



**Submission to the
Review of the Holidays Act 2003**

21 August 2009

Introduction

1. This submission is from the Tourism Industry Association New Zealand (TIA), located in Wellington. If you wish to contact us regarding this submission, in the first instance, please telephone Simon Wallace, TIA Policy Manager on 04 494 1842 or 0272 489 375 or e-mail him at simon.wallace@tianza.org.nz
2. Over the past few weeks, TIA has sought comment from its members on the Review of the Holidays Act 2003. To inform its submission, the Association sent out a tailored survey to its membership and received nearly 50 responses (this is included as a factual summary in the paper under *TIA Member Survey*).
3. The views in this submission include feedback received not only from the members that responded to the survey, but also direct feedback received from other sectors in the tourism industry, including the Holiday Accommodation Parks New Zealand (HAPNZ), the Inbound Tour Operators Council (ITOC), The New Zealand Hotel Council (NZHC) and the Youth Hostels Association of NZ (YHA). While the views of these associations are represented in this paper, some of these organisations may have made their own submissions, in which case, the Department of Labour (DOL) should be aware of the specific issues these associations' may have raised.
4. As well as including the comments gained from its membership through the *TIA Member Survey* and from consultation with tourism industry sector associations (as named in paragraph 3.) TIA includes overall comment on its position as the peak industry body.
5. With respect to the Ministerial Advisory Group's terms of reference, TIA supports outcomes in the Holidays Act that will:
 - make it easier for businesses and employees to understand and apply;
 - reduce direct and compliance costs; and
 - make it more flexible in application and readily applicable to a range of employment arrangements.
6. This paper begins with background about the tourism industry and TIA, general overview comments and a factual summary of the responses received from our survey to members. It then comments on three of the more contentious areas of the Act, the calculation of relevant daily pay, the trading of the fourth week's holiday and transferring public holidays to another day. The paper concludes with a set of recommendations.

Background on the Tourism Industry

A bedrock of New Zealand's economy

7. Tourism is a major contributor to the New Zealand economy that will always be here - and won't easily go offshore. Tourism takes the lead in promoting New Zealand to the world. Because of our 100% pure positioning, New Zealand is recognised as one of the most beautiful, unspoiled and scenic places on earth. The 100% pure market positioning signifies pride in our country, pride in our people and culture, and pride in the unique environment and experiences that New Zealand offers.
8. The brand positioning built by a vibrant tourism industry has become an important source of national confidence and identity and a front window for "Brand New Zealand". Indeed, the clean, green, pure offer that is synonymous with New Zealand tourism has been widely adopted and used to promote New Zealand exports in a range of other industries as well.
9. If New Zealand Inc. is to continue to prosper, to attract investment and to raise its position in OECD rankings, then it is vital that the tourism industry, and the positive image it projects, remain strong.

Delivering Value

10. Below is a snapshot of the economic value provided by tourism to the New Zealand economy:
 - Tourism contributes close to 10% of gross domestic product (GDP) as well as directly and indirectly employing nearly one in ten New Zealanders.
 - Tourism in New Zealand is a \$50 million per day industry. The New Zealand tourism industry delivers \$24 million in foreign exchange to the New Zealand economy each day of the year. Domestic tourism contributes another \$26 million in economic activity every day.
 - Tourism expenditure reached \$20.1 billion for the year ended March 2007. This represents 18.3% of New Zealand's foreign exchange earnings.
 - Importantly, and despite more challenging times in the past 12 months, tourism remains one of New Zealand's largest foreign exchange earners and its contribution is felt at national, regional and local levels.

About Us

11. TIA has been the lead association that represents the interests of about 1700 tourism businesses in NZ. Established in 1955, the businesses TIA represent cover a range of tourism-related activities – hospitality, transport, accommodation, adventure and activities, attractions and retail as well as related tourism services.

12. The primary role of TIA is to be the voice of the tourism industry. This includes working for members on advocacy and policy matters, communication, events, membership and business services. The TIA team is based in Wellington and led by Chief Executive, Tim Cossar.

Overview and General Position on the Holidays Act

13. The Holidays Act affects every single tourism business and in 24/7 industries like tourism and hospitality where many casual and seasonal workers are employed, the rules and regulations governing holidays are critical. The 2009 review is particularly timely given there has been recent criticism from individuals and businesses of all sizes at just how complex and time-consuming the Holidays Act is for all parties to understand and work with.
14. It is critical that Holidays Act legislation is clear in its interpretation, but at the same time flexible enough to take account of the vast number of individual employment agreements that exist because of the seasonal and part time nature of jobs in the sector. As evidenced by replies to the *TIA Member Survey*, the calculation of relevant daily pay is just one of the areas (see paragraphs 26 to 30) in the Holidays Act that is certainly open to interpretation. In past years, TIA has submitted to various Holidays Act amendments, including the Holidays Amendment Bill in 2004 and the Holidays (4 weeks annual leave) Bill in 2003. These Bills have been well intentioned, but the resultant changes have made compliance issues more cumbersome for businesses in the tourism industry.
15. While the industry is seeking more clarity from this review, the diverse nature of the tourism industry means a “one size fits all” approach is not always going to be the right one for the sector. What works for a large tourism entity, such as Sky City, Air New Zealand, Ngai Tahu Tourism, or one of the major hotel chains, all of whom have computer based payroll systems, won’t necessarily work for the many small to medium sized enterprises (SMEs) that characterise the tourism industry.
16. It is hoped this review will recognise the significant and sometimes adverse outcomes the Holidays Act has for businesses that need to run seven day a week operations. The holiday period, for example, has always been one that has traditionally provided extra income to make up for seasonality and peaks and troughs in the earning ability of operators. Now, however, a range of businesses are finding the decision to open during holiday periods a marginal exercise. Some are closing and that doesn’t reflect well on the image of the New Zealand tourism sector with either local or international visitors.
17. While the main objectives of this review are to make the Holidays Act easier to understand as well as reducing compliance costs, it is the Association’s view that many of the areas where compliance or other costs actually occur are not contained within the scope of this Review. Extra payments for working on public holidays or holidays in lieu should be matters for negotiation between the parties to an employment contract and not arbitrary according to the Holidays Act legislation.

TIA Member Survey

18. As noted, TIA canvassed its members to seek their views for this submission receiving nearly 50 replies. Including the three main questions posed by the Advisory Group (the calculation of relevant daily pay, employees trading the fourth week's annual leave for cash and allowing employers and employees to transfer public holidays), we asked our members a number of other questions of particular relevance to the tourism sector. In total, we posed the following six questions, all of which we think will be useful in the context of this Review:

- a. How could the Holidays Act be simplified to make it easier to administer?
- b. Do you have trouble calculating the holiday and leave entitlements for casual and seasonal staff? Yes or No
- c. What are your thoughts on the calculation of relevant daily pay? Is there an alternative calculation that would be easier to make?
- d. If an employer agrees, do you think an employee should be able to trade in their fourth week of annual leave/holidays for cash? Yes or No
- e. Do you think employees should be able to transfer public holidays such as Christmas or Easter to another day?
- f. Do you think Waitangi Day and ANZAC Day should be "Mondayised" if they fall on a Saturday or Sunday?

a. How could the Holidays Act be simplified to make it easier to administer?

19. The nature of replies to this question indicates the difficulty some tourism businesses are having in calculating holiday pay entitlements. Responses ranged from those who were quite happy with the Act to those who believed the Holidays Act should be completely abolished. A selection of comments from tourism businesses is given below.

"Running a 7 day business and trying to treat everyone equally with respect to statutory holidays is very difficult".

"The Act needs to take into account that motel cleaners and other tourism employees are employed on an "as required basis". It is not practical to have a fixed roster....Because staff do not have rostered days off, public holidays would otherwise have been a day of work and all public holidays worked have to be paid as a stat day".

"As a flying business, public holidays should be able to be transferred and taken on bad weather (no flying days)".

“By having a day in lieu or time and a half, but not both”.

“Every stat holiday has a standard day’s pay plus a % bottom line on the hourly rate and only paid to those who actually worked and for the hours of work all the other employees would get a full day’s pay in addition to having the day off”.

“Making it possible to accumulate holidays worked and to claim them as annual leave together”.

“No penalty rates unless wage earner has been in proprietor’s employment for at least 12 months”.

“Get rid of time and a half plus the day in lieu for casual cleaners. We actually do not allow one night’s stay in accommodation if checking in or out on a public holiday and this hurts the prospective guest as well as our bottom line and the wage packets of our staff. Employers and staff should be able to negotiate without government interference”.

“By recognising 7 days a week business in examples of calculations”.

b. Do you have trouble calculating the holiday and leave entitlements for casual and seasonal staff? Yes or No

20. Of the 36 who answered this question, 20 said yes and 16 said no. The nature of replies to this question indicates that some operators still have trouble calculating holiday and leave entitlements for casual and seasonal staff. It is mostly smaller and medium sized enterprises or operators without computer based payroll systems that have the most difficulty making these calculations. A selection of the comments tourism operators made in response to this question were:

“Yes. I end up using 8% of gross pay which is the easiest system I have found to administer and for my staff to understand”.

“Yes. Our staff are neither casual nor seasonal but are employed as and when required – it is very difficult to work out their entitlements under the current legislation”

“No, add an 8% to gross earnings”.

“Yes, just guess work for me really”.

“Yes, it is all very complicated. I have a payroll system but even then it is hard to understand”.

“No, just calculated as a percentage of previous earnings”.

“Yes, with constant interruptions that you get in a hospitality business it is almost in the too hard basket”.

“Yes, it is grossly unfair to have staff on with 1.5 times and others on 2.5 times. Make it all 2 times”.

c. What are your thoughts on the calculation of relevant daily pay? Is there an alternative calculation that would be easier to make?

21. This question drew a blank with many respondents and this is perhaps indicative of the confusion or lack of understanding that some tourism businesses have in regard to relevant daily pay (RDP). Other operators, more familiar with RDP, said they had little or no problems in making the calculation. A selection of comments from tourism businesses is given below.

“Add pay over the last four weeks and divide it by the number of days worked and that is the daily pay rate”.

“I think it should be based on the previous 4 weeks not on the higher of either the previous 4 weeks or previous year. This penalises us for the seasonal nature of our business”.

“The relevant daily pay is fine for a regular worker in the office that works regular hours. But for your workers (especially cleaners) with irregular hours it’s difficult. Why should I pay based on the last 4 weeks, if on the day there might be no work at all and they have taken the day off and perhaps have to pay them 4 hours. For workers with irregular work hours on a daily basis there should be no pay”.

“It is a little open to interpretation. We have staff who think they will always be paid more in holiday pay than normal pay. This is not always the case”.

“Standard hourly rate for hours worked without regard to any other factors”.

“This is a problem for the small business who is not utilising computerised payroll systems”.

“Average pay. Over the last month”.

d. If an employer agrees, do you think an employee should be able to trade in their fourth week of annual leave/holidays for cash?

22. Of the 39 who answered this question, 32 said yes and 7 said no. This shows that a clear majority of those in the survey believe employees should have the option of trading their fourth week annual’s leave. A selection of replies from tourism operators is given below:

“Yes. We come under pressure to do this. It would be nice to be able to say yes”.

“Yes. If it’s a mutual agreement, fine”.

“No. If this legislation is adopted it means that the employer will in fact be paying the employee twice for one week a year. Not only will the employee be paid out for a week, but they will then be paid for the work undertaken”.

“Yes, I find the workers with irregular work hours often would prefer to have it paid out as they do not work a 40 hour week anyway”.

“No, this may create friction between an employee who may want to and the employer who has no issue with the holiday period entitled to”.

“Yes, it's their days, not the government's to say what to do with”

“Yes. But not cash – the government could double the value in the employee's Kiwisaver. This is motivation for them to join. A week's cash will be frittered. Turn into savings – what a great opportunity”.

“Definitely no. Out of the tourism industry, many employees are forced to take most of their holiday during the Christmas/New Year closedown. Until the fourth week was added they had little holiday left to take later in the year. It has to be better for employees well-being and productivity to take holidays mid-year or thereabouts. It's in our national interest to encourage better productivity, not a cash grab approach to life”.

e. Do you think employees should be able to transfer public holidays such as Christmas or Easter to another day?

23. Of the 40 who answered this question, 21 said yes and 19 said no. This indicates that opinion is evenly divided with some employers recognising that there could be an advantage in being able to transfer public holidays to those who think it is just too cumbersome to administer. A selection of replies from tourism operators is given below:

“Yes. Not everyone finds Christian holidays to be important, they may prefer days that are important to them”.

“If our staff work on New Year's Eve past midnight which everyone does usually, they click onto holiday pay, but they were still finishing a shift which began on a non-holiday. Further with Wellington Anniversary Day also in January, we end up with 3 holidays in January and 50% of public holidays within 30 days of each other...It certainly would benefit small businesses to have these holidays traded to mid-winter when we are typically cutting staff hours due to less work being available”.

“No, too hard for us when we are quoting on jobs up to 3 years in advance”.

“Yes, as long as the day in lieu is taken when suitable to both sides”.

“No, I believe if they work they should get double time but no day in lieu”.

“Yes, I think that would be fine as those dates are typically when accommodation establishments are the most busy”.

“No, very difficult to work rosters”.

“No, puts an additional burden on employers to manage this both in terms of admin, costs, replacement of labour if required”.

f. Do you think Waitangi Day and Anzac Day should be “Mondayised” if they fall on a Saturday or Sunday?

24. Of the 40 who answered this question, 14 said yes and 26 said no. The clear majority of respondents to the survey said that neither Anzac Day nor Waitangi Day should be “Mondayised” because of cost to businesses. There were, however, some who said “Mondayising” Waitangi and Anzac Days could be a boost to the tourism industry by encouraging more New Zealanders to holiday over long weekends.

“Yes, it is an important holiday in my view”.

“Yes, extending the number of long weekends is a great shot in the arm for our industry”.

“No, we work 7 days a week anyway”.

“No, it commemorates a date in history – leave it on the anniversary”.

“Yes. As an accommodation business, long weekends are good for revenue. As an employer, whatever day it falls on has costs, so at least we might get some benefit”.

“Yes. It would give a long weekend”.

“No. Why? Where is the benefit to the greater community? This day must be recognised – look at the dilution of the anniversary days. Make it special”.

25. In sum, while this survey is only a small sample of opinion from an industry as large as tourism, the verbatim comments will give the Department an understanding of grass-roots opinion from a range of small, medium and large tourism operators.

Comment

Calculation of Relevant Daily Pay (RDP)

26. As evidence from the *TIA Member Survey* shows, the calculation of relevant daily pay (RDP) causes difficulty across the industry. While the calculation of RDP is generally easier for larger companies with computer payroll systems, TIA believes the RDP policy inflates wage costs for all businesses by incorporating overtime,

bonuses and other allowances to form the basis of calculating holiday and sick pay.

27. The current method of calculation of RDP for non-working days leads employers to a situation where they can end up paying employees more for non-working days than working days. This creates an incentive for employees to take a sick day off on public holidays as those days pay more.
28. While the terms of reference for this review have ruled out any return to ordinary pay as the basis for calculating holiday and sick pay, TIA supports the alternative options adopted by Business New Zealand (BNZ) in its submission. BNZ has suggested that two less complicated possibilities could be either:
 - An agreed contractual rate; or
 - Payment for normal work hours on the day including regularly worked overtime, but excluding payments made for “performing the work” as distinct from payment for “time at work”.

If either of these two options were preferred, they would offer a degree of certainty as to what was and was not to be included in holiday and sick pay calculations.

29. TIA also supports the position adopted by the Hospitality Association of New Zealand (HANZ) towards RDP. It has suggested that additional components such as the cash value of any board and lodgings provided to an employee be separately agreed between the employer and employee, but excluded from RDP calculations.
30. Whatever system is adopted, TIA believes the current system is overly complex, especially for the many small to medium sized enterprises in the tourism industry. It would be more transparent if RDP was set at a level that was fair, predictable and easy to administer and did not include overtime, bonuses or other allowances in the calculation.

Trading the Fourth Week of Annual Leave for Cash at the Employee's Request

31. Our survey showed a majority of employers favouring the option of employees trading the fourth week of annual leave for cash. A small number of survey respondents said they would not want to exchange the fourth week's holiday for cash for reasons ranging from work-life balance to the need to encourage more holidays as a tourism business.
32. TIA supports the trading of a fourth week's holiday on the proviso that it is a flexible negotiation between employer and employee to suit a particular circumstance. TIA would not support an employer who forced this situation on to a worker and for that reason there should be protection in the Act to prevent this from happening.
33. As mentioned, many workers in the tourism industry are employed on a part time or casual basis and for this reason many have no desire for four week's holiday and

would much prefer trading in the extra week for cash. While it certainly is better for employees to take a break from their place of work, there can also be cases of genuine hardship where cash is preferred over a holiday.

34. TIA believes there is some merit in the position taken by the New Zealand Hotel Council (NZHC) in its submission where it advocates for a fixed holiday year as is the case in the United Kingdom. Under this policy, holidays accrued in a company's financial year must be taken within a fixed period of time, usually 12 months. In New Zealand employees can accrue holiday leave over a number of years and this can create a financial liability for employers who fail to properly manage their employees' leave.
35. As pointed out by some operators who responded to our survey, there are some issues that can arise for employers by trading the extra week's leave for an employee. The most obvious example was an increase in costs to the employer as the employee will receive the cash for the extra week's traded leave and will also receive a week's payment for working, in effect receiving 53 weeks of pay in a calendar year. This in turn leads to extra cost increases for a business, such as KiwiSaver contributions, ACC levies, superannuation, as well as annual leave being accrued at a higher rate.

Transferring the observance of a public holiday listed in the Act to another day

36. While opinion in the *TIA Member Survey* was evenly divided on this question, the Association believes that transferring public holidays as currently listed in the Act could be cumbersome. It also runs counter to the objective of this Review in that it creates extra compliance issues for businesses.
37. The tourism industry acknowledges the increasing diversity and multi-cultural nature of the New Zealand populace which is evident amongst employees in the tourism industry. However, with a minimum of four weeks annual leave provided to all employees, there are ample opportunities for people to take this leave if they wish to observe their own days of national, religious or cultural significance. The hotel industry, for example, employs a large number of multi-cultural staff and transferring publicly listed holidays to other days, when staff are required to work shifts, would be administratively complex.

Working Group

38. Given the diverse range of opinions that exist across the wider tourism and hospitality sectors, as well as the importance of the Holidays Act to the industries, TIA believes there would be merit in convening a working group of sector representatives to meet with the Department of Labour to discuss issues and address possible solutions in this Review. For example, this group could examine a range of alternatives for calculating relevant daily pay given the wide range of industry views on this area of the Act. This group could be brought together at relatively short notice and could meet with officials in Wellington.

Recommendations

39. TIA makes the following recommendations with respect to the Review of the Holidays Act 2003:

- a. Examine options to simplify the calculation of relevant daily pay as it affects tourism businesses;
- b. Support the trading of a fourth week's holiday for cash provided it is a flexible negotiation and the employee's rights are protected by legislation;
- c. Retain the public holidays as they are currently listed in the Holidays Act; and
- d. The Department of Labour convene a working group of tourism and hospitality representatives to discuss issues and address possible issues arising from this Review.

Simon Wallace
Policy Manager
Tourism Industry Association New Zealand
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