislation does not define what 'casual' employee means (it is set out in case law). It is generally taken to mean an employee who works only as and when required, who can turn down work and who has no expectation of ongoing employment (Section 28 of the Act).

**Closedown period:** Employers can have a customary closedown of all or part of their operations once a year and can require employees to take annual holidays during the closedown, even if an employee has to take unpaid leave. Christmas is the most common time for a closedown, although it can occur at any time of year (Sections 29 to 35 of the Act).

**FBAPS leave:** A collective term for Family violence leave, Bereavement leave, Alternative holidays, Public holidays and Sick leave.

**Fixed-term agreement:** Employment relationships with a set start and end day or event, along with a genuine reason, based on reasonable grounds, for such an arrangement. This arrangement, including the way in which the employment will end and the reasons for it ending that way, must be clearly specified in writing in the employment agreement (Section 28 of the Act).

**Gross earnings ('GE'):** For the purposes of calculating payments for holidays and leave, gross earnings means all payments that the employer is required to pay to the employee under the employee's employment agreement for the period during which the earnings are being assessed (subject to certain exclusions under the Act) (Sections 8, 9A, 10A, 14, 23, 25, 26, 28 and 34 of the Act).

**Leave without pay:** When an employer allows an employee time off work when they would otherwise be working, but does not pay them for this time (Section 16 of the Act).

**Ordinary Leave Pay (OLP):** OLP is a new calculation proposed by the Taskforce to replace the existing Relevant Daily Pay and Ordinary Weekly Pay calculations. OLP would include the base rate for any hours worked in the relevant period, plus pay for any scheduled overtime,



allowances, incentive or commission payments that the employee would have received if they had worked for the relevant period.

**Ordinary Weekly Pay ('OWP'):** The amount an employee receives under their employment agreement for an ordinary working week, including regular allowances, regular productivity or incentive-based payments (including commission and bonuses), the cash value of board or lodgings, and regular overtime. Intermittent or one-off payments as well as discretionary payments and employer contributions to superannuation schemes are not included in Ordinary Weekly Pay. If it is not possible to calculate the payment for an ordinary working week based on these factors then the Act includes a formula to be used to calculate Ordinary Weekly Pay (Sections 8, 10, 10A, 11, 21, 22, 24 and 71 of the Act).

**Otherwise Working Day ('OWD'):** An Otherwise Working Day is a day that an employee would have worked, if it was not for them being sick, being on bereavement leave, being on family violence leave, being on annual holidays or it being a public holiday (Sections 12, 13, 43 and 68 of the Act).

**Pay-as-you-go ('PAYG') annual holiday pay:** Employees who meet either of two specific sets of criteria (i.e. are on a fixed-term arrangement for less than 12 months, or work on an intermittent or irregular basis) can agree with their employer to be paid annual holiday pay on top of their gross earnings for each pay period, instead of receiving paid annual holidays (provided that certain requirements are satisfied) (Section 28 of the Act).

**Paying out some of the annual holiday entitlement:** This is commonly referred to as 'cashing up' some annual holidays. Employees can ask their employer to pay out up to a maximum of one week of their minimum four-week annual holiday entitlement each entitlement year (instead of taking the time off as paid annual holidays). The employee must make the request for this pay out and the request must be in writing. Employers may have a policy against paying out (including in an applicable collective agreement), but even if they do not have such a policy they do not have to agree to a pay-out (Sections 28A to 28F of the Act).

**Permanent employee:** A person employed on an ongoing indefinite basis.

**Regular payments:** Regular payments, such as payments for overtime and productivity or incentive-based payments, are included in calculations of Ordinary Weekly Pay. Although the Act does not define what constitutes a regular payment, payments that an employee receives on a regular basis should be included (for example, any payments that are paid every (or most) weeks should be included). MBIE Holidays Act Guidance<sup>1</sup> includes advice for employers to help them determine what payments should be considered regular (Section 8 of the Act).

**Relevant Daily Pay ('RDP'):** What an employee would have received if they were at work on that day. Relevant Daily Pay includes: payments such as regular (taxable) allowances, productivity or incentive-based payments (including commission and bonuses), and overtime payments if the employee would have received them on the relevant day; and the cash value of board or lodgings if this has been provided by the employer. It does not include employer contribution payments into an employee superannuation fund or reimbursements payable to the worker for the day (Sections 9, 9A, 10, 10A, 11, 49, 50, 52, 53, 60 and 71 of the Act).

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<sup>1</sup> <https://www.employment.govt.nz/assets/Uploads/d53229842c/holidays-act-2003-guidance-holidays-leave-.pdf>





## Foreword

8 October 2019

Hon Iain Lees-Galloway  
Minister for Workplace Relations and Safety

Dear Minister,

It is with pleasure that I submit these recommendations for changes to the Holidays Act 2003 to you on behalf of the Holidays Act Taskforce.

You asked us to have regard to a range of criteria in our review and in particular to attempt to reach consensus in our recommendations. I am pleased to say that thanks to the hard work of the Taskforce members and their genuine desire to arrive at solutions that meet the needs of all parties, we have managed to do so.

The recommendations in this report are endorsed by all Taskforce members.

Throughout the review the Taskforce has been guided by some key principles which have informed our discussions and the decision-making process we have followed. These principles are:

- *Certainty* - the recommendations contained in this report will provide the certainty that employers and employees require. Employers will know what they need to do to meet their obligations under the Act and employees will know what their entitlements are and when they have or have not received them.
- *Transparency* – the Taskforce’s proposals will ensure that employees are fully informed about their leave entitlements so they can see how their entitlements have been delivered and how any leave payments have been calculated.
- *Practicality* – the Taskforce has been focused on ensuring that the proposals it develops can work in the real world. Throughout the review the Taskforce has tested proposals with anonymised payroll data and with multiple employer and employee scenarios to check that they will be implementable in the many and varied businesses across New Zealand.

The proposals in this report will ensure that Government, unions, employers and, most importantly, employees, can have confidence that in the millions of instances each year when an employee requests and is granted leave by their employer, their leave balance and payment for that leave can and will be correctly calculated. The proposals meet the objectives from the terms of reference, and deliver the much needed clarity around holidays, and other leave entitlements and pay, that employers and employees have sought for many years.

I would like to take this opportunity to thank all those who have participated in the review and who have shared their views throughout the process. I would also like to express my appreciation to the Taskforce’s Secretariat for the work they did to support the Taskforce.

I commend these proposals to you and look forward to the Government’s response.

Yours faithfully

Gordon Anderson  
**Holidays Act Taskforce Chair**



## Executive Summary and recommendations

### Summary

1. The issues that the Holidays Act 2003 (the Act) poses for employers, employees and others are well documented. Many employers struggle to comply with the Act, especially where there is unpredictable variation in employees' working arrangements or payment rates, and there have been, and continue to be, many costly remediation cases. The lack of clarity and certainty associated with the current Act make it difficult to implement for employers and hard for employees to be sure that they are receiving their statutory entitlements.
2. To address the issues with the current Act, the Taskforce proposes a range of recommendations to revise the system for determining, calculating and paying the statutory leave entitlements set out in the Act.
3. Although it considered a wide range of employee working arrangements, at a high level the Taskforce focused on achieving the following goals for two broad groups:
  - For those employees with clear, predictable work patterns, the Taskforce wanted to ensure that taking leave and calculating leave payments should be an easy and simple process.
  - For those employees with uncertainty about some or many aspects of their working arrangements (for example, unpredictable working hours and/or payment rates), the Taskforce wanted to ensure that there are clear prescriptive rules that employees and employers can use to accurately determine, calculate and pay leave entitlements.
4. The Taskforce recommends a system that retains the existing units of entitlement set out in the Act. This means that annual holidays entitlements would continue to be calculated, taken and paid in weeks with FBAPS<sup>2</sup> entitlements continuing to be calculated, taken and paid in days. Although the Taskforce is proposing that the units of entitlement be retained, it proposes significant changes in a number of areas to provide the certainty and clarity that employers and employees require. These range from clear prescriptive methodologies for determining deductions and payments for all paid leave, to a new and objective 'Otherwise Working Day' test, for categorically determining whether an employee is eligible for a day of FBAPS leave.
5. The Taskforce's recommendations address the Terms of Reference and will greatly improve the workability of the Act. The Taskforce is well aware that uncertainty costs businesses as well as being unsettling and potentially costly for employees. This is why these recommendations include clear methodologies to provide definitive answers in those cases where it is not obvious how to determine leave entitlements and payments.
6. Employees with fixed, predictable hours and regular pay will see little change as a result of the bulk of the Taskforce's proposals. Calculating leave deductions and payments will remain simple for these straightforward cases. It is those employees with varied or unpredictable working hours and/or payments who will most benefit from the Taskforce's proposals. These employees will now have the certainty that has been lacking to date about how any periods of paid leave should be calculated and taken.
7. The diagrams on pages 11-12 indicate the key points of uncertainty in the current approaches to determining annual holidays and FBAPS leave payments that would be addressed under the Taskforce's proposed methodologies for determining payments for all leave types.

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<sup>2</sup> Family violence leave, Bereavement leave, Alternative holidays, Public holidays and Sick leave.



8. A number of options were developed and tested in the course of the review. These included two versions of an hours-based accrual system (where employees earn annual holidays in hours at a set percentage rate for every hour worked). This type of accrual system was supported by some stakeholders and opposed by others. The testing of the accrual options identified that such a system would leave some people worse off. As a result, the Taskforce did not proceed with further development of an hours-based accrual system.
9. All members agree that the recommendations in this report provide a solution that meets the objectives of the review. Consensus would not have been achievable on any other approach.
10. The key elements of the Taskforce's proposals are set out below:
  - Annual holidays entitlements should be calculated, taken, paid and held in weeks or portions of weeks, while FBAPS leave should continue to be held in days
  - A prescriptive approach to calculating payments for leave. This would pay the greater of the following payments for the relevant period of annual leave:
    - Ordinary Leave Pay (base rate plus any scheduled overtime, allowance, commission and incentive payments)
    - Average weekly pay for the last four or 13 weeks
    - Average weekly pay for the last 52 weeks.
  - Each day (or part-day) of FBAPS leave should be paid based on the greater of:
    - Ordinary Leave Pay
    - Average Daily Pay
  - A prescriptive process to determine how much leave needs to be taken for an employee to have a period of time away from work (this will be particularly useful if it is not clear what a "week" is for an employee)
  - An employee would still become entitled to four weeks' annual holidays after 12 months but would have the ability to take leave in advance on a pro-rata basis
  - A prescriptive 'Otherwise Working Day' test for determining when a particular day is an 'Otherwise Working Day' for FBAPS purposes (e.g. if an employee has worked 50 per cent or more of the corresponding days in the previous four or 13 weeks)
  - A clearer definition of 'gross earnings' would be used as the default for all leave payment calculations<sup>3</sup> as follows:
    - *'employee's leave payments should reflect all cash payments received, except direct reimbursements for costs incurred'.*
11. One of the key problems with the current Act is the lack of clarity that it provides about how to determine leave entitlements and payments when there is variability or uncertainty about an employee's working pattern (for example, when an employee's pay varies or when an employee's hours of work have no set pattern).
12. The Taskforce's recommendations directly address this lack of clarity and provide the certainty needed, through a series of prescriptive methodologies and tests that will provide definitive answers even in cases where certain aspects of the working arrangement are unpredictable or variable. These include:

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<sup>3</sup> Although some specific payments may not be included in particular calculations, such as the calculation of Ordinary Leave Pay.



- a clear process to follow to determine how much of an annual holidays entitlement needs to be used for a period of time away from work
  - a prescriptive test for determining an Otherwise Working Day for FBAPS purposes
  - a clear definition of when a working arrangement is so ‘irregular and intermittent’ that an employee may receive their annual holidays entitlement as payment rather than as paid time off.
13. In addition to proposals for the calculation and delivery of annual holidays and FBAPS entitlements, the Taskforce has also made a number of other recommendations to address other issues with the Act.
14. While further detailed policy and design work will be required to finalise the precise details that will be required to implement these proposals, the recommendations in this report provide the structure and format of a revised system for determining, calculating and paying the statutory entitlements set out in the Act. Updating the Act to be in line with modern legislative drafting principles will also help improve the Act (for example, through adding examples to illustrate particular points).
15. The Taskforce’s recommendations are summarised in the table below and discussed in more detail in Section 6.

### Recommendations

Theme	Recommendations
Payment for annual holidays and FBAPS leave	<ol style="list-style-type: none"> <li>1. The greater of the following should be paid for the relevant period of annual leave:               <ol style="list-style-type: none"> <li>a. Ordinary Leave Pay (base rate plus any scheduled overtime, allowance, commission and incentive payments)</li> <li>b. Average weekly pay for the last four or 13 weeks</li> <li>c. Average weekly pay for the last 52 weeks.</li> </ol> <ul style="list-style-type: none"> <li>• Each day (or part-day) of FBAPS leave should be paid based on the greater of:                   <ol style="list-style-type: none"> <li>a. Ordinary Leave Pay</li> <li>b. Average Daily Pay</li> </ol> </li> </ul> </li> </ol>
Annual holidays entitlement	<ol style="list-style-type: none"> <li>2. Annual holidays entitlements should be calculated, taken, paid and held in weeks or portions of weeks.</li> <li>3. Employees should become entitled to four weeks’ leave after 12 months continuous employment, but have the ability to take leave in advance on a pro-rata basis.</li> <li>4. A clear process should be followed to determine how much of an employee’s leave entitlement should be used for a period of time away from work. Where an employee’s days and hours of work are set out in an employment agreement, shift roster or other document and these are an accurate reflection of the employee’s actual working pattern, these agreed days and hours should be used as the basis for determining leave entitlements and deductions.</li> <li>5. The ‘parental leave override’ in the <i>Parental Leave and Employment Protection Act 1987</i> should be removed, to address discrimination against parents who take time off to care for their young children.</li> <li>6. The ability for employers to use pay-as-you-go (PAYG) for employees on fixed-term contracts of less than 12 months should be removed</li> </ol>



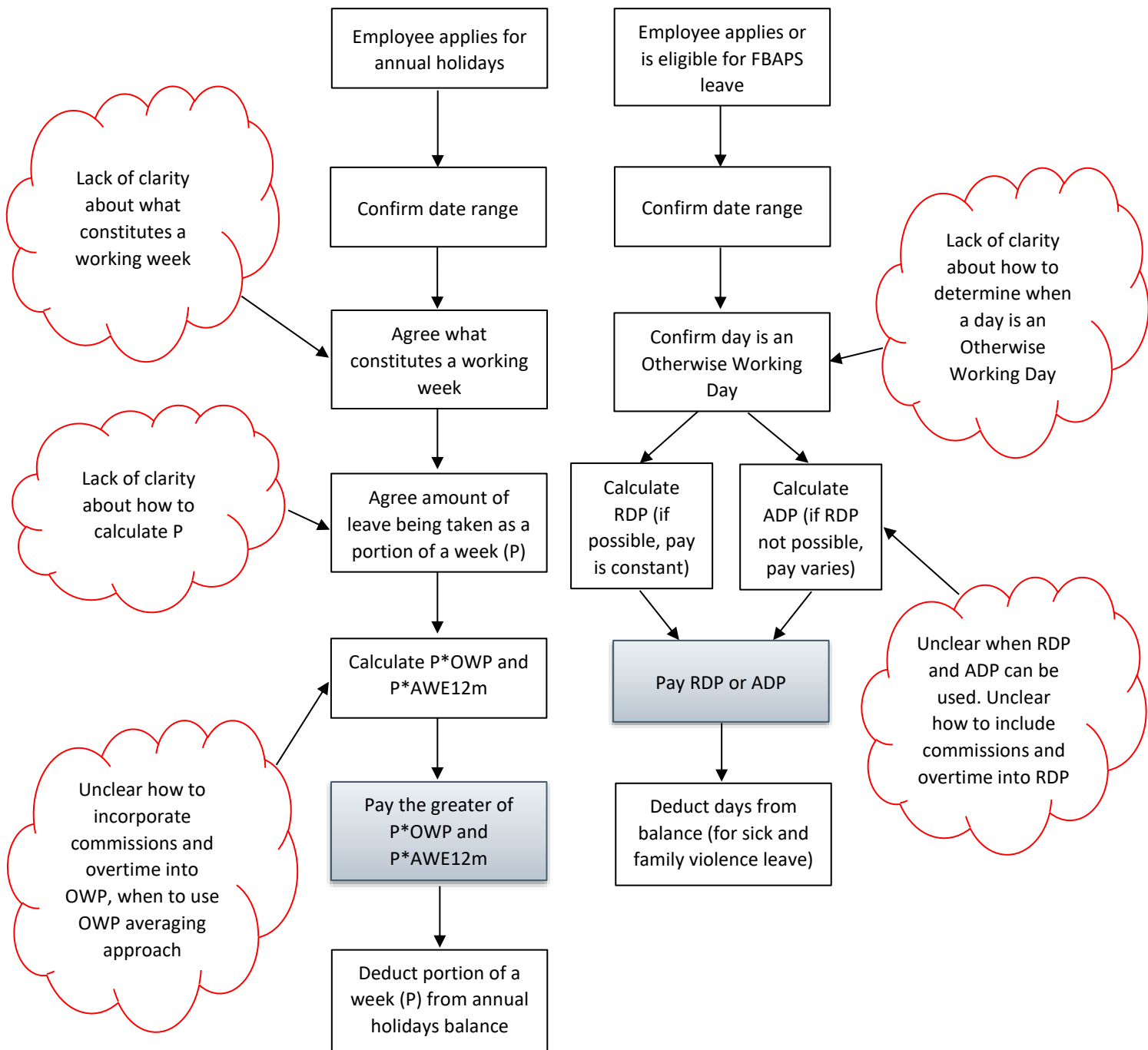
Theme	Recommendations
	<p>and a more detailed definition should be provided for when PAYG can be used because a work pattern is 'intermittent or irregular'.</p> <p>7. An employer's ability to require employees to attend work under an availability provision should be suspended from the end of the last shift the employee works before their leave period until the start of the first shift they work on their return from leave.</p> <p>8. The following definition of 'gross earnings' should be used for leave payment calculations: <i>an employee's leave payment should reflect all cash payments received, except direct reimbursements for costs incurred</i>'.</p>
FBAPS leave entitlement	<p>9. FBAPS leave should continue to be held in days.</p> <p>10. Eligible employees should be entitled to bereavement leave and family violence leave from the first day of employment. Eligible employees should be entitled to one day of sick leave from their first day of employment, with an additional day per month of employment until the full entitlement of five days is reached after four months.</p> <p>11. Employees should have the ability to take sick leave and family violence leave in units of less than a day on a proportionate basis for time and pay with a minimum amount of a quarter of a day.</p> <p>12. There should be a new test for which employees are eligible for sick, bereavement and family violence leave.</p> <p>13. A new prescriptive methodology should be used to determine whether a day is an Otherwise Working Day for an employee for FBAPS purposes.</p> <p>14. The list of people for whom bereavement leave applies should be extended to include a more modern understanding of family members.</p> <p>15. Provisions relating to transferring public holidays should be amended to reduce the chance of employees being disadvantaged by the transfer.</p>
Other proposed changes	<p>16. The Taskforce was unable to reach a consensus view in relation to establishing an additional public holiday (e.g. for Matariki).</p> <p>17. Closedown provisions should be amended to provide greater transparency and certainty for employees. In addition, the requirement that holidays are paid out at 8 per cent and an employee's anniversary date is reset should be removed (although it should still be possible for anniversary dates to be reset by agreement).</p> <p>18. On the sale and transfer of a business, employees should have a choice about whether to transfer all of their leave entitlements to the new employer or have them paid out and reset.</p> <p>19. Record keeping requirements should be updated to reflect changes to how leave entitlements are held, calculated and paid.</p> <p>20. Employers should be required to provide payslips to employees in every pay period.</p> <p>21. Issues that cause non-compliance with the current Act should be considered in the design of the compliance and enforcement mechanisms to support any revised Act.</p>



Theme	Recommendations
	22. Employers and employees should have the ability to agree to arrangements that are different to those in the Act, providing that it can be demonstrated that these arrangements provide the employee with leave entitlements that, at a minimum, meet the standards set out in the Act.



## Current leave payment process

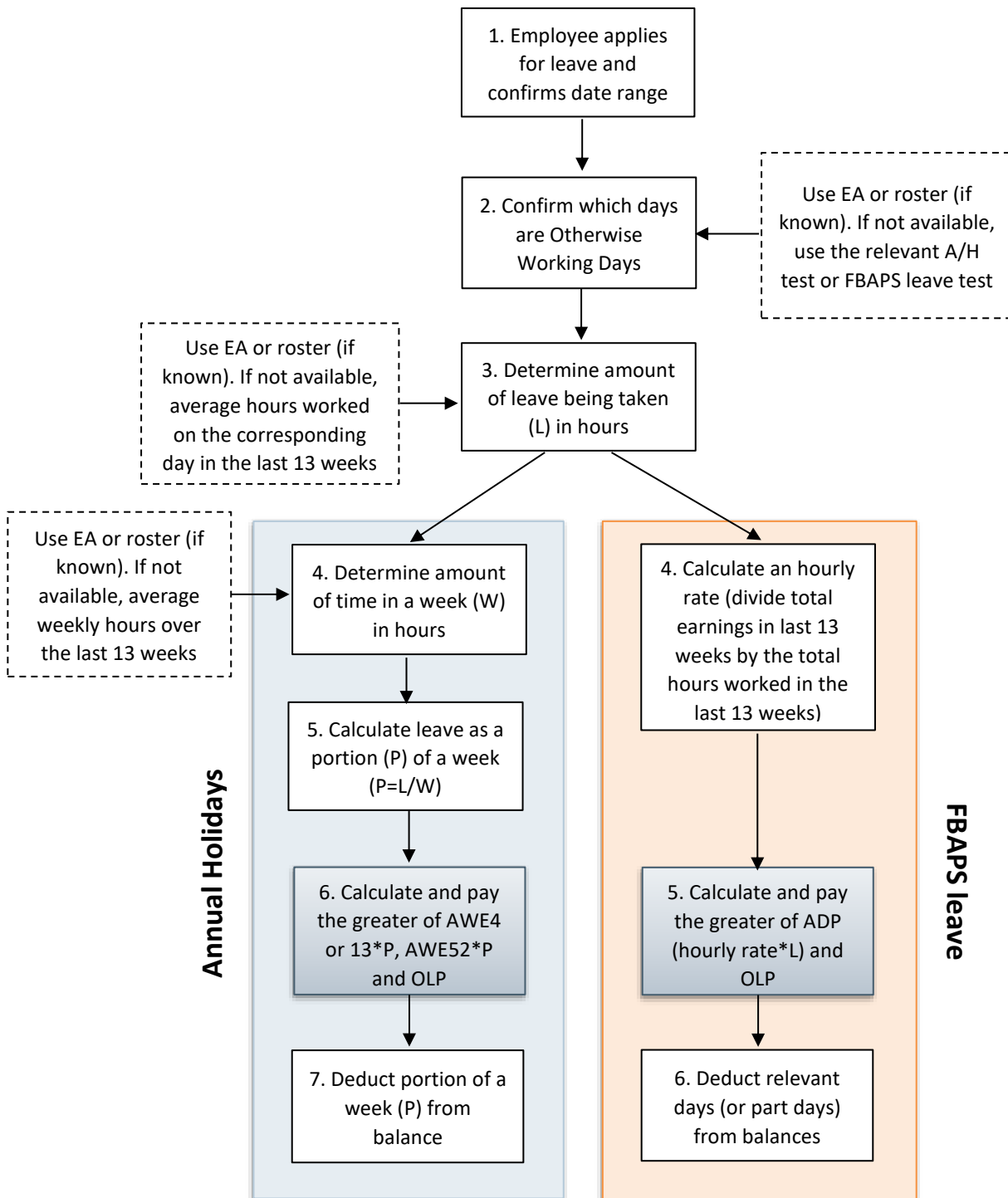


### Abbreviations

- P = Portion of a week
- RDP = Relevant Daily Pay
- ADP = Average Daily Pay
- OWP = Ordinary Weekly Pay
- AWE12m = Average weekly earnings over the last 12 months
- FBAPS = Family violence leave, bereavement leave, alternative holidays, public holidays, sick leave



## Proposed leave payment process



**Abbreviations**

ADP = Average Daily Pay  
 A/H = Annual holidays  
 AWE4 or 13 = Average weekly earnings in last 4 or 13 weeks  
 AWE52 = Average weekly earnings in last 52 weeks  
 EA = Employment agreement  
 FBAPS = Family violence leave, bereavement leave, alternative holidays, public holidays, sick leave  
 L = Leave in hours  
 OLP = Ordinary Leave Pay  
 P = Portion of a week  
 W = Working week in hours





## Section 1: Introduction

16. In May 2018, the Minister for Workplace Relations and Safety established a tripartite Taskforce comprising government (the Ministry of Business, Innovation and Employment (MBIE), State Services Commission and Inland Revenue), the New Zealand Council of Trade Unions, and Business New Zealand, to review the Holidays Act 2003 (the Act). Professor Gordon Anderson, an employment law specialist from Victoria University, chaired the Taskforce and MBIE provided Secretariat support.
17. The purpose of the review was to make recommendations to Government for a clear and transparent set of rules for providing entitlements to, and payment for, holidays and leave.
18. This report begins with relevant background information and a summary of the process the Taskforce followed (Section 1). This is followed by a brief overview of the issues with the current Act (Section 2), a summary of the feedback received from stakeholders on the Issues Paper published by the Taskforce in August 2018 (Section 3), and an overview of the options that the Taskforce developed and tested in the review (Section 4). Section 5 sets out how the Taskforce assessed these options and made its decisions, while Section 6 sets out the Taskforce's final recommendations.

### Summary of the review

19. It has become apparent in recent years that there is a high level of non-compliance with the Act. While it generally works for a standard, five day, 40 hour week, the Act can be difficult to apply to more diverse working arrangements and complex remuneration packages. Non-compliance has resulted in many employees not receiving the correct remuneration for their entitlements and employers spending significant resources on both remediating historical underpayments and complying with the Act.
20. The Taskforce that was established for the review was 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:
  - continue to promote the existing purpose of the Holidays Act 2003, which is to promote balance between work and other aspects of employees' lives by providing minimum entitlements to annual holidays, public holidays, sick leave, bereavement leave and family violence leave
  - provide clarity and certainty for employers and employees so that employees receive their correct entitlements
  - are simpler than the current Act in relation to provisions of, and payment for, entitlements to holidays and leave
  - are readily implementable in a payroll system
  - minimise compliance costs for employers
  - minimise perverse incentives on employers and employees
  - ensure the balance of decision-making between employers and employees when it comes to requests for holidays and leave is appropriately calibrated
  - are readily applicable to the full range of working and remuneration arrangements in the labour market both now and in the future
  - aim to protect overall entitlements for employees.
21. The Taskforce's Terms of Reference can be found in Annex One and the Cabinet paper establishing the Taskforce can be found at: <http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/holidays-act-review>.



## Scope of the review

22. The scope of the review was sufficiently broad so as 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.
23. The Taskforce also had scope to consider any other matters relating to the Act that it saw fit. This included holidays and leave entitlements modified by other Acts (such as the *Parental Leave and Employment Protection Act 1987*) and the interplay between the Act and other amendments to legislation (such as the recent amendments to the *Employment Relations Act 2000*). The Taskforce was expected to consult to get a comprehensive understanding of the issues with the current legislation, and to draw on examples from overseas jurisdictions where appropriate.
24. The review did not include the issue of remediation of historical underpayments of holiday and leave pay. Employers still have an obligation to remediate employees for current and historic underpayments, and must be compliant with the current Act until any new legislation comes into effect.
25. The Taskforce notes that a transitional period would be required to ensure a smooth transition for employers, employees and payroll providers to the provisions of any amended Act. The Taskforce did not, however, consider the requirements of such a transitional period as part of the review.

## The review process

26. The review comprised three phases:
  - Phase one – Understanding the full range of issues with the current Act
  - Phase two – Developing and testing options
  - Phase three – Confirming preferred option(s) and finalising recommendations

### **Phase One – Understanding issues with the current Act**

27. It was important for the Taskforce to ensure that it had a full understanding of the issues associated with the current Act. To this end, the Taskforce developed an Issues Paper which was released in August 2018 for a period of public consultation. The Issues Paper set out the Taskforce's understanding of the key issues employers, employees and payroll providers face in trying to implement the Act. Feedback was sought from interested stakeholders about:
  - whether the issues outlined in the Issues Paper were described accurately
  - whether stakeholders had experienced any other issues working with the Act that were not captured in the Issues Paper (and if so, what those other issues were)
  - whether stakeholders had any suggestions or proposals for change.
28. A total of 87 submissions were received in response to the Issues Paper. They are summarised in Section 3 of this report. CTU affiliate unions did not make submissions in response to the Issues Paper. Instead, the affiliate unions provided their feedback directly to the Taskforce via the CTU representatives. Business NZ felt that the Issues Paper captured their concerns with the current Act.

### **Phase Two – Developing and testing options**

29. The second phase of the review involved developing a number of options for change. The options were informed by feedback received during Phase One, as well as by views and proposals put forward by members of the Taskforce.



30. A key part of this phase was the need to ensure that options for change were robustly tested, to ensure that they would work in practice. To achieve this, the Taskforce contracted Hudson Taylor, a professional services firm with expertise in payroll matters, to assess and test the options that the Taskforce had developed, with anonymised real payroll data.
31. Hudson Taylor undertook three stages of testing as follows:
  - Stage One testing – a conceptual peer review to test whether the options developed by the Taskforce were capable of being implemented in payroll systems.
  - Stage Two testing – detailed testing of each option with anonymised payroll data covering a wide range of working arrangements, employers and employee types, and different sectors of the New Zealand economy.
  - Stage Three testing – further testing of the preferred options to assist with the final decision-making.
32. The testing process and the results of the testing are discussed in more detail in Section 4.

### **Phase Three – Confirming preferred option(s) and finalising recommendations**

33. Phase Three of the review involved assessing the options developed by the Taskforce against a range of criteria. The results of the testing carried out at Phase Two of the review formed part of this assessment, but a number of other criteria were also used as set out in the Taskforce’s Terms of Reference. The results of this analysis then formed the basis of the final recommendations of the Taskforce, which are set out in Section 6 of this report.
34. Phase Three also included targeted consultation with payroll providers to seek feedback on specific aspects of the proposed recommendations.

### **Overview of the Holidays Act 2003**

35. The Act sets out the minimum entitlements to holidays and leave, and payment for them, that employers are obliged to provide to their employees. Its purpose is to promote balance between work and other aspects of employees’ lives by providing minimum entitlements to annual holidays, public holidays, sick leave, bereavement leave and family violence leave. The Ministry of Business, Innovation and Employment (MBIE) is responsible for administering and enforcing the Act.
36. Two key aims of the Act can be summarised in the following principles:
  - Entitlements are to be determined in relation to the work pattern at the time the leave is taken. This principle is intended to ensure that the entitlements (both in terms of the leave period to be taken, and the level of payment for the leave period) reflect the employee’s work pattern at the precise time they take their leave rather than being based on what they have hypothetically accrued or ‘earned’ over time.
  - 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 for the period they are taking leave for.
37. The key provisions of the Act include:
  - at least four weeks of annual holidays each year for employees
  - a paid day off when a public holiday falls on a day that an employee would usually work



- at least five days each year of paid sick leave
  - three days paid leave if an employee's immediate family member dies, or one day's paid leave for the death of a person outside their immediate family
  - from 1 April 2019, the Act now provides up to ten days of leave for people affected by family violence (on a similar basis to the provisions for sick leave and bereavement leave).
38. The Act provides a number of calculations for determining pay when employees take holidays or leave. For annual holidays, employees must be paid whichever is the greater of their Ordinary Weekly Pay or their average weekly earnings over the previous 12 months. For all other types of leave, employees must be paid their Relevant Daily Pay, or if impractical or the employee's daily pay within the relevant pay period is variable, their Average Daily Pay.
39. The Act also covers a number of issues such as annual closedowns for businesses, transferring public holidays, the ability to 'cash up' one week's annual holiday entitlement and the employer's obligation to keep records. The enforcement provisions follow those in the Employment Relations Act 2000 and, as with other minimum entitlements, permit both employees and Labour Inspectors to take cases.



## Section 2: Issues with the current Act

40. In August 2018, the Taskforce produced an Issues Paper which summarised the main issues with the current Act and sought views from stakeholders about whether they had been correctly captured. The key issues with the current Act are outlined below. For a fuller discussion please see the Issues Paper:

<https://www.mbie.govt.nz/assets/Uploads/bbb42c0baf/holidays-act-review-issues-paper.pdf>.

### Who is affected by the issues with the current Act?

#### **Many employers and employees are affected by non-compliance with the Act...**

41. It is clear to the Taskforce that issues with the Act are widespread across the New Zealand economy. Many employers and employees are affected by non-compliance with the Act and even employers with a workforce working standard hours may face challenges, such as not including all relevant payments in 'gross earnings'. Finding solutions to the challenges posed by the Act will therefore support all employers and employees to better understand their obligations and entitlements.
42. Employees and employers are not assisted in endeavouring to comply with the Holidays Act where payslips do not contain the necessary information to assess compliance, or similarly, where leave transaction records are not easily accessible. Arguably many non-compliance issues could have been addressed earlier through a greater level of transparency.

#### **...but it's harder for some employers for different reasons...**

43. Some employers find it more difficult to comply with the Act, or are more likely to face implementation issues than others, particularly where there are flexible or variable work practices in place. Small employers may have difficulty interpreting the Act, while large employers attempting to systematise their payroll can run into issues with the parts of the Act that require manual decision-making and intervention (such as the determination of what a 'week' is for an employee).
44. Some employers are unable to comply with the Act because their payroll system is not compliant, or because they misunderstand the capabilities and limitations of their system. Furthermore, the 'set-and-forget' mentality that some employers have regarding systemisation often means that payroll systems may not be updated when circumstances change.
45. Some sectors and industries are particularly prone to complex working arrangements that do not fit the standard working week that the Act was originally based on. For example, sectors that have a high proportion of employees working irregular hours, such as hospitality, retail, or health services, may be more likely to have problems with interpreting and implementing the Act.

#### **...and the effects can be worse for some employees**

46. A common problem for many employees is the uncertainty about entitlements and payments that is associated with working irregular hours, shift work, or changing hours.
47. Issues also arise in relation to payments as well as the actual entitlements, especially when employees' pay is variable or the payroll system is not updated when changes occur. This can occur when employees' payments include commission, incentive-based payments, overtime, or board and lodgings. Complications can arise in determining whether these additional payments are 'regular' or not, and whether they should or should not be included in the calculation of payments for leave.



## There are a number of cross-cutting issues with the current Act

48. There are a number of cross-cutting issues that apply across the whole Act rather than to one specific section. These relate to the design of the Act itself and are the cause of many of the problems employers, employees and professional service providers (including payroll providers) face in working with the Act. These issues include:
- the lack of prescription in the Act which can make it hard to implement, particularly if agreement between employer and employee is not reached (for example, there is no explicit guidance about how to determine a 'week' for the purpose of the annual holidays entitlement if it is not clear (e.g. if an employee works variable hours and days from week to week))
  - the complexity of the Act, which can cause confusion for those using it (for example, the Act includes several different pay calculations, and employers often struggle to use the correct calculations at the correct times (such as when to use Relevant Daily Pay compared to Average Daily Pay))
  - the lack of clarity in relation to specific terms included in the Act (for example, the lack of a clear definition of 'regular' in relation to determining what income should be included in calculations for the payment of leave).

## Annual holidays – determining entitlements and payments

49. There are a range of specific issues related to those sections of the Act that deal with the entitlements to, and payments for, annual holidays. These include:

### Determining what a week is

50. A fundamental issue in terms of compliance with the Act is to determine what a week is in relation to an employee's working arrangements. This can be very simple for some, but difficult for other forms of working arrangements, such as those on shift patterns that are not based on calendar weeks, or those with variable days and hours of work.
51. If agreement is not reached early on between an employer and an employee about what constitutes a working week for that employee, then this can have significant consequences when the employee takes leave. The basis of this agreement may also change over time, meaning that the agreement may need to be revisited. In practice this does not always occur when working arrangements change.

### Incorrect accrual over time

52. Problems can arise when payroll systems are used that have not been adapted to the requirements of New Zealand law. For example, many payroll systems use accrual methods based on accumulating an entitlement over time. This approach may not be compatible with the requirements of the Act, in particular the need for entitlements to be determined in relation to the work pattern at the time the leave is taken. Particular problems arise when an employee's hours increase, as an employee will not accrue sufficient time for four weeks' leave if their hours increase during the year.

### Knowing which method to use to determine payments for annual holidays, and how to use it correctly

53. Section 21 of the Act requires employees to be paid for their annual holidays at a rate that is the greater of either their Ordinary Weekly Pay (OWP) at the point the leave is taken, or their average weekly earnings (AWE) for the 12 months previous. Correctly applying section 21 requires employers to calculate both OWP and AWE and to use the larger number. There are many stages in this process, which introduces the risk of non-compliance, if reliable quality assurance is not used.



### Using the 'pay-as-you-go' provision inappropriately

54. Section 28 allows an employer to regularly pay annual holiday pay of 8 per cent of the employee's gross earnings, in lieu of providing four weeks of annual holidays (commonly referred to as 'pay-as-you-go' (PAYG)).
55. However, an employer is only able to do so if the employee is on a fixed-term agreement for less than 12 months, or works on a basis that is 'so intermittent or irregular that it is impracticable for the employer to provide the employee with four weeks' annual holidays.'
56. It is not always clear to employers when this clause applies, and what 'impracticable' means – especially if an employee requests or agrees to have holiday pay included in their regular pay. There is no statutory definition of a 'casual' working arrangement, even though this term is sometimes used in employment agreements.

### Taking annual holidays in advance

57. Employees are entitled to four weeks' paid annual holidays after 12 months of continuous employment. Employees can request annual holidays in advance but employers have no obligation to approve this request. This means an employee may not be able to take any time off work during their first 12 months of employment. There are legitimate personal and community responsibilities that can mean that workers require time away from work before they have completed 12 months of continuous employment.

### FBAPS leave (family violence leave, bereavement leave, alternative holidays, public holidays and sick leave) – determining entitlements and payments

58. There are also a range of specific issues related to those sections of the Act that deal with the entitlement to, and payments for, FBAPS leave. These include:

#### Determining an 'Otherwise Working Day' (OWD)

59. Although Section 12(3) provides a list of factors to be taken into account by the employer and employee when determining whether a day is an OWD, these factors are not ranked and there is no guidance about the weighting that should be attached to each factor.

#### Determining what payments are included in an employee's 'Relevant Daily Pay' (RDP) and when 'Average Daily Pay' (ADP) can be used instead

60. The payment for a public holiday, alternative holiday, sick leave, bereavement leave and family violence leave is determined using RDP. This is defined by section 9 of the Act as the amount of pay that the employee would have received had they worked on the day concerned.
61. RDP is a subjective and hypothetical decision, based on the historic earnings of the employee as well as the employer's estimation of what the employee '*would have received had the employee worked on the day concerned*' (for instance, by looking at what other employees who did work earned). This is more difficult to calculate if employees' earnings vary considerably (especially if commissions or other additional payments are part of their earnings), if the business is not open on the OWD that is being considered (e.g. it is shut for a public holiday) or where sufficient records are not kept.
62. There is also an issue relating to the calculation of ADP, as the formula in section 9A (2) requires the employee's gross earnings to be divided by the number of whole or part days they worked. This could potentially disadvantage employees who work varied





hours, as using ADP to calculate their pay treats all days equally, regardless of how much is earned on each specific day.

### **Partial sick leave days**

63. Currently, the Act describes sick leave and family violence leave entitlements in terms of days, and does not divide those entitlements into smaller units, such as part days or hours. In practice, the Taskforce understands that some employees and employers may agree to account for the sick or family violence leave entitlement in hours or part-days. However, the Act does not explicitly allow for these forms of leave to be taken in units of less than a day.
64. For example, if an employee works for part of the day and then goes home sick, this may be counted as using a whole day of sick leave, no matter how much of the day the employee has worked before going home. This can lead to an employee using their full sick leave entitlement of five days when in fact they have only been off sick for parts of these five days.

### **Other issues**

65. The Taskforce is aware of a number of other issues that are not specifically related to entitlements and payments for annual holidays and FBAPS leave.
66. For example, people who work a Monday to Friday five-day week observe all public holidays regardless of the day that they fall on. This does not apply to other working arrangements (i.e. if somebody regularly works weekends but not Mondays).





## Section 3: Feedback from stakeholders on the Issues Paper

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

### Key themes from the submissions

68. The 'headline' messages that came through from the submissions were:
- strong support for a more prescriptive approach (whatever shape this took)
  - strong support for a simplified system with fewer calculations
  - strong support for an accrual-based system (similar to the Australian system)
  - strong support for a system based on hours.
69. The CTU consulted with its individual affiliates and submitted their feedback directly through its representation on the Taskforce. The CTU unions:
- strongly supported greater guidance and prescription in those areas where there is current employer non-compliance
  - strongly supported maintaining a universal leave entitlement based on service
  - strongly supported maintaining leave balances in weeks (annual leave) and days (FBAPS)
  - strongly supported greater transparency through the provision of enhanced payslips and better access to leave transaction histories.

### Submissions analysis

70. A total of 87 submissions on the Taskforce's Issues Paper were received, including five late submissions received after the closing date. Of the 87 submissions, 50 were submitted directly to the Secretariat as 'standalone' submissions, while 37 were submitted via MBIE's online response form.
71. The 87 submissions comprised:
- 41 submissions from employers
  - 13 from payroll practitioners or providers
  - 14 from individuals
  - 19 from other groups or organisations (such as law and accounting firms submitting based on their clients' experiences).
72. The vast majority of submissions (80) expressed support for the broad content of the Issues Paper. Three did not agree with the Issues Paper, and four did not give a position either way.
73. The Secretariat analysed the submissions according to a number of themes, broadly corresponding to the different sections of the Issues Paper. Some key points from the submissions are set out below:
- **Cross-cutting issues with the Act** – there was general agreement that elements of the current Act are confusing and that the lack of prescription in certain areas makes it hard to comply with the Act.



- **Annual holidays issues** – comments from submissions included that:
  - the various calculations for annual holidays cause confusion about how to use them and when (for instance OWP vs AWE), and payroll systems are not always able to do this correctly
  - transferring an employee from PAYG to annual holidays can be problematic
  - it is unfair for the entitlement to annual holidays to only arise after 12 months
  - there may be incentives for employees to take leave at particular times.
- **FBAPS leave issues** – comments from submissions included that:
  - the ‘Mondayisation’ of public holidays is unfair for those who don’t work Mondays
  - RDP and ADP are confusing and hard to define and can lead to gaming
  - the lack of prescription about what an ‘Otherwise Working Day’ is leads to non-compliance
  - it is hard to know when to use ADP – what does ‘possible’ or ‘practicable’ mean?
  - it is impractical and unfair not to pro-rata sick leave when in reality people do take part days
  - the six-month stand-down period for sick and bereavement leave is unfair.
- **Role of the Labour Inspectorate** - comments from submissions included that:
  - the Labour Inspectorate should provide more education and guidance for employers on how to comply with the Act
  - future roles for the Labour Inspectorate could include certifying payroll systems, and having the power to issue a binding ruling if an employer and employee agreed on an issue.

74. Key problems with the Act identified by the CTU included:

- lack of transparency and insufficient information on payslips to ascertain if leave has been correctly paid
- poor access to leave transaction records in a form that can be easily checked.
- employers excluding some components of pay from AWE, OWP or RDP (“switching allowances off”)
- employer discretion as to when to use RDP or ADP resulting in the lower amount being paid
- employers not using averaging to assess OWP when hours worked are variable
- employers not following the prescribed method for calculating ADP
- inconsistent approaches by employers to different types of termination payments: redundancy, gratuities, “golden handshakes” – all of which are forms of delayed remuneration
- sick and bereavement leave being denied for “casual” employees
- the “pay as you go” provisions being used inappropriately
- public holiday leave and alternative holidays not being granted when they should



- leave balances being maintained in incorrect units of time, including employers using hours instead of weeks or days, and crediting and debiting balances inconsistently to the disadvantage of employees.

## Suggestions for change

75. The majority of submitters (76) provided specific suggestions or recommendations about changes that could be made to the Act in relation to annual holidays, FBAPS or other provisions. Some of the specific suggestions included are outlined below by topic area.

### Suggestions relating to annual holidays entitlements

76. There was some support for an accrual system based on hours because of the simplicity of such a system (i.e. entitlements build up from day one). Others proposed using days or even minutes as the units of entitlement.
77. Other suggestions included:
- using 'guaranteed' or 'agreed' hours in employment agreements as the basis for determining entitlement (i.e. do not include overtime)
  - using a statutory minimum number of hours per 12 months (i.e. rather than four weeks)
  - differentiating between workers with regular hours and workers with variable hours, and using an accrual system for those with variable hours
  - that the employer should not have to agree to leave being taken
  - providing more guidance and better definitions in relation to issues such as casual employment, what a 'week' is for a particular employee, which payments should be included in the calculation of the payment rate, and what is meant by terms such as 'regular' and 'ordinary working day'.

### Suggestions relating to the calculation of leave payments

78. There was support for simplifying the payment calculations for leave. Options proposed included using one rate for all leave or the greater of a comparison between two rates (for example, of the rate set out in an employment agreement or an average over 12 months).
79. Other suggestions included:
- only use Average Weekly Earnings, rather than Ordinary Weekly Pay, because using Ordinary Weekly Pay incentivises taking leave after a spike in payments
  - using a 'daily rate' (common in the meat industry)
  - basing leave payments on gross earnings divided by contracted hours; hours worked over the contracted rate would not accrue more leave, but would increase the payment rate
  - allowing a 'cashing up' of more than one week of leave
  - using a four-week average for calculating payments as 52 weeks was too long.

### Suggestions relating to FBAPS leave

80. A variety of suggestions were received in relation to the treatment of FBAPS leave. These ranged from a suggestion to replace all forms of FBAPS leave (apart from public holidays) with a single entitlement of 10 days of personal leave, to a suggestion to change the qualification period for bereavement leave from six months to 1,000 hours.



81. Other suggestions included:

- using an accrual system for sick leave
- removing time and a half for alternative holidays
- addressing the Mondayisation issue related to public holidays (i.e. those not scheduled to work on Mondays are disadvantaged in relation to public holidays)
- increasing the sick leave entitlement to 10 days per year but with a cap of 20 days accumulated sick leave
- allowing sick leave to be taken in part days.

**Other suggestions**

82. In addition to proposals in the areas outlined above, a range of other suggestions were provided. These include removing the 'parental leave' override, providing approved software that employers could use or requiring payroll companies to gain some form of accreditation.



## Section 4: Options developed and tested

83. The Taskforce developed and tested a number of options for changes to the way leave entitlements are treated under the current Act.

### **An initial set of options for change was developed...**

84. The Taskforce developed the following five high-level options for change:

- Option One used an entitlement based system with a proposed working arrangements test to define working patterns
- Option Two used an entitlement based system with additional prescription to determine leave entitlements for non-standard working patterns
- Options Three, Four and Five were all based on an accrual system with variations in the units that accrued:
  - In Option Three leave accrued on paid hours worked
  - In Option Four leave accrued on agreed hours
  - In Option Five leave accrued in weeks towards a four week fixed entitlement.

### **...which were then tested with a specialist payroll advisor**

85. Hudson Taylor, a professional services company with payroll expertise, was contracted by the Taskforce to provide independent advice to the Taskforce on the implications that the options would have if they were implemented across New Zealand. A key part of this testing was to ensure that options were tested against the wide range of working arrangements and employer types that can be found across the New Zealand economy.

86. Hudson Taylor was initially contracted to undertake two stages of testing:

- Stage One – a conceptual peer review to assess whether the options developed by the Taskforce were sound from a payroll systems perspective (i.e. capable of being implemented in payroll systems in New Zealand).
- Stage Two – detailed testing of the options developed by the Taskforce against anonymised payroll data to understand the impact these would have on different kinds of working arrangements present in the New Zealand economy.

87. Following the Stage Two testing the options were refined and a preferred option emerged.

88. A final round of testing (Stage Three) was then undertaken by Hudson Taylor on the preferred option and other proposals developed by the Taskforce. These other proposals included a prescriptive methodology for determining an 'Otherwise Working Day' and a revised definition of 'gross earnings' to be used for leave payment calculations.



## Section 5: How the Taskforce made its decisions

89. The Taskforce considered the options it developed and tested against a range of criteria set out in the Terms of Reference. These criteria set out that the Taskforce's recommendations were expected to:
- continue to promote the existing purpose of the Holidays Act 2003
  - provide clarity and certainty for employers and employees so that employees receive their correct entitlements
  - be simpler than the current Act in relation to the provision of, and payment for, entitlements to holidays and leave
  - be readily implementable in a payroll system
  - minimise compliance costs for employers
  - minimise perverse incentives on employers and employees
  - ensure the balance of decision-making between employers and employees when it comes to requests for holidays and leave is appropriately calibrated
  - be readily applicable to the full range of working and remuneration arrangements in the labour market both now and in the future
  - aim to protect overall entitlements for employees.
90. While the Taskforce considered all of these factors in its decision-making, it paid particular attention to the aims of providing clarity and certainty for employers and employees while aiming to protect overall entitlements for employees and ensuring that the recommendations could be implemented in the wide range of working arrangements in place across the New Zealand economy.
91. Individual Taskforce members had a range of views about particular issues considered by the Taskforce. On some issues the Taskforce's final recommendations may not reflect the personal views of individual members but the Taskforce worked hard to ensure it could deliver a set of consensus recommendations without any 'minority views'.

### **The Taskforce considered a range of options before selecting its preferred system...**

92. As noted earlier in the report, the Taskforce considered a range of options in the course of the review. One of the options supported in a number of submissions received by the Taskforce was an accrual model based on hours worked. Under this type of model, all employees would earn annual holidays in hours at a set percentage rate (7.69% of every hour worked would give employees the equivalent of four weeks leave per year). The employee's leave balance would accrue in hours as they worked and any annual holidays taken would be calculated in hours. Employees would receive leave based on their arrangements at the time they 'earn' the hours (rather than at the time of taking leave).
93. This type of accrual system was supported by some stakeholders and opposed by others. The testing of the accrual options identified that such a system would leave some people worse off. As a result, the Taskforce did not proceed with further development of an hours-based accrual system.
94. All members agree that the recommendations in this report provide a solution that meets the objectives of the review. Consensus would not have been achievable on any other approach.
95. A weekly entitlement system was selected by the Taskforce as its preferred option. The Taskforce considered that this option struck a good balance between retaining certain aspects of the current Act such as the existing units of entitlement while adding the



necessary level of prescription to give employers and employees the certainty that they need.

96. Retaining the annual holidays entitlement in weeks has the benefit of 'automatically adjusting' to an employee's changed circumstances. If an employee increases or decreases their hours then as long as their annual leave entitlement is held in weeks, this entitlement will automatically adjust to the changed hours (e.g. if an employee increases their hours from 20 to 30 hours per week, then one week's annual holiday entitlement automatically becomes worth 30 hours rather than 20 hours).
97. This option was selected by the Taskforce as its preferred option and refined through further testing. Further details about the component parts of the recommended option are included in the next section.

**...and carried out some targeted consultation with the payroll industry**

98. In September 2019 the Taskforce consulted with representatives from the payroll industry on its draft recommendations that were expected to have the most significant impact on payroll systems. The feedback contained a range of views with some respondents expressing support for some proposals but noting concerns with other proposals.
99. The Taskforce made changes to its proposals in light of the responses received. For example, following feedback about the complexity that would be involved in the proposal to apportion commission or incentive payments across pay periods, the Taskforce decided not to progress with this proposal.
100. A number of specific technical points were also raised in the feedback which the Taskforce acknowledges will need to be addressed in the detailed design phase that will be required before the proposed changes are implemented.



## Section 6: Final recommendations

101. This section outlines the final recommendations of the Taskforce across the following sections:
- process for leave calculations and payments
  - annual holidays entitlements
  - annual holidays payments
  - FBAPS leave entitlements
  - other proposed changes.
102. A comparison of the main holiday and leave entitlements under the Holidays Act 2003 and the Taskforce's proposals can be found in Annex 2.

### Process for leave calculations and payments

#### Issue 1 – Calculating leave payments

103. One of the main issues with the current Act is the number of calculations and lack of clarity about how to calculate leave payments for the various forms of leave.
104. The Taskforce has discussed a range of options for addressing this by providing greater clarity and prescription about the process for determining the amount of leave to be used and the payments for any period of leave.
105. The Taskforce considered a single process for calculating leave payments for all forms of paid leave. However, it ultimately concluded that separate methodologies should be retained for calculating annual leave and FBAPS leave.
106. Annual leave entitlements are based on average weekly earnings and annual leave payments take account of work carried out over the previous 12 months. There is an expectation that the whole of the annual leave entitlement will be used to ensure that employees have a minimum of four weeks paid leave from work each year.
107. In contrast there is no expectation that an employee should use all of their FBAPS entitlement (with the exception of the public and alternative holidays leave). FBAPS leave exists to provide employees with paid leave for particular events (e.g. a public holiday, an episode of sickness or the death of a close relative). Payments for FBAPS leave should, to the greatest extent possible, reflect what the employee would have earned if they had worked on the specific day in question.
108. The Taskforce considered, therefore, that the different policy rationales for the different forms of leave was best accommodated in a system where each form of leave continued to be treated separately, albeit with greater prescription about the specific methodologies to be followed.
109. The methodologies provide clear rules to be followed at each step of the process to provide the certainty that is missing from the current Act (for example, how to determine a week for an employee if this is not set out in an employment agreement or work roster). The processes to be followed for FBAPS and annual leave are set out in the diagram on page 31.
110. This approach is intended to provide a clear set of rules that employers can use when processing requests for each form of leave. The specific rules that would apply to each step are covered in the following sections.

#### Annual leave payments

111. The approach proposed by the Taskforce includes a new concept of Ordinary Leave Pay (OLP). OLP is a new calculation intended to replace the existing Relevant Daily Pay and





Ordinary Weekly Pay calculations. OLP would include the base rate for any hours worked in the relevant period, plus pay for any scheduled overtime, allowances, incentive or commission payments that the employee would have received if they had worked for the relevant period.

112. The underlying principle for OLP is that it should capture all payments that the employee would have received if the employee had been at work for the period in question. This is to ensure that, while on paid leave, the employee is paid a minimum of what they would have been paid if they were at work for the relevant period.
113. Section 8 of the Act states that annual holiday pay should be paid based on average earnings over the last four weeks if OWP cannot be calculated. The Taskforce considered whether the four week average earnings calculation should be replaced by a 13-week average earnings calculation. However, testing undertaken by the Taskforce noted that removing the four week average earnings calculation could disadvantage some employees in particular situations (e.g. employees who take leave just after a busy period of work for whom the four week average earnings calculation is used because it is not possible to calculate OWP). The Taskforce therefore considers that further work would be required to determine whether a four or 13 week averaging period would be the most appropriate period to consider alongside OLP and the 52 week average when calculating annual holiday pay.
114. Currently Section 21 of the Act states that annual holiday pay must be the greater of OWP or the employee's average weekly earnings over the last 52 weeks. In some circumstances this can result in an employee's income reducing when they are on leave when compared to their income from directly before the leave. For example, if an employee had worked at an increased level of income due to, for example, a seasonal variation. The Taskforce is proposing to address this issue by introducing a new average weekly pay calculation over the last four or 13 weeks.

#### **FBAPS leave payments**

115. The process for calculating FBAPS leave payments is set out in the diagram on page 31 and includes the following key steps:
  - a) Determine that the day in question is an Otherwise Working Day (see separate section on this issue)
  - b) Determine the number of hours that would have been worked on the day in question – this should be determined by the hours set out in an employment agreement or roster. If no hours of work are set out in an employment agreement or roster then the expected hours of work should be calculated by the average hours worked across all corresponding days worked in the previous 13 weeks (e.g. if the day in question is a Monday, then an average of the hours worked on all of the Mondays worked in the previous 13 weeks)
  - c) Calculate Average Daily Pay for the day in question – this should be done by calculating the hourly pay rate (based on the total earnings in the last 13 weeks divided by the total weekly hours worked in the last 13 weeks) and then multiplying the hourly rate by the number of hours that would have been worked on the day in question
  - d) Pay the greater of the Average Daily Pay and Ordinary Leave Pay for the day in question
  - e) If an employer uses an employment agreement or roster to calculate the hours worked on the day in question in (b) above, then weekly hours from an employment agreement or roster must be used in the weekly calculation to determine the hourly pay rate in (c) above. If an employer uses actual hours worked to calculate the hours



worked on the day in question in (b) above, then actual hours worked must also be used in the weekly calculation to determine the hourly pay rate in (c) above.

116. The Taskforce considers that the proposed FBAPS payment methodology delivers appropriate leave entitlements and payments for all employees, and can be implemented in payroll systems. It will give employers the certainty they seek that they are meeting legislative requirements. Testing undertaken on behalf of taskforce members<sup>4</sup> was able to confirm that, in a range of scenarios, the proposed methodology minimises overpayments or underpayments that were present with other methodologies considered. Testing on this aspect was conducted using a different methodology than for other aspects of the report. For this reason the Taskforce notes that additional testing and analysis (particularly using real representative payroll data) may provide additional assurance that there are no unintended consequences of the proposal.

### **Recommendation 1**

The Taskforce recommends that leave payments should be calculated as follows:

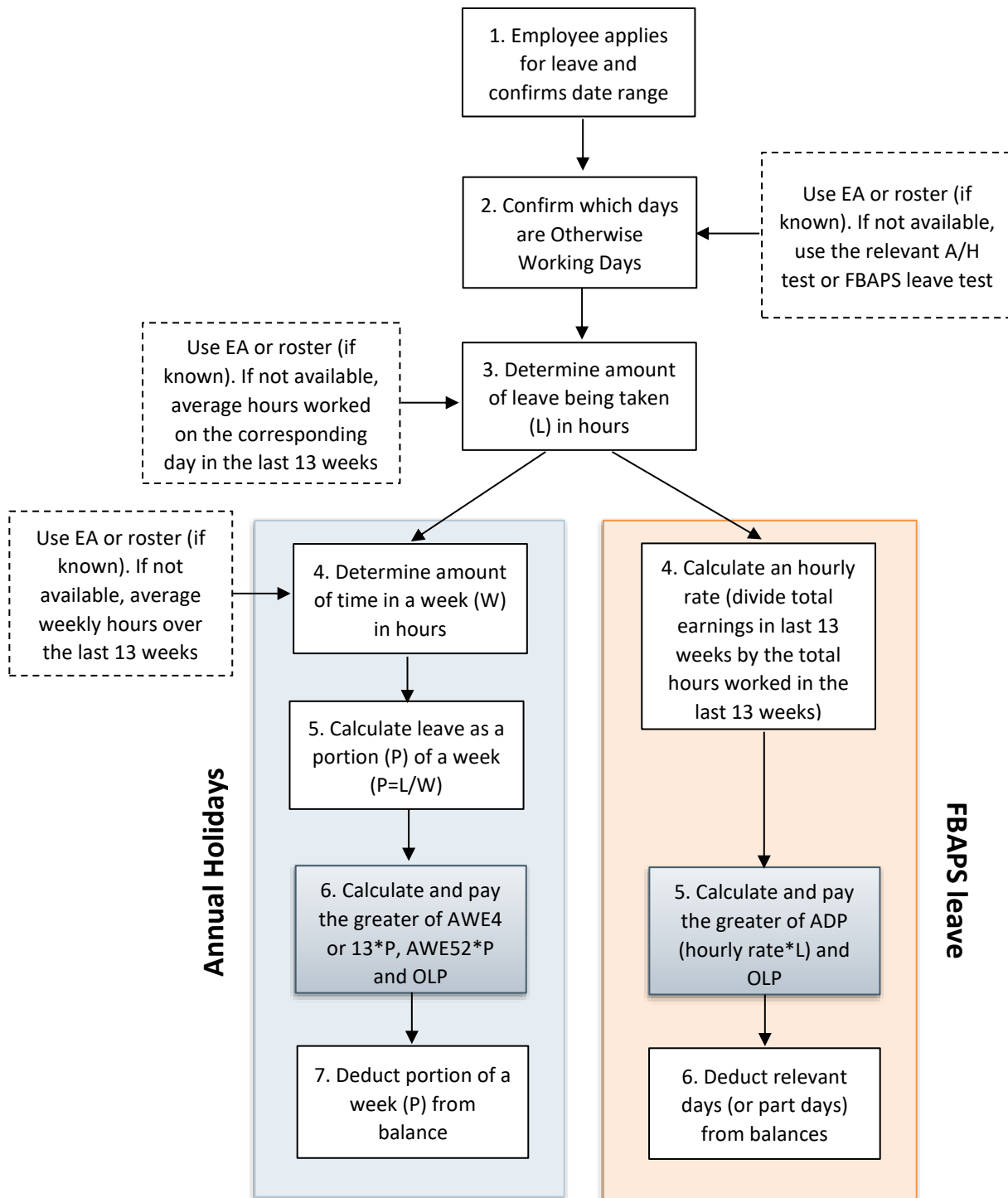
- The relevant period of annual holidays leave should be paid based on the greater of:
  - Ordinary Leave Pay
  - Average Weekly Pay for the last four or 13 weeks
  - Average Weekly Pay for the last 52 weeks.
- Each day (or part-day) of FBAPS leave should be paid based on the greater of:
  - Ordinary Leave Pay
  - Average Daily Pay

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<sup>4</sup> Testing undertaken by Dragonfly on behalf of CTU.



## Proposed leave payment process



**Abbreviations**

ADP = Average Daily Pay  
 A/H = Annual holidays  
 AWE4 or 13 = Average weekly earnings in last 4 or 13 weeks  
 AWE52 = Average weekly earnings in last 52 weeks  
 EA = Employment agreement  
 FBAPS = Family violence leave, bereavement leave, alternative holidays, public holidays, sick leave  
 L = Leave in hours  
 OLP = Ordinary Leave Pay  
 P = Portion of a week  
 W = Working week in hours



## Annual holidays entitlements

### Issue 2 – Annual holidays unit of entitlements

117. One of the most significant issues with the Act is the difficulty that it poses in calculating annual holiday entitlements and payments for employees who have variations in the hours they work and/or the amount they are paid. For these employees, it can be very hard to establish what ‘a working week’ is. This can make it difficult to determine how much of an employees’ entitlement needs to be used for a particular period of annual holidays.
118. As noted earlier, the Taskforce considered and tested a range of options in relation to how annual holiday entitlements should be calculated and paid. The Taskforce was keen to ensure that it recommended a system that was straightforward for the majority of employees while also containing enough prescription to provide certainty for those situations where it is not clear what proportion of an annual holidays entitlement should be used for a period away from work nor how much the employee should be paid.

#### Recommendation 2

The Taskforce recommends that annual holidays entitlements should be calculated, taken, paid and held in weeks or portions of weeks.

### Issue 3 – Taking annual holidays in advance

119. Employees are currently entitled to four weeks’ paid annual holidays after 12 months of continuous employment. Although employees can request annual holidays in advance, employers have no obligation to approve this request. This means an employee may not be able to take any time off work during their first 12 months of employment.
120. The Taskforce acknowledges that many good employers already allow their employees to take leave in advance. However, it would like to see all employees have the ability to take annual holidays within the first 12 months of employment if the need arises.

#### Recommendation 3

The Taskforce recommends that employees should have the ability to take annual holidays in their first 12 months up to the amount they would be eligible for on a pro-rata basis (i.e. no right to take more leave than entitled to). For example, an employee who had worked in a role for three months could not be unreasonably prevented from taking a week of annual holidays. Any leave that was requested above the pro-rata entitlement would be at the discretion of the employer.

In addition, the Taskforce also recommends that:

- 3.1 Annual holidays in advance on a pro-rata basis should be subject to the same considerations as any annual holidays request. For instance, the provisions that apply to the taking of annual holidays entitlements should be replicated to maintain the balance of interest between the employee and employer (i.e. an agreement between parties as to when annual holidays in advance will be taken, and the obligation on employers to not unreasonably withhold consent).
- 3.2 Annual holidays in advance needs to reflect the pattern of work at the time it is taken. For example, if an employee increases their hours later in the year, they cannot go back and receive a top-up on the holidays they have previously taken.
- 3.3 It should be made explicit that employers are expressly prohibited from requiring employees to take annual holidays in advance.
- 3.4 Alternative holidays cannot be unreasonably withheld (in line with annual holidays in



advance).

3.5 Balances of leave in advance and leave entitlement should be treated the same. For example, when leave in advance is taken, it will result in a negative leave balance as the entitlement does not arise until after 12 months.

121. The Taskforce believes that this approach better balances the different needs of employers and employees and provides employees the flexibility to take time off before they receive their entitlements.

#### **Issue 4 – Calculating annual leave entitlements and payments for employees**

122. One of the problems with the current Act is how to determine how much of an annual leave entitlement an employee needs to use for a period of time away from work, if the employee works variable hours.
123. The Taskforce has considered this issue in detail and proposes that the following stepped methodology should be used to determine how much of an employee's leave entitlement should be used for a period of annual leave.

*Step 1 – Identifying days the employee wishes to take annual holidays on (step 3 from diagram on page 31)*

- An employee may take annual holidays on any days that meet one of the following criteria:
  - the employee has worked on the corresponding calendar day within the last 13 weeks, or
  - the day in question is a day on which the employee could be contractually obliged to work, or
  - the day in question is a day on which the employee could offer to work in accordance with the terms of their contract.

*Step 2 – Determining hours that would have been worked on each day of leave (step 4 from diagram on page 31 to determine value of L)*

- If the number of hours an employee would have worked on a specific day is set out in an employment agreement or work roster then this figure should be used. If the number of hours an employee would have worked is not set out in an employment agreement or work roster, then an average working day for all leave purposes should be determined by calculating the average daily hours the employee worked on all corresponding calendar days in the previous 13 weeks (e.g. if the employee wishes to take leave on a Monday then the average hours worked on all Mondays in the 13-week period should be used). This calculation will need to be carried out for each day of leave the employee wishes to take.

*Step 3 – Determining what a week is for an employee (step 5 from diagram on page 31 to determine value of W)*

- If an employee's hours of work are set out in an employment agreement or work roster then these hours would be used to determine what a week is for the employer. If the hours of work are not set out in an employment agreement or work roster then a week would be determined by the average number of hours worked per calendar week within the previous 13 weeks (or across the length of the shift cycle if there is a repeating shift pattern).

*Step 4 – Converting leave to be taken into a portion of a week (step 6 from diagram on page 31 to determine value of P)*

- The period of annual holiday to be taken needs to be converted into a portion of a week so it can be deducted from the annual holidays entitlement:



- For a single day of leave this should be determined by dividing the average working day in hours by the average working week in hours. This will give the portion of a week to be deducted from the leave balance.
  - For multiple days of leave the entire amount of leave to be taken should be calculated in hours (repeat Step 2 for each day of leave requested) before it is divided by the employee's working week (the answer from Step 3 (W)).
124. The process above should be followed for all periods of annual leave requested by an employee. In many cases the answer will be straightforward but this prescriptive methodology will provide a definitive answer even in those cases where it is not obvious. This does not prevent employers and employees from agreeing and paying weeks of leave where an employee has an entitlement to leave but is in a non-work period (e.g. for employees who have periods of work followed by periods where they do not work).
125. The Taskforce also proposes that there be an audit requirement that if an employee's actual hours were found to be 20 percent or more above their contracted hours over a 13-week period then the employee's actual hours should be used instead. This audit requirement would be intended to act as an incentive to ensure that the employee's contracted hours are an accurate reflection of their actual hours of work.
126. The Taskforce also proposes a provision to prevent an employee from being required to use more than one week's annual holidays entitlement for a calendar week of leave. This is to avoid an unusual situation that could arise under an averaging approach where an employee with a particular work pattern could theoretically be expected to use more than one weeks leave in a single calendar week. For example, if an employee wished to take leave in a week where they were scheduled to work more hours than their average weekly hours over the preceding 13 weeks then it is possible that the actual hours of leave they wish to take would be more than their average weekly hours of work. In this case, the amount of leave to be taken should be capped at one week for each calendar week. The averaging worked hours methodology set out in this section should only be used for part weeks of leave since any full weeks of leave will be deducted in units of entire weeks.

#### **Recommendation 4**

The Taskforce recommends that:

- 4.1 The stepped process outlined above should be followed to determine how much of an employee's annual leave entitlement should be used for a period of time away from work where an employee's days and hours of work are not set out in an employment agreement, shift roster or other document.
- 4.2 Where an employee's days and hours of work are set out in an employment agreement, shift roster or other document and these are an accurate reflection of the employee's actual working pattern, these hours should be used as the basis for determining annual holiday entitlements.
- 4.3 An audit requirement be introduced such that if an employee's actual hours were found to be 20% or more above their contracted hours over a 13-week period then the employee's actual hours should be used instead.
- 4.4 A provision be introduced so that an employee cannot be required to use more than one week's annual holidays entitlement for a calendar week of leave (the averaging worked hours methodology set out in this section should only be used for part weeks of leave).



### **Issue 5 – Parental leave ‘override’**

127. The Parental Leave and Employment Protection Act 1987 includes an ‘override’ to the Holidays Act 2003, which states that for any annual holidays an employee becomes entitled to within 12 months of beginning a period of parental leave, they will only be paid at the rate of their average weekly earnings over the last 12 months.
128. Because the employee’s average weekly earnings during parental leave will be \$0, and parental leave periods can be up to 52 weeks long, this means that some employees are entitled to be paid \$0 per week for annual holidays when they return from parental leave. The employees’ average weekly earnings will only gradually increase over the following year, leaving employees disadvantaged at a time when they may most need to use their holiday entitlement. Because the vast majority of people who take parental leave in New Zealand are women, this can also be seen as an issue of gender equity.
129. The Taskforce noted the added cost for employers of removing the parental leave ‘override’, but felt this was outweighed by the benefits for parents and primary carers of being able to take time away from work to spend time with their new child, without being financially disadvantaged. The Taskforce also noted feedback that the provision was often misunderstood, and was difficult to input in some payroll systems, which leads to some employees having the ‘override’ applied to more of their leave balance than it should have been.

#### **Recommendation 5**

The Taskforce recommends that the parental leave ‘override’ in the Parental Leave and Employment Protection Act 1987 should be removed to address discrimination against parents who take time off to care for their young children.

### **Issue 6 – Clarifying the eligibility of Pay-As-You-Go (PAYG) provisions**

130. The Act allows for an employer to regularly pay annual holiday pay with the employee’s pay, also known as PAYG, if the employee works for the employer on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with four weeks’ annual holidays. In addition, the Act states that PAYG must be specified in an employment agreement at a rate of not less than eight per cent and that the holiday pay is identifiable as a separate component of the employee’s pay.
131. The Taskforce wishes to improve the definition of ‘intermittent or irregular’ in relation to PAYG to provide clarity for employers and employees, reduce inappropriate use of PAYG, and increase the general threshold of eligibility for PAYG. The rationale behind these changes is to promote the actual taking of holidays, whenever possible, in line with the purpose of the Act.

#### **Recommendation 6**

- 6.1 The Taskforce recommends that the ability for employers to use pay-as-you-go (PAYG) for employees on fixed-term contracts of less than 12 months should be removed and a more detailed definition should be provided for when PAYG can be used because a work pattern is ‘intermittent or irregular’.
- 6.2 The proposed four-part test of an ‘intermittent or irregular’ working pattern is:
  - the employee has no minimum number of hours and no expectation of ongoing employment, and
  - the employer has no obligation to provide work or the employee to accept work, and





- there is no underlying pattern of work within each Review Period, and
- there is evidence of periods without work within each Review Period.

The following enabling parameters that support the new definition are:

- An 'underlying pattern of work' can be defined as: *an assessment, within a specified timeframe, that time at work does not repeat in a manner possible to anticipate.*
- 'Periods without work' can be defined as: *a continuous period away from work of more than one week.*
- A recurring 13-week Review Period, beginning on the first day of employment.
- If the employer and employee agree to the definition at the start of employment, the Act assumes the definition is met until the date of the first Review Period.
- On the date of the first Review Period, the employer analyses relevant data such as payroll records and work schedules and determines whether the definition has or has not been met.
- If the employer determines the definition *has been met*, PAYG can continue until the next determination at the subsequent Review Period.
- If the employer determines the definition *has not been met*, PAYG is stopped and leave entitlements begin. In such an instance the employer is *not* liable for leave entitlements for the work done within the Review Period in question.
- From the second Review Period onwards, the employer becomes retroactively liable for leave entitlements if an objective review of relevant data indicates that the definition was no longer met but PAYG was not stopped, i.e. wilful blindness.
- If the employer and employee *disagree* whether the definition has or has not been met at a review, then the employee can opt out of PAYG even if the employer considers that they still meet the definition (the employee cannot opt in to PAYG if the employer does not agree they meet the definition).
- The employer or the employee can agree at any time that the definition is no longer met. In such instances, PAYG is stopped and leave entitlements begin.
- The employer's review of the definition must be conducted in good faith.
- PAYG loading should be clearly identified as a distinct component of every pay record.

The Taskforce also recommends that:

- 6.3 Annual holiday entitlements for those meeting the 'intermittent and irregular' definition should be paid every pay period as 8 per cent of gross earnings and itemised separately on employee's payslips.
- 6.4 PAYG should be optional for those employees that meet the definition.
- 6.5 PAYG should no longer be an option for fixed-term employees on contracts of less than 12 months.

### **Issue 7 – Interaction between availability provisions and Holidays Act entitlements**

132. Availability provisions (under section 67D of the Employment Relations Act 2000) are clauses in employment contracts that require the employee to be available to accept any work the employer offers within specified periods. Employees are paid compensation for making themselves available.
133. The Employment Relations Act and Holidays Act are both silent on the relationship between availability clauses and Holidays Act entitlements. This gap means there is





potential for problems to arise in situations where an employee with an availability provision in their contract is on annual holidays during (or adjacent to) a period when they are expected to be available to work, or where an employee with an availability provision in their contract is told a shift has become available, but is unable to work due to sickness, bereavement, or family violence.

#### **Recommendation 7**

The Taskforce recommends that:

- 7.1 Employers' ability to require employees to attend work under an availability provision should be suspended from the end of the last shift the employee works before their leave period until the start of the first shift they work on their return from leave. The employee could still agree to work during this period if they wished.
- 7.2 It should be made explicit that as soon as an employee agrees or is required to work a day under an availability provision, the day in question should become an 'agreed working day' and the entitlement to sickness, bereavement and family violence leave would now apply to this shift.

### **Annual holidays payments**

#### **Issue 8 – Definition of 'gross earnings'**

134. Although 'gross earnings' is defined in section 14 of the Holidays Act, there is a lack of clarity about whether certain forms of payments should be included in the calculation of annual holidays and FBAPS payments. For example, employers are not always clear whether payments such as discretionary payments, cashed up holidays and redundancy payments should be included in 'gross earnings', and this issue is one of the most common issues that feature in litigation related to the Act.
135. There is also no definitive position on whether the following payments should be considered as part of the 'gross earnings' definition:
  - employee share benefits
  - insurance benefits
  - contractual redundancy compensation
  - payments that are compensatory and would not ordinarily be considered "earnings".
136. The Taskforce wanted to provide clarity in this area to ensure that employers know what is expected of them to meet their obligations in respect of payments made in relation to Holidays Act entitlements.
137. A number of options were considered in relation to this, including considering whether definitions used in the Income Tax Act 2007 could be used for Holidays Act purposes. Although this option appeared initially appealing, upon further investigation a number of downsides were identified such as the fact that the purposes of tax legislation and employment regulation are not necessarily always aligned.
138. The Taskforce considered that a simpler definition could be provided that captured the intent of the provisions and would be easier for employers to understand and comply with.
139. The Taskforce noted the impact that this proposal could have on employers as it would mean that all commission payment and bonuses would always be included (as there would no longer be any exclusion of 'discretionary payments'). However, it noted that many of these payments are already included. In addition, employers would be able to



adjust the quantum of any such 'discretionary payments' in light of the fact that such payments would now form part of an employee's gross earnings.

140. The Taskforce considered smoothing commission/incentive payments across the period that they relate to (for example, a six-monthly commission payment could be smoothed across the 26 weeks that it relates to rather than be counted as a lump sum in a 13-week average). However, feedback from payroll industry representatives raised concerns about the complexity that this proposal would create. In light of this feedback the Taskforce decided not to progress with this proposal.
141. Instead the Taskforce proposes that any payments that relate to a period that falls entirely within a reference period (whether the reference period is four or 13 weeks), for example, monthly or quarterly commission payments, should be included in the four or 13 week average while payments that relate to longer periods (such as annual bonuses) should be excluded from the four or 13-week average but included in the 52-week average.
142. Where there is uncertainty over the period which generated the payment/commission a possible rule could be that the payment is excluded from the 13-week reference period if it has a value greater than  $\frac{1}{4}$  of all such payments received in the last 52 weeks. The Taskforce noted that further work may be required in relation to the treatment of these type of payments (especially if a four-week average earnings calculation was chosen instead of a 13 week average earnings calculation).
143. The Taskforce agreed to recommend that 'cashed up' statutory annual holidays should be included in 'gross earnings' but should be excluded from the four or 13-week leave payment calculation.
144. The Taskforce considered the issue of redundancy compensation payments but could not come to an agreed position about whether these payments should be included in the definition of 'gross earnings'. One alternative that was discussed was that 8 per cent of the value of any redundancy compensation payments could be included in the calculation of leave payments to be paid upon termination rather than the entire value of the redundancy compensation payments being included. The Taskforce noted the case currently before the courts on this issue and considered that the outcome of this case could inform a future decision about whether these payments should be included or excluded.

#### **Recommendation 8**

- 8.1 The Taskforce recommends that the following definition of 'gross earnings' should be used as the basis for leave payment calculations:
  - *'an employee's leave payment should reflect all cash payments received, except direct reimbursements for costs incurred'*
- 8.2 The Taskforce proposes that any payments that relate to a period that falls entirely within a reference period (whether the reference period is four or 13 weeks), for example, monthly or quarterly commission payments should be included in the four or 13 week average while payments that relate to longer periods (such as annual bonuses) should be excluded from the four or 13 week average but included in the 52 week average

## **FBAPS leave entitlements**

### **Issue 9 – FBAPS unit of entitlements**

145. FBAPS entitlements are held in days. While the Taskforce considered the issue of the units of entitlement to be used throughout the Act, it did not consider that there was a strong case to move away from defining FBAPS entitlements in days.



### **Recommendation 9**

The Taskforce recommends that FBAPS entitlements should continue to be held in days.

### **Issue 10 – Availability of sick leave, family violence leave and bereavement leave**

146. All employees under the Act are entitled to five days' paid sick leave a year, 10 days' family violence leave a year and bereavement leave of either three days or one day per bereavement depending on the nature of the relationship with the deceased. These forms of leave are made available to employees after six months' continuous employment. Although an employer and employee can agree to take sick leave, family violence leave or bereavement leave in advance, there is no obligation on the employer to provide them before six months' employment.
147. The Taskforce recognises that employees have little control over when they may need sick leave, family violence leave and bereavement leave, and would benefit from having protections in place in the first six months. The current waiting period may also encourage some employees to go to work sick, which raises health and safety concerns and is not in line with the intention of the Act to promote balance between work and other aspects of employees' lives.

### **Recommendation 10**

The Taskforce recommends that:

- 10.1 Eligible employees should be entitled to bereavement leave and family violence leave from the first day of employment.
- 10.2 Eligible employees should be entitled to one day of sick leave from their first day of employment, with an additional day per month of employment until the full entitlement of five days is reached after four months (the entitlement of five days for the second and subsequent years of employment should apply from the anniversary of their employment).

### **Issue 11 – Partial sick and family violence leave**

148. The Act considers sick leave and family violence leave in days and does not explicitly allow for these types of leave to be taken in units of less than a day. For example, if an employee works for part of the day and then goes home sick, this may be counted as using a whole day of sick leave. This is potentially unfair for employees and can reduce their sick and family violence leave entitlements at a faster rate than actually used.
149. In practice, many employers allow their employees to take sick leave in part days. However, the Taskforce sees a clear benefit in this applying to all employees as it would protect employees' entitlements to these types of leave and provide clarity to employers and employees.
150. The Taskforce also considered whether employees should have the ability to take bereavement leave, alternative holidays and public holidays in units of less than a day. However, it concluded that allowing for partial bereavement leave could create a situation where employees feel compelled to shorten their bereavement leave, while allowing for partial alternative holidays and public holidays would not align with the purpose of these provisions.

### **Recommendation 11**

The Taskforce recommends that employees should have the ability to take sick leave and family violence leave in units of less than a day on a proportionate basis for time and pay with



a minimum amount of a quarter of a day.

### Issue 12 – Eligibility for sick leave, family violence leave and bereavement leave

151. Under the current Act, employees are eligible for sick leave, family violence leave and bereavement leave if:
- they have six months' current continuous employment with the same employer, or
  - they have worked for the employer for six months for:
    - an average of 10 hours per week, and
    - at least one hour in every week or 40 hours in every month.
152. As outlined above, the Taskforce recommends that these forms of leave are available to eligible employees from their first day of employment. If this recommendation was implemented, the current eligibility criteria would no longer be appropriate and would need to be amended to better align with this approach.

### Recommendation 12

The Taskforce recommends that a new test be established for eligibility for family violence, sick and bereavement leave, as follows:

- 12.1 All employees with *agreed hours* and an *expectation of continuous employment* should be eligible for family violence leave and bereavement leave from the first day of employment.
- 12.2 All employees with *agreed hours* and an *expectation of continuous employment* should be eligible for sick leave from the first day of employment. Sick leave days should build up from one day on the first day of employment to a full entitlement of 5 days after 4 months.
- 12.3 'Agreed hours' refers to the hours that the employer and employee have agreed that the employee will work, as outlined in the employment agreement. 'Expectations of continuous employment' refers to the expectation that the employee will not have any periods of unpaid leave that are longer than one week.
- 12.4 Employees with *no agreed hours* or who are *not expected to work continuously* should be subject to an 'hours test' applied after 13 weeks. This test requires that the employee works on average at least 10 hours a week over the preceding 13 weeks. If the employee meets this threshold, they become eligible for sick leave, family violence leave and bereavement leave. If they do not meet this test, it is repeated after 13 weeks to see if they meet the hours requirement or have been working continuously.
- 12.5 All employees should be eligible for sick leave, family violence leave and bereavement leave *after six months of continuous employment*.

### Issue 13 – Prescriptive Otherwise Working Day test

153. Although section 12(3) provides a list of factors to be taken into account by the employer and employee when determining whether a day is an Otherwise Working Day, these factors are not ranked and there is no guidance about the weighting that should be attached to each factor. This can cause problems when determining whether an employee is eligible or not for a day of FBAPS leave.
154. To address this the Taskforce is proposing a prescriptive test that can be used to definitively answer the question of whether a particular calendar day is an Otherwise Working Day for an employee.



155. The Taskforce also discussed the ‘Mondayisation’ issue whereby those employees who regularly work Mondays receive more paid public holidays as a result of their working patterns than other employees who do not regularly work on Mondays.
156. The Taskforce considered establishing a ‘pro-rata’ public holidays entitlement based on the average number of days per week worked. This would ensure that all employees who worked the same number of days per week received the same entitlement to paid public holidays regardless of which particular days of the week they worked. Under this approach, every employee’s public holidays entitlement would be based on the number of days worked per week as set out below:

No. days worked per week	Public holidays employee is eligible for
5,6 or 7	11
4	9
3	7
2	5
1	3

157. The ‘pro-rata’ entitlement would be calculated at the end of the year and the employee would then receive any additional entitlement in the form of alternative holidays (for example, if an employee worked four days a week and throughout the year only received seven paid public holidays then at the end of the year they would receive an entitlement of two alternative holidays). No employee would be disadvantaged under the proposal so if, as a result of their working pattern, an employee had received more paid public holidays than their ‘pro-rata’ entitlement suggests they should have received no action would be taken.
158. While establishing a ‘pro-rata’ public holidays entitlement would address the ‘Mondayisation’ issue, it would add complexity and cost for employers. The Taskforce was unable to reach agreement about recommending the establishment of such an entitlement.

### **Recommendation 13**

The Taskforce recommends that a day should be considered an Otherwise Working Day for an employee for FBAPS purposes if:

- the employee was expected to work on the day in question according to a work pattern that has previously been agreed between the employee and employer (for example, a regular shift pattern that is set out in an employment agreement), or
- the employee has worked on 50% or more of the corresponding days in either the previous 4 weeks or the previous 13 weeks.

### **Issue 14 – Extension of bereavement leave**

159. The Act provides three days’ bereavement leave on the death of immediate family member. A separate provision enables an employee to take one day’s bereavement leave on the death of any other person at the discretion of the employer.
160. Bereavement leave is intended to help employees emotionally recover from their loss before returning to work, and to allow them to take care of matters to do with the bereavement. The Taskforce believes that eligibility for three days’ bereavement leave should be extended, to recognise that employees could be equally bereaved by the loss of extended family, and to support cultural practises and varied family arrangements.



#### **Recommendation 14**

The Taskforce recommends that section 69(2)(a) of the Act, regarding people on whose death the employee may take 3 days of bereavement leave, should be extended to include:

- stepfamily
- family-by-marriage not already included (siblings-in-law and children-in-law)
- cultural family groups (e.g. whāngai relationships)
- aunts, uncles, nieces and nephews
- miscarriage (this proposal is currently being progressed via a private members bill).

The Taskforce notes that the definition included in the Family Violence Act 2018 appears to cover all of these groups and individuals, but may need to be updated to specifically include miscarriage:

*family member, in relation to a person, means—*

*(a) any other person who is or has been related to the person—*

*(i) by blood; or*

*(ii) by or through marriage, a civil union, or a de facto relationship; or*

*(iii) by adoption:*

*(b) any other person who is a member of the person’s whānau or other culturally recognised family group’*

#### **Issue 15 – Transferring public holidays**

161. An employer and employee can currently agree to transfer a public holiday that is an Otherwise Working Day for the employee to be observed on a different Otherwise Working Day. This provision is intended to recognise cultural diversity in workplaces, but it can disadvantage employees.
162. An employee who works a public holiday is paid time and a half and also given an alternative paid day off. The ‘transfer’ of a public holiday is equivalent to this alternative paid day off, but the employee is no longer paid time and a half for working on the public holiday. The ‘transfer’ can also be complicated for employees with variable rosters, who may not know in advance whether the day they would like to transfer their public holiday to will be an Otherwise Working Day for them.

#### **Recommendation 15**

The Taskforce recommends two changes to this section of the Act:

- 15.1 The Act currently states that “the purpose of the transfer is not to avoid the employee’s entitlements under sections 50 and 56 for working on a public holiday, although the transfer may have that effect.” The employee’s entitlements under sections 50 and 56 are to be paid time and a half for working on the public holiday, and to be provided with an alternative holiday if they work on a public holiday. The Taskforce recommends that the phrase “although the transfer may have that effect” is removed from the Act.
- 15.2 The Taskforce recommends that a day that a public holiday is transferred to should automatically be treated as an Otherwise Working Day for an employee, regardless of their working pattern. This enables employees to transfer paid public holidays to days that are of significance to them, without being limited by their work pattern or lack of clarity about future rostering.



## Other proposed changes

### Issue 16 – Establishing a 12th public holiday

163. The Taskforce also discussed the case for establishing a public holiday for Matariki. The Māori calendar (the Maramataka) begins in June when the Matariki star cluster reappears in the sky. Recently, some politicians, members of the public, and media commentators have argued that a new public holiday should be created to recognise Matariki, which would celebrate the ‘Māori New Year’ and honour Māoritanga (traditions and culture). New Zealand currently has 11 public holidays, and Waitangi Day is the only one of these that honours Māori as tangata whenua.

#### Recommendation 16

The Taskforce was unable to reach a consensus view in relation to establishing an additional public holiday.

The Taskforce noted that Matariki could be marked either by establishing an additional public holiday or by transferring an existing public holiday to recognise Matariki. The Taskforce noted the case for Matariki to be recognised with a public holiday but did not feel it was within its remit to make recommendations about whether Matariki should be marked with a public holiday, and if so how this should be achieved (i.e. by establishing an additional public holiday or transferring an existing public holiday to Matariki).

### Issue 17 – Closedowns

164. The Act allows employers to have one period per year where they ‘customarily’ close operations and require employees to use some or all of their annual holiday entitlements. Businesses can have additional closedowns throughout the year if employees agree, but employers cannot require the use of holiday entitlements for these additional closedowns.
165. A number of issues were identified with the ‘closedowns’ section of the Act. Many aspects of the provision lacked clarity; the minimum notice period appeared to be disproportionate to the impact closedowns can have on employees; and there were particularly negative consequences for employees not entitled to holidays at the time of a closedown. The current Act prescribes a mandatory 8 per cent pay-out for employees not entitled to holidays at the time of a closedown, which leads to a ‘reset’ of those employees’ anniversary dates, so they are ineligible for paid holidays for another 12 months.

#### Recommendation 17

The Taskforce recommends that closedown provisions should be amended to provide greater transparency and certainty for employees. In addition, the requirements that holidays are paid out at 8% and an employee’s anniversary date is reset should be removed.

The Taskforce recommends six changes to the closedowns sections of the Act:

- 17.1 Employees should have an obligation to inform incoming employees, in writing, if their business has a ‘customary’ closedown, with an indication of the general time of year and length of this closedown. This should happen before the prospective employee signs the employment agreement.
- 17.2 The Act should note that a new business can establish the ‘custom’ of a closedown, but they must provide a reasonable notice period to all existing employees.
- 17.3 The requirement that employees who are not entitled to holidays at the time of a closedown be paid out 8% of their gross earnings and have their anniversary date reset should be removed (although it should still be possible for anniversary dates to





be reset by agreement). This would no longer be necessary, due to the Taskforce's previous recommendation that employees should be able to take holidays in advance of entitlement, on a 'pro-rata' basis.

- 17.4 Employees should be able to take holidays in advance beyond their 'pro-rata' entitlement in the event of a 'customary' closedown, but employers may not compel employees to do this.
- 17.5 A minimum notice period of 14 days should be introduced for 'agreed' additional closedowns (the Act is currently silent on notice periods for these).
- 17.6 The agreement between employer and employee that additional closedowns will occur must be in writing.

#### **Issue 18 – Sale and transfer of a business**

- 166. Under the current Act, employees' outstanding leave entitlements cannot be transferred from an outgoing employer to a new employer in the event that a business is sold. This is because, in these situations, existing employment agreements come to an end and the Act requires that outstanding entitlements to leave are to be paid out at the end of employment. The exception to this requirement is when vulnerable workers are involved and section 69J of Part 6A of the Employment Relations Act 2000 applies.
- 167. The Taskforce is aware that it is not always well understood by employers what is permitted with regards to leave entitlements when the sale and transfer of a business occurs. In addition, employees can be disadvantaged by having their leave entitlements paid out as they need to then wait 6 or 12 months until they are once again entitled to annual holidays, sick leave, family violence leave and bereavement leave.

#### **Recommendation 18**

The Taskforce recommends that on the sale and transfer of a business, employees should have a choice about whether to transfer all of their leave entitlements or have them paid out and reset.

#### **Issue 19 – Record-keeping requirements**

- 168. Under the current Act, employers must keep the information necessary to demonstrate that they have complied with minimum entitlement provisions. This helps ensure that employers hold the information needed to calculate pay and leave entitlements, address any queries from employees and support any investigation into incorrect payment or miscalculation.
- 169. The Taskforce agrees with this general approach and recognises that the record-keeping provisions will need to be updated if changes are made to how leave entitlements and payments are calculated.
- 170. The Taskforce also noted that employees should have access to information about their holiday and leave records on request and that the employer would be expected to provide this information in a format that can be understood by the employee.

#### **Recommendation 19**

The Taskforce recommends that:

- 19.1 Record-keeping requirements should be updated to reflect changes to how leave entitlements are held, calculated and paid, as outlined in Annex 3.
- 19.2 Employers should be required to retain all holiday and leave records for six years and to make these available to employees on request in a format that can be understood and supports verification by the employee. However, employers should retain relevant





records for longer than six years in cases where an issue has been raised in good faith.

**Issue 20 – Payslips**

- 171. There is currently no legal requirement for employers to provide payslips to employees in New Zealand. Although employees have a legal right to ask their employer for their wages, time and leave records, this information could be made more transparent and accessible for employees.
- 172. The Taskforce believes it is important that employees have regular access to information regarding their leave entitlements, and that payslips create the opportunity for this to be issued to employees on a consistent basis. Payslips increase transparency over pay and allow employees to better understand and track their leave entitlements.

**Recommendation 20**

The Taskforce recommends that employers should be required to provide payslips to employees in every pay period. Payslips could be in a digital or physical format, but employees should be able to request that their payslip be provided in a specific format.

While noting that the precise design and format of payslips will require further work, the Taskforce recommends that payslips should include the type of information outlined in the table below.

**Proposed information to be included in payslips**

Format	Payslips should be in electronic form or hard copy
<b>General data</b>	<ul style="list-style-type: none"> <li>• Employer name</li> <li>• Employee name</li> <li>• Date which payslip was made</li> <li>• Date of start of employment</li> <li>• Number of hours worked each day and pay for those hours</li> <li>• Days or portion of days worked over a calendar week</li> <li>• Gross amount</li> <li>• Net amount</li> <li>• Specifics of all deductions from gross amount</li> <li>• Types of pay (e.g. regular, overtime, or a combination, PAYG)</li> <li>• <b>Inputs and methodologies, as applicable, used to calculate general data</b></li> </ul>
<b>Leave entitlements</b>	<ul style="list-style-type: none"> <li>• Date on which entitlement to annual holidays begin</li> <li>• Date on which entitlement to FBAPS leave begin</li> <li>• Current entitlement to annual holidays expressed in weeks or portion of weeks</li> <li>• Current entitlement to family violence, sick leave and alternative holidays (if applicable) expressed in days or portions of days</li> <li>• Balance of annual holidays leave expressed in weeks or portion of weeks</li> <li>• Balance of family violence, sick leave and alternative holidays (if applicable) entitlements expressed in days or portions of days</li> <li>• <b>Inputs and methodologies, as applicable, used to calculate leave entitlements</b></li> </ul>
<b>Leave transactions</b>	<ul style="list-style-type: none"> <li>• Payment for annual leave or FBAPS leave, if applicable</li> <li>• Payment for cashed-out annual holidays, if applicable</li> </ul>



	<ul style="list-style-type: none"> <li>• Payment for PAYG, itemised separately, if applicable</li> <li>• <b>Inputs and methodologies, as applicable, used to calculate leave transactions</b></li> </ul>
<b>Quarterly review of employees' working arrangement (for PAYG, sick, bereavement and family violence leave eligibility purposes)</b>	<ul style="list-style-type: none"> <li>• Date on which quarterly review carried out</li> <li>• Result of quarterly review for PAYG eligibility (if applicable) and any changes to entitlements resulting from the review</li> <li>• Result of quarterly review for sick, bereavement and family violence leave eligibility and any changes to entitlements resulting from the review</li> </ul>
<b>Termination</b>	<ul style="list-style-type: none"> <li>• Reference to termination pay, if applicable</li> <li>• Reference to leave pay, if applicable</li> <li>• <b>Inputs and methodologies, as applicable, used to calculate termination</b></li> </ul>
<b>Corrections</b>	<ul style="list-style-type: none"> <li>• Notation of any corrections to previous payslips, including references to payslip number, methodologies and data that have been corrected</li> </ul>

### Issue 21 – Compliance and enforcement

173. The Taskforce noted that the issues that cause non-compliance with the current Act should be considered in the design of the compliance and enforcement mechanisms to support any revised Act. This work should also consider the ability of different parties to raise concerns in relation to the Act, the appropriate enforcement mechanisms available to the different stakeholders (for example, which options are available to which parties) and the appropriate avenues for these concerns to be pursued.
174. The Taskforce noted that the development of the appropriate compliance and enforcement mechanisms for any revised system would require further design and policy work.

#### Recommendation 21

The Taskforce noted that the issues that cause non-compliance with the current Act should be considered in the design of the compliance and enforcement mechanisms to support any revised Act.

### Issue 22 – Ability to agree above minimum standards

175. The Taskforce was keen to ensure that employers and employees have the ability to agree to leave arrangements that vary from the entitlements set out in the Act providing it can be demonstrated that these arrangements provide the employee with leave entitlements that, at a minimum, meet the standards set out in the Act.
176. In its deliberations the Taskforce chose to focus on developing recommendations for the economy as a whole. While it did consider the impact that particular options could have on particular employee types and working arrangements, it chose not to directly enter into discussions with any specific sectors throughout the review to avoid being seen to have favoured any specific sector in the development of its recommendations.
177. The Taskforce does, however, acknowledge that its proposals will have implications for specific sectors (such as the education sector) which will need to be worked through.



**Recommendation 22**

The Taskforce recommends that employers and employees have the ability to agree to arrangements that are different to those in the Act providing that it can be demonstrated that these arrangements provide the employee with leave entitlements that, at a minimum, meet the standards set out in the Act.



## Annex 1: 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. may include consideration of the place of the standard five day, 40 hour, working week in the Act
  - b. any other matters relating to the Act that it sees fit. This may include holidays and leave entitlements modified by other Acts (such as the *Parental Leave and Employment Protection Act 1987*).
10. The principles set out in paragraph 4 may also be reconsidered, but options must aim to preserve the intent of these as far as possible.
11. The Group will not, however, consider the complex issue of remediation of historical underpayments of holiday and leave pay.

### Membership and Process

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



## **Rules of engagement**

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

## **Timing and reporting**

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



## Annex 2: Entitlements under the Holidays Act 2003 and proposed system

Entitlement	Holidays Act 2003	Proposed system
Annual holidays	<ul style="list-style-type: none"> <li>Employees are entitled to four weeks' annual holidays each year when they have worked for their employer for 12 months.</li> </ul>	<ul style="list-style-type: none"> <li>Employees are entitled to four weeks' annual holidays each year when they have worked for their employer for 12 months.</li> <li>Employees have the ability to take annual holidays in their first 12 months up to the amount they would be eligible for on a 'pro-rata' basis.</li> </ul>
Sick leave	<ul style="list-style-type: none"> <li>Employees are entitled to five days' paid sick leave a year.</li> <li>Employees are entitled to sick leave after six months' continuous employment, or if they have worked for the employer for six months for an average of 10 hours per week and at least one hour in every week or 40 hours in every month.</li> <li>Sick leave is explicitly considered in units of days.</li> </ul>	<ul style="list-style-type: none"> <li>Employees are entitled to five days' paid sick leave a year.</li> <li>Eligible employees are entitled to one day of sick leave from their first day of employment, with an additional day per month of employment until the full entitlement of five days is reached after four months.</li> <li>Employees are eligible for sick leave if they have agreed hours and an expectation of continuous employment. If not, they are eligible after 13 weeks if they have worked on average at least 10 hours a week, or after six months continuous employment.</li> <li>Employees have the ability to take sick leave in units of less than a day on a proportionate basis for time and pay with a minimum amount of a quarter of a day.</li> </ul>
Family violence leave	<ul style="list-style-type: none"> <li>Employees are entitled to 10 days' paid family violence leave a year.</li> <li>Employees are entitled to family violence leave after six months continuous employment, or if they have worked for the employer for six months for an average of 10 hours per week and at least one hour in every week or 40 hours in every month.</li> <li>Family violence leave is explicitly</li> </ul>	<ul style="list-style-type: none"> <li>Employees are entitled to 10 days' paid family violence leave a year.</li> <li>Eligible employees are entitled to family violence leave from the first day of employment.</li> <li>Employees are eligible for family violence leave if they have agreed hours and an expectation of continuous employment. If not, they are eligible after 13 weeks if they have worked on average at</li> </ul>



Entitlement	Holidays Act 2003	Proposed system
	considered in units of days.	<p>least 10 hours a week, or after six months' continuous employment.</p> <ul style="list-style-type: none"> <li>• Employees have the ability to take family violence leave in units of less than a day on a proportionate basis for time and pay with a minimum amount of a quarter of a day.</li> </ul>
Bereavement leave	<ul style="list-style-type: none"> <li>• Employees are entitled to bereavement leave of either three days or one day per bereavement.</li> <li>• Employees are entitled to bereavement leave after six months' continuous employment, or if they have worked for the employer for six months for an average of 10 hours per week and at least one hour in every week or 40 hours in every month.</li> <li>• Bereavement leave does not extend to: stepfamily; siblings-in-law and children-in-law; cultural family groups; aunts, uncles, nieces and nephews; and miscarriage.</li> </ul>	<ul style="list-style-type: none"> <li>• Employees are entitled to bereavement leave of either three days or one day per bereavement.</li> <li>• Eligible employees are entitled to bereavement leave from the first day of employment.</li> <li>• Employees are eligible for bereavement leave if they have agreed hours and an expectation of continuous employment. If not, they are eligible after 13 weeks if they have worked on average at least 10 hours a week, or after six months' continuous employment.</li> <li>• Bereavement leave extends to: stepfamily; siblings-in-law and children-in-law; cultural family groups; aunts, uncles, nieces and nephews; and miscarriage.</li> </ul>
Public holidays	<ul style="list-style-type: none"> <li>• Employees are entitled to a public holiday if it falls on a day that the employee would otherwise have worked.</li> </ul>	<ul style="list-style-type: none"> <li>• Employees are entitled to a public holiday if the employee was expected to work on the day in question or they have worked on 50% or more of the corresponding days in either the previous 4 or 13 weeks.</li> </ul>
Alternative holidays	<ul style="list-style-type: none"> <li>• Employees are entitled to an alternative holiday if they: <ul style="list-style-type: none"> <li>○ work on a public holiday that is an Otherwise Working Day for them, or</li> <li>○ are on call on a public holiday that is an Otherwise Working Day for them and they have to limit their activities on the day.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Employees are entitled to an alternative holiday if they: <ul style="list-style-type: none"> <li>○ work on a public holiday that is an Otherwise Working Day for them, or</li> <li>○ are on call on a public holiday that is an Otherwise Working Day for them and they have to limit their activities on the day.</li> </ul> </li> </ul>





Entitlement	Holidays Act 2003	Proposed system
Pay-as-you-go (PAYG)	<ul style="list-style-type: none"> <li>• If an employee works so intermittently or irregularly that it is impracticable for the employer to provide them with four weeks' annual holidays, they may agree to be paid annual holiday pay with their pay.</li> <li>• PAYG is also available for employees on fixed-term arrangements of less than 12 months.</li> </ul>	<ul style="list-style-type: none"> <li>• Only employees that meet the following test may agree to be paid annual holiday pay with their pay: <ul style="list-style-type: none"> <li>○ no minimum number of hours and no expectation of ongoing work, and</li> <li>○ employer has no obligation to provide work or the employee to accept work, and</li> <li>○ there is no underlying pattern of work, and</li> <li>○ there are periods without work.</li> </ul> </li> <li>• Employers are required to review working arrangements every 13 weeks to ensure that employees on PAYG still meet this test.</li> <li>• PAYG is not available to employees on fixed-term arrangements of less than 12 months (unless they meet the four-part test).</li> </ul>



## Annex 3: Current record-keeping requirements and proposed additional requirements to reflect the Taskforce’s recommendations

Section 81 of the Holidays Act (current)		Proposed new requirements* (bold bullets represent new data points)	
<b>General data</b>	<ul style="list-style-type: none"> <li>Employee name</li> <li>Date of start of employment</li> <li>Number of hours worked each day in a pay period and pay for those hours</li> <li>Current entitlement to annual holidays</li> <li>Date on which employee last became entitled to annual holidays</li> <li>Current entitlement to sick days</li> </ul>	<b>General data</b>	<ul style="list-style-type: none"> <li>Employee name</li> <li>Date of start of employment</li> <li><b>The date of any day worked, and the number of hours worked on that day</b></li> <li><b>The start and end of any shift cycle during the pay period</b></li> <li><b>For each hour paid, the category of payments made (e.g. weekly pay, overtime, commissions, etc.)</b></li> <li><b>Gross earnings over the pay period</b></li> </ul>
<b>Annual holidays and FBAPS leave</b>	<ul style="list-style-type: none"> <li>Dates on which annual holidays or FBAPS have been taken</li> <li>Amount of payment for annual holidays or FBAPS taken</li> <li>Portion of annual holidays that have been paid out in each entitlement year</li> <li>Date and amount of payment for cashed-out annual holidays</li> </ul>	<b>Annual holidays</b>	<ul style="list-style-type: none"> <li><b>The entitlement to annual holidays at the beginning of each pay period, expressed in weeks or portion of weeks.</b></li> <li>The date on which the employee last received an entitlement to annual holidays, and what the entitlement was, expressed in weeks or portions of weeks</li> <li>The dates on which the employee used any of their annual leave entitlement, and: <ul style="list-style-type: none"> <li>whether the annual leave was during a closedown period, under section 32 of the Act</li> <li>how much leave was used for each day of leave, expressed in portions of a week.</li> </ul> </li> <li><b>The balance of annual leave at the end of the pay period expressed in weeks or portion of weeks</b></li> </ul>
<b>Public holidays</b>	<ul style="list-style-type: none"> <li>Dates and payments for public holidays worked</li> <li>Number of hours worked on public holidays</li> <li>Day or part of a day of any transferred public holidays</li> <li>Date of entitlement to an alternative holiday</li> <li>Dates and payments for any public or alternative holiday not worked but entitled to holiday pay</li> <li>Cash value of any board or lodgings</li> <li>Payments for cashed-out alternative holidays</li> </ul>	<b>FBAPS leave</b>	<ul style="list-style-type: none"> <li><b>The entitlement to each category of FBAPS leave, at the beginning of the pay period, expressed in days or portions of days</b></li> <li>The date on which the employee last received any entitlement to FBAPS leave (for each type of leave, and what the entitlement was, expressed in days)</li> <li>The dates on which the employee used any of their FBAPS leave entitlements, and how much leave was used each day (expressed in portions of a day)</li> <li>The balance of FBAPS leave at the end of the pay period, expressed in days or portions of days</li> <li>If applicable, a record of the hours test that was applied to determine eligibility for family violence, bereavement and sick leave</li> <li>If applicable, a record of the 50% or more corresponding days in previous 4 or 13 weeks test to determine an Otherwise Working Day for FBAPS leave</li> </ul>
<b>Termination records</b>	<ul style="list-style-type: none"> <li>Date of termination of employment</li> <li>Holiday pay upon termination of employment</li> </ul>	<b>Public holidays</b>	<ul style="list-style-type: none"> <li>Dates and payments for public holidays worked</li> <li>Number of hours worked on public holidays</li> <li>Day or part of a day of any transferred public holidays</li> <li>Date of entitlement to an alternative holiday</li> <li>Dates and payments for any public or alternative holiday not worked but entitled to holiday pay</li> </ul>



			<ul style="list-style-type: none"> <li>• Cash value of any board or lodgings</li> <li>• Payments for cashed-out alternative holidays</li> </ul>
		<b>Leave history per entitlement year</b>	<ul style="list-style-type: none"> <li>• <b>Date and amount of payment representing PAYG under section 28 of the Act</b></li> <li>• <b>Portion of annual holidays that have been paid as PAYG expressed in weeks or portions of weeks</b></li> <li>• <b>For PAYG employees, a record of the quarterly review of working pattern to determine if the employee was still eligible for PAYG</b></li> <li>• <b>Date and amount of payment for cashed-out annual holidays</b></li> <li>• <b>Portion of annual holidays that have been cashed out in each entitlement year, expressed in weeks or portions of weeks</b></li> </ul>
		<b>Leave methodologies</b> (directly in the section or referenced to another part of the Act)	<ul style="list-style-type: none"> <li>• <b>Which leave methodologies (under which section of the Act) that have been applied to any portion of leave taken, [e.g. the methodology applied to determine average working week, including reference periods, equations, shift cycles, etc.]</b></li> </ul>
		<b>Quarterly review of employees' working arrangement</b> (for PAYG, sick, bereavement and family violence leave eligibility purposes)	<ul style="list-style-type: none"> <li>• <b>Date on which quarterly review carried out</b></li> <li>• <b>Calculation used and result of quarterly review for PAYG eligibility (if applicable) and any changes to entitlements resulting from the review</b></li> <li>• <b>Calculation used and result of quarterly review for sick, bereavement and family violence leave eligibility and any changes to entitlements resulting from the review</b></li> </ul>
		<b>Termination records</b>	<ul style="list-style-type: none"> <li>• Date of termination of employment</li> <li>• Holiday pay paid upon termination of employment</li> </ul>
		<b>Corrections</b>	<ul style="list-style-type: none"> <li>• <b>Notation of any corrections to previous payslips, including references to payslip number, methodologies and data that have been corrected</b></li> </ul>

