



## **SUBMISSION**

Prepared by  
**New Zealand Retailers Association**

For the  
**Department of Labour**

On the  
**Review of the Holidays Act 2003**

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## **Introduction**

These submissions are presented by the New Zealand Retailers Association (NZRA)

The Association is the largest trade association involved in the retail industry in New Zealand. We represent an industry that has annual sales of \$66billion and which employs 325,000 people (approx 20% of the New Zealand workforce) in more than 49,000 outlets throughout New Zealand.

Our national membership includes general merchandise chains, specialised chains, traditional department stores, grocery stores, supermarkets and thousands of owner operators spread throughout the country. The membership also includes a number of specialised trade groups representing manufacturers, distributors and retailers in the plumbing materials, metal fastener, pet, equestrian, jewellery, bicycle and sporting goods sectors.

Nationally, the retail sector is the largest in terms of turnover (second only to manufacturing), and the biggest employer group, therefore the needs and concerns of the sector outlined in this submission need to be afforded serious consideration.

We wish to firstly couch our submission in the frame that retail is not a 9am – 5pm, Monday to Friday, 5-day a week business environment. Staff working in retail may be full time, part time, fixed term or casual, and no matter if you're a small employer or a large national chain, you may experience any combination, or all of these in your store/s. Employment legislation can cause complexities when applied practically in a retail environment, and the Association operates an employment advisory service for its members to assist retailers to navigate through the numerous issues that arise.

We appreciate the opportunity to submit on those issues pertaining to the Review of the Holidays Act 2003.

## **Submission**

### **The Calculation Of Relevant Daily Pay (RDP)**

#### **1. *Discuss any specific complexities and costs associated with calculating RDP.***

RDP is the base for payment for all leave entitlements other than annual holidays. It is a confusing concept that ignores the purpose of penal rates and other additional wage related payments provided to reward work actually performed and results achieved. Such payments are fundamentally different from core wage entitlements.

RDP causes particular problems in the retail industry where sales incentives and commissions are sometimes paid. The Relevant Daily Pay calculation, when paid at one half time extra for working on a public holiday has the effect of 'double dipping' for a significant number of employees in the retail sector.

Take the example, (which is common in retail) where an employee is paid on a weekly or fortnightly base rate, and then in addition is paid a monthly commission based on sales for that month. When that employee works on a public holiday, and many retail employees do, then that employee is entitled to Relevant Daily Pay (including commission), relating to the time actually worked on the day, plus half that rate again. At the end of the month however the employee is paid a commission based on sales, including the sales for the public holiday, which has already been paid at half time extra.

The net result of this approach is that the employee receives two and a half times the commission for the public holiday.

Under the current rules, the only way to avoid this is to recalculate and adjust commissions paid at month end which becomes a complicated exercise. In many cases these calculations are beyond the scope of payroll packages, and it needs to be kept in mind that in some cases there are hundreds of employees involved.

If the employee does *not* work on the public holiday, the employer will have to use the default 4-week average formula to determine the commission portion due for the day. This may bear little relation to what would have actually happened on the day and will be affected by the timing of commission cycles.

The payment cycle for incentives is often separate from the wage payment cycle, further complicating the situation. Wages are usually paid weekly or fortnightly, but typically commissions are paid monthly after payment is made for the goods. In some cases, commissions may be paid on a three monthly or annual cycle.

Retail employers have to try to make sense of the Act and if the rate of RDP cannot be otherwise resolved they are required to apply the default formula. This requires the employer to calculate a nominal average daily rate using the employee's gross earnings for the previous four weeks. It is readily apparent that the rate of RDP may vary significantly depending on whether a commission payment was made in that four week period or not.

**2. *Is there an alternative calculation that would be easier to make without returning to the ordinary pay calculation under the Holidays Act 1981?***

We previously supported a calculation formula presented by Business NZ, and consider this to be relevant and preferential to that currently used.

It is the adoption of a concept of Standard Daily Pay based on gross earnings in the last 4 full pay periods worked by the employee, less variable elements that are not common to every working day worked by the employee. This would have the effect of ensuring that Commission payments aren't paid twice.

On this basis, Standard Daily Pay would be calculated using the formula  $\frac{a - b}{c}$

where:

**a** is the employee's gross earnings for the 4 pay periods before the end of the pay period immediately before the calculation,

**b** is the total value of

- penal payments,
- overtime payments that are not part of the employee's regular pay,
- productivity or incentive payments (including commissions) that are not part of the employee's regular pay
- one-off or exceptional payments
- discretionary payments that the employer under the terms of the employee's employment agreement is not bound to make.

**c** is the number of paid days in the 4 pay periods referred to in **a**

Such a Standard Daily Pay concept could be used for sick leave, bereavement leave, public holidays observed and Alternative Holidays taken.

Public holidays *worked* should simply entitle the employee to time and a half for any **time** actually worked, and regular payment for other actual entitlements *earned on the day*, eg commission on actual sales. (Plus, where the public holiday falls on a day they would otherwise work they will be entitled to an Alternative Holiday).

Where payment of any component, eg commission, is usually paid on a different cycle, it should not be paid until the usual time, as specified and agreed in the Employment Agreement.(i.e. If commission for the month is typically paid at the end of the month, there is no need to complicate this calculation by requiring it to be paid with that week's base pay).

The following is a working example to explain the current impacts, and proposed application:

**Current RDP Calculations**

The employee earns

Base Rate	= \$13 / hour
Commission	= Average \$60/day (as an example)
Hours worked	= 8 hours/day
Calculation of RDP	= (\$13 x 8) + \$60
	= \$104 + \$60
	= \$164.00
Effective Hourly Rate	= \$20.50

**Worked Example of The Current Situation**

The retailer opens on a public holiday and the store achieves an "average" level of sales.

The employee receives	
RDP	= \$20.50 x 8 hours x 1½
	= \$246.00
Plus Commission for the day	= \$60.00
Total	= \$306
<b>Effective Hourly Rate</b>	<b>= \$38.25/hr</b>
+ Day in lieu RDP	= \$20.50 x 8 hours
	= \$164
<b>Total value of the day</b>	<b>= \$470 = \$58.75/hr</b>

### **RDP Calculation Solution**

Because of the way the relevant daily pay is calculated, we have a “double dipping” situation in regards to the commission payments.

The intent of the law was to pay half as much again on the day worked, and give an alternative day off. Thus the person who **works** is paid for 20 hours, whereas the person who **doesn't work** is paid for the 8 hours they would have normally worked.

We would suggest that

### **In the situation where the employee works:**

- The Relevant Daily Pay is calculated without past commissions
- The actual commission earned on the day is paid at the usual unit rate
- The day in lieu is paid at the historical relevant daily pay (this would also apply to those who don't work on the day but the day of the week is a normal working day for them).

Thus we have,

RDP(i) Including Commission	= \$164/day
	= \$20.50/hour
RDP(ii) Excluding Commission	= \$104/day
	= \$13.00/hour

The Employee Works the Public Holiday (8 hours)

RDP(ii) x 1.5 x 8 hours	= \$13 x 1.5 x 8
	= \$156
Plus Commission Earned on the Day	= \$60
Total	= \$216
<b>Effective hourly rate</b>	<b>= \$27/hr</b>
+ Day in lieu valued at RDP(i)	= \$20.50 x 8 hours
	= \$164
<b>Total value of the day</b>	<b>= \$380 = \$47.50/hour</b>

Therefore:

- 1) The person **who doesn't work** simply gets paid 8 hours by the full RDP (RDP (i)) or \$20.50/hr. This equates to \$164.

- 2) The person **who works** the day gets 1.5 times the base rate, plus the commission on the day, plus the day in lieu. This amounts to an equivalent of \$380 or \$47.50/hr.

This stops the current situation of "double dipping".

**Note:** While not relevant to this example, it is worth noting that because of the level of retail activity on most public holidays, the earnings per day (via higher commission payments) is greatly enhanced. This impacts significantly on the effective hourly rate.

We ask that the Advisory Group rigorously test any alternative solution, and in that regard, we offer our assistance in assessing the suitability for its application in the retail environment.

### **Trading The Fourth Week Of Annual Leave For Cash At The Employee's Request**

3. ***What are your views on an employee and employer agreeing to trade the employee's fourth week of annual leave (or some other part of the employee's minimum annual leave entitlement) for cash?***

We often get retailers saying employees have asked to have their leave paid out to assist them financially. Under the current Act, if they do so, to help the employee, the employer is still liable for the paid time off.

Accordingly, we support inclusion within the Act for the provision for an employee and employer to agree to trade the employee's fourth week, however we stipulate that such a request must only be initiated by the employee, and **may** be agreed to by the employer - Employers must be able to decline (or defer) for cash flow or other genuine business reasons.

Additionally, we also see no reason why part-timers, working an average of, say, less than 25 hours a week can't request to take pay instead of leave for a larger portion than one 'week'. Alternatively, part-timers may choose to have their annual holiday entitlement paid as part of weekly/fortnightly wages. Refer Section 11, pertaining to Casual employees. In these circumstances an employee will retain the right to take 4 weeks annual holidays; however those holidays will now be unpaid.

4. ***Are there any specific issues, for example, criteria or costs and benefits that the Group should take into consideration?***

The timing of a request to cash up leave made by an employee might not be at a suitable time for an employer. If we assume that most requests to cash up a week will be made by employees for financial reasons and therefore likely to be made at short notice, there may be considerable financial implications for the employer, and they may not agree to the request at that time.

For example, in retail there are busy periods (eg. December), and quiet periods (eg. October), of trading. If a retailer has a staff member taking leave in October - a quiet period - other employees will cope with the absence. Businesses are often structured accordingly. However, if the employee takes leave during December - a busy period - a replacement employee would be required, so that one week of leave has cost the retailer twice (the cost of the employee on leave, and the cost of the replacement).

#### **Costs to employer**

##### **Employee takes leave:**

October	1 week leave cost only (no replacement needed)
December	1 week leave + 1 week for temp = 2 weeks leave cost

##### **Employee cashes up leave:**

Anytime	1 week paid leave + 1 week at work = 2 weeks leave cost
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When annual leave is taken, a retailer is better able to manage their costs and impacts across the business and other employees by ensuring that most leave is taken during the quiet period. This can be stipulated in IEA's. However, if an employee wishes to cash up one week's value of leave, then the employer is effectively disadvantaged - by having to pay what they would if actual leave was taken during a busy period by paying the employee for the week that they are at work plus the week's leave value in cash, regardless of when that leave is taken.

**5. *If you think an employer and an employee should be able to agree to trade the fourth week's leave for cash, what protections do you see would be necessary to ensure entitlements are not reduced and employees' choice to trade the fourth week is genuine?***

As previously mentioned, we believe that a request for the cashing up of a fourth week's annual leave must only be initiated by the employee, and may be agreed to by the employer. Employers must be able to decline (or defer) for cash flow or other genuine business reasons. Therefore, the request from the employee to an employer to cash up a fourth week of annual leave **must** be agreed to by both parties.

In terms of process, it should be required that a written and signed request is made by the employee. It should also contain the facility for a Labour Inspector to consider complaints where an employee considers entitlement was reduced or choice was not genuine.

We also wish to note that we believe it is sensible to retain a base of 3 weeks for time taken for full timers.

**Allowing All Employers And Employees To Agree To Transfer The Observance Of A Public Holiday Listed In The Act To Another Day**

**6. *What are your views on employees being able to transfer public holidays to another day, for example, observing the final day of Ramadan instead of Good Friday?***

Prior to the November 2007 Supreme Court decision and the September 2008 Amendment (dealing with transfer where shifts span midnight between two public holidays) it was considered that while the Act provided the default public holidays, it also provided for an employer and employee to agree to observe a holiday on a different day. Such agreement might have been made for operational needs of the employer, the cultural or religious beliefs of the employee, or for just plain sense. For example, where the agreed transfer of a day allows an employee a long weekend off rather than two days off with a worked day in the middle, as for:

- a) Good Friday, public holiday & non-trading day; Saturday normal working day; Easter Sunday, non-trading day, *not* a public holiday; Monday public holiday, working day. An agreement to observe Easter Monday on Saturday would give the employee three days off in a row, rather than working every second day.
- b) Christmas Day Saturday public holiday & non trading; Sunday, usual RDO so Boxing Day transfers to Tuesday under Act; Monday usual working day; Tuesday Boxing Day. An agreement to observe Boxing Day on Monday would give the employee three days off in a row rather than two off, one on, one on.

Otago Anniversary Day in 2008, which fell on Easter Sunday, also highlighted the problems of no longer being able to agree a different observance day.

Currently, other than the transferral of Christmas/New Year holidays for weekend occurrence, observance can be transferred only when a shift crosses midnight, spanning two calendar days and where one of those days is a public holiday.

The ability to agree to observe a public holiday on a different day should be reinstated. To return to this position, where an employer and employee may agree to observe a holiday on a different day, removes the need for any legislating around swapping, for example, specific days of religious or cultural significance.

**7. *If you have done this previously have there been any issues with transferring?***

No. However, the agreement must be genuine, clearly understood and documented.

**8. *What protections do you see would be necessary to ensure entitlements are not reduced and employees' choice to transfer the public holiday is genuine?***

We request the following protections:

- No reduction in the number of nominated Public Holidays.
- If allowed under changes, permanent 'swap' eg for cultural or religious reason (say, Ramadan for Easter Monday) should be agreed *before* employment commences and be documented in employment agreement.
- One off requests –genuine agreement at least two weeks prior to earliest relevant date, implications fully understood, full documentation.
- Facility for Labour Inspector to consider complaints. Mediation facilities if necessary.

### **The Accumulation Of Alternative Holidays (Days In Lieu)**

#### **9. *What are your views on employees accumulating a number of days in lieu (alternative holidays)?***

Any days not used (or paid out on an employee's request after one year) will accumulate. Our view is that it is preferable that not too many days are able to accumulate. These days are paid at RDP, so their value will increase if kept for a long time

A short day worked on a public holiday leaves an employee (whose IEA allows for temporary change of roster) with short pay for the week. If they would normally work 8 hours but work 4, they will get less pay.

An option to cash up the alternative day would be fairer.

### **The Treatment And Entitlements Of Casual Employees In Relation To Holidays And Leave**

#### **10. *Discuss your understanding of what casual employees are entitled to under the Act.***

Genuine casual entitlements – no regular hours, no expectation of ongoing work: only situation where 8% holiday pay can be paid with each pay.  
Must be shown separately on payslip.

#### **11. *Discuss any complexities associated with calculating holiday and leave entitlements and payments for casual employees.***

Complexities mostly relate to part timers wrongly defined as 'casuals', rather than with genuine casuals. There are many problems with employers labelling part timers with flexible hours as 'casuals'. They pay holiday pay with wages whereas leave should be accrued.

This practise should be recognised and allowed by agreement between the parties, with the final decision resting with the employer,

A definition of 'casual' employee is required, along with the ability of the employee (not full timers) to choose to be 'casual' (in their employment agreement) and to receive holiday pay with wages. Wages would then include a loading of 8%.

Our recommendation is that this option could be offered to any employee who works less than 25hrs per week, and further, that anyone taking up this option is given the opportunity at each anniversary to revert to accruing paid time, rather than accepting payment.

Crossover with KiwiSaver – casuals: The IRD have advertised a “new definition of casual employees for KiwiSaver purposes”. NZ employee categories are not defined in legislation.

When asked where this appears in the KiwiSaver Act, IRD refer to the updated IRD KiwiSaver employer guide (KS4), which defines temporary employees (less than 28 days) and states that “casual employees engaged on an irregular and intermittent basis and who receive holiday pay with their wages will not be subject to automatic enrolment”. Unable to find a definition in the Act.

This will further encourage payment of holiday pay with wages where leave should be accrued, and consequently encourage a breach of Holidays Act and avoidance of KiwiSaver obligations.

**12. Do you have any examples of casual employees being advantaged or disadvantaged by the application of the Act?**

No, but flexible part timers who frequently feel disadvantaged are, for example, university students who do not want paid holidays. They are working in their holidays and want payment, not paid time. Payment by choice would help their living/study funds.

**Treatment Of Public Holidays**

**13. What are your views on the significance of the 11 public holidays listed in the Act? (These are: Christmas Day; Boxing Day; New Year's Day; 2 January; Waitangi Day; Good Friday; Easter Monday; ANZAC Day; Queen's Birthday; Labour Day; and Provincial Anniversary Day.)**

These 11 days are significant in that they are long established. We would not like to see an increase on this.

However, considering the cultural make-up of our country, Religious based holidays may have no significance to many people – who may wish to swap for another day that is significant to them.

In regards to Easter Monday, it was unfortunate for retailers that this holiday was ever established - effectively being Easter Sunday Mondayised - highlighting lack of foresight by "Monday to Friday" legislators.

With the transition to seven day trading, Easter Sunday, arguably the most significant day of this religious weekend, is not marked by a public holiday. Monday workers get a public holiday, Sunday workers don't. Additionally, the whole Easter Sunday trading issue further confounds things for retailers and their employees.

### **Shop trading on Easter Sunday and its interface with the Holidays Act 2003.**

#### **14. Do you consider that Easter Sunday should be recognised as a public holiday?**

Not if it means a 12<sup>th</sup> holiday. However, if it operates as a transfer day depending on whether you normally work on the Sunday, yes. (Reasoning as in 13).

*Note re 2011 ANZAC & Easter Monday:* Looking ahead to 2011 and the schedule of NZ public holiday dates published by the Department of Labour, we see an alarming clash for Easter. Easter Monday 2011 will fall on Monday April 25, which is also ANZAC Day.

The Holidays Act deals with this in Section 44(4) by saying that where two or more public holidays fall on the same day they must be treated as one day. The implications for retail, given the current shop trading restrictions, are harder to swallow.

With Good Friday and Easter Sunday being non-trading days, Easter Monday is traditionally *the* big trading day of Easter. In 2011 however, Easter Monday will also be ANZAC Day and therefore carry a trading restriction until 1pm. Retailers will lose half a day of trading at the worst possible time.

In a snapshot of Easter that year, under current legislation there will be no trading on Friday, Sunday and until 1pm on Monday. Retailers will suffer, the public will feel the lack of choice and the tourists will go elsewhere.

We couldn't let the opportunity to comment on Easter Sunday go by without stating our desire to see the removal of all trading restrictions for Easter Sunday.

#### **15. If so should it be "Mondayised" in the same way as, for example, Christmas Day is under the Act and replace Easter Monday as a public holiday?**

Please refer to point 14.

### **Other Matters**

While outside of the Terms of Reference for the review, we wish to make the following comment in regards to sick leave.

The minimum 5-day entitlement for all employees means that a person employed for one day per week has the same entitlement as a full time employee. In the extreme example, an employee may have 5 jobs all at one day a week. Each job will entitle them to 5 days sick leave. How long before they actually have to work?

Sick leave should be pro-rata, that is, the entitlement should be 'a week' not 5 days, a week being whatever that employee's week is. This would be in line with the annual leave entitlement. **Full time employees are distinctly disadvantaged when it comes to sick leave.**

### **Conclusion**

We are encouraged by the Review of the Holidays Act 2003 and our submissions highlight the issues of concern for our sector. We appreciate the Ministerial Advisory Group's serious considerations of the comments and/or recommendations contained in this submission, especially given the sizeable significance of the employer and employee numbers represented in the sector. Accordingly, we would like to extend an invitation to the Advisory Group to discuss our submission further.

New Zealand Retailers Association  
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