

**Submission on the Holidays Bill**

**By the Meat Industry Association of New Zealand  
(Inc.)**

**For The Transport and Industrial Relations Select  
Committee**

**30 May 2003**

## **1. Meat Industry Association of New Zealand (Inc.) (“MIA”)**

MIA is made up of the following members:

- Meat (sheep, cattle, deer, pig and goat) processors
- Registered meat exporters under the Animal Products Act 1999
- Affiliated members involved in packaging, cold storage, land (including rail), sea and air transport.

MIA represents meat processors and exporters who export virtually all New Zealand’s sheepmeat exports and 98% beef exports. Total export receipts from members’ exports (excluding by-products) exceeded \$4.35 billion in 2001. Currently 58 export plants and 30 packing houses are situated throughout New Zealand from Moerewa to Invercargill. Processing plants range from single shift, one chain (60 employees) to multi-chain, multi-shift (over 2,000 employees). The total number of industry employees at peak season is in excess of 20,000. Most process workers are seasonal employees although there is a marked difference in season duration between the North and South Islands. The Holidays Act currently presents many difficulties for MIA members in terms of entitlement interpretation and calculation.

## **2. Consultation Process**

In preparing this submission all members and affiliate members were consulted and asked for input. MIA members may make individual submissions reflecting concerns relating to their specific operations.

## **3. Submission**

MIA supports the stated intention of the Explanatory Note to the Holidays Bill which is to make the minimum entitlements easy to understand and apply but MIA strongly opposes the *increase* in minimum entitlements. MIA supports bringing the relevant parts of the ANZAC and Waitangi Day legislation within the scope of the Holidays Act.

MIA was part of the Advisory Group established to review the Holidays Act 1981. The Advisory Group was not tasked with reaching consensus on an increase in minimum entitlements but to discuss future policy options for improving the confusion the Act created. The review was to take into account the Act’s application to diverse working patterns and balancing the needs of employers and employees with a view to increasing productivity.

The government has several times made a commitment to controlling compliance costs but this Bill adds to such costs. What started as a clarification exercise has, in some instances, turned into an opportunity for the Government to increase minimum entitlements. MIA recognises that a few clauses have improved in favour of the employer but on the whole there has been a marked shift to increasing minimum entitlements.

## **Clause by Clause Comment**

### **3.1 Clauses 7-11 Ordinary Pay**

MIA opposes these clauses insofar as they relate to sole or primary piece rate systems.

One particularly confusing aspect of the Holidays Act 1981 is the use of different terms to mean the same thing; ordinary pay. Under the Act it arises in several provisions:

- “ordinary pay” – s4
- “on pay” – s7A
- “wages for an ordinary working day” – s25
- “pay at the ordinary time rate of pay for the normal number of hours” – s30A

The Court of Appeal in Ports of Auckland Ltd v New Zealand Waterfront Workers Union (Inc.) [1996] 2 ERNZ 25 held the terms to be interchangeable and that incentive rates dependent on actual results need not be notionally calculated. Therefore it is imperative that the new Bill clarified that finding. However the Bill has not done so in terms of situations where there is no applicable time rate of pay.

Remuneration systems based 100% on production are commonly used in the meat industry, these payments being known as piece rates or incentive rates. Necessarily, for such a system there is no applicable time rate of pay. The systems are continued from the award system in place from 1936-1990 and have proved a particularly useful means of increasing productivity because employees’ wages are a direct function of effort. They are also commonly used in the horticulture, shearing, textiles, and fishing industries. In the meat industry if a 100% incentive rate system is not used a hybrid system is also commonplace where an hourly rate is supplemented with incentive rates. Unlike the 100% (or near 100% systems) these systems appear to be unaffected by the Bill.

The system is desired as much by employees as employers. The meat industry being a seasonal industry, one unavoidable result of having such a system in place is that there is no ordinary working day as such and it should therefore be up to the parties to decide this in advance.

The Bill appears to prohibit allowing sole or primary pieceworkers and employers from agreeing an ordinary rate below the prescribed calculation. This is the combined effect of Clauses 7 and 9 (hourly rate employees are unaffected). Strictly speaking, it is not possible to determine that type of employee’s ordinary pay under subclause (1) and it appears subclause 4 is designed for situations where there is no applicable time rate of pay, ie piece rates. The calculation  $a-b/c$  blurs the distinction between average earnings historically payable for annual holidays and ordinary pay which is historically payable for statutory holidays. Unlike under the current Act there is no provision to allow the parties to agree ordinary pay or payment for an ordinary working day where there is no ordinary time rate of pay.

This aspect of the Bill is not what the Working Group recommended in its final report September 2001:

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

(a) *Policy Recommendation* (subject to employer exception see below):

- Codify Ports of Auckland based on the following principles:
  - an employee must be paid what he/she would receive for an ordinary working day;
  - the pay for an ordinary working day is a matter of construction of each particular employment agreement;
  - there is no scope for bargaining for a lesser special rate solely for the purposes of calculating statutory holiday pay;
  - anything which is clearly payable only in defined circumstances or at defined times is excluded, such as overtime, bonuses and allowances. Productivity and incentive based payments which are dependent on actual working results need not be notionally calculated and paid;
  - allowances that are payable as of course[sic] should be distinguished from those payable only in particular circumstances, even if they occur regularly and even if they would have been payable if the employee had worked that day.

(b) *Employer Exception*

- The third point (above) does not include situations where there is a negotiated ordinary rate of pay applicable to all non-working time when payment for work is based, for example, on piece rate, productivity incentive based payments, commission or bonus payments.

Nor is it what the Employment Relations Service advised the Minister in the Technical and Consequential Issues Paper 8 February 2002:

7. There is a need to clarify and simplify the definition of “ordinary pay”. In accordance with the Advisory Group’s view, it is recommended that “ordinary pay” be defined in accordance with the principles of the Court of appeal decision in *Ports of Auckland*, which ruled *inter alia* that:

- (a) There is no scope for bargaining, solely for the purposes of calculating holiday pay, a rate of pay lower than an ordinary day’s pay.
- (b) “Ordinary pay” includes extra payments where they are an integral part of the normal course of work (e.g., shift allowances) or where the entitlement arises from conditions that exist every working day (e.g., danger pay for working with a particular machine).
- (c) “Ordinary pay” does not include extra payments that depend on unpredictable or erratic circumstances (e.g., rain pay), **results** (e.g., bonuses), time outside ordinary working hours (e.g., overtime).

- (d) where payments based on (c) above have been included in a composite rate, these items should be excluded from the calculation of ordinary pay based on the wording of the employment agreement.
8. The employer representatives on the Advisory Group preferred an exception to 7(a) above, suggesting that lesser pay should be allowed in some circumstances where this is provided for in the employment agreement. Accepting this suggestion, however, would enable the Holidays Act to be replaced with inferior provisions in some circumstances. [emphasis added]

Following Ports of Auckland and more recently Greenlea Premier Meats Ltd v Horn (CA 98/02, 10 December 2002), the position under the current Act is clear. Employers and piece rate employees may agree in advance an ordinary hourly rate to apply for statutory holidays, a rate which is not connected or dependent on actual results.

Rather than codifying Ports of Auckland the Bill codifies the Greenlea Employment Court decision (Labour Inspector, Horn v Greenlea Premier Meats Ltd 11 April 2002, AC 25/02) which the Court of Appeal overturned. Further, anomalous situations would arise from the *a-b/c* rule. If there has been little or no production in the four weeks preceding a statutory holiday the payment *a-b/c* will be less than the ordinary rate. This was acknowledged by the Employment Court (para 36) to be an unavoidable effect of the decision.

Further, the new provision satisfies none of the objectives set out in the Explanatory note:

- easy to understand and apply;
- will support productive workplace relationships; and
- will be no need to go outside the Act for calculation.

There may also be a clash between clauses 7(4) and 11. A Labour Inspector may believe a rate should be imposed but, for sole or primary piece rate employees, s7(4) would appear to rule out such an imposition.

The retention of clause 7(4) will create more confusion and additional compliance time than if pieceworkers are able to agree a flat rate in advance. Each of the 11 statutory holidays will have separate calculations for each individual employee. This is nonsensical. For the meat industry this aspect of the Bill would incentivise employers to move away from piece rates to base hourly rates, something that would be non-beneficial for productivity generally and for employer and employee alike.

#### Recommendation:

MIA recommends a codification of Ports of Auckland as recommended by the Advisory Group. This would be achieved by either deleting the bracketed words in 9(2)(c) and/or by inserting the current s4(2) in place of clause 7(4).

#### 3.2 Clause 18– Two Weeks Leave

This provision contains a phrase “must allow” which is similar to its predecessor “shall allow”. The meaning is ambiguous because an employer may breach the Act if an employee is allowed to expend all available leave without taking a two week

continuous break. The clause would be clearer if it read “an employee is entitled to take at least two weeks of the entitlement in a continuous period.”

### 3.3 Clause 19– Fourteen Days Notice

MIA disagrees with an extension to the current seven days notice. Such a period for notice is rarely relied on as closures (and therefore the required taking of annual leave) are usually well anticipated. However due to sudden livestock shortages sometimes a shorter period of notice for closure is required.

### 3.4 Clause 29– Plant Closures

Sometimes plants close down more than once in a year, e.g., September and December, or in drought conditions where livestock numbers fluctuate dramatically. This provision would prevent an employer in the meat industry from requiring employees taking annual leave during any more than one closure and therefore puts that employer at a disadvantage.

### 3.5 Clause 39- Mondayisation

This is a significant area of confusion for the industry and the clarification is not before time. However the clarification comes at a price. The provision will have a double-up effect on cost in that most employees will become entitled to paid Christmas/New Year statutory holidays whether or not the day would have been an otherwise working day for those employees. Many MIA members run seven day a week operations which extend over the Christmas/New Year period and the provision will therefore have significant cost implications. For each statutory holiday on which holiday pay is duplicated the employer must pay two sets of holiday pay but, under current budgets and planning, actual production will only have generated enough revenue for one set of payments. This provision will therefore create a significant sunk cost to the industry. It is possible that a company would need to find up to 4/11 of its statutory holiday budget to comply with the provision. This outcome is at odds with the purpose of the clarification process.

### 3.6 Clause 46– Time and a Half for Working a Holiday

MIA strongly opposes this clause. As previously stated, much of the meat industry is a seven day a week operation and plants generally operate on statutory holidays. Further, most listed statutory holidays fall during the meat industry’s peak season, December-February each year. The effect of this clause (mandatory time and a half) may create distortions in employment relationships. Although meat industry employees are generally paid penal rates for working statutory holidays (stemming from the awards system) this is by agreement. Time and a half is sometimes less than that currently used and there may be gravitation towards it in future agreements. There will inevitably be problems dealing with implementing such a provision for employees not employed on an hourly rate.

MIA recommends deletion of the words “plus half that rate again” in clause 46(2)(a).

### 3.7 Clause 49 – Time and a Half for Day in Lieu

MIA also strongly opposes this clause which says the day in lieu for an employee who has worked on a holiday must be paid at time and a half. This compounds the additional compliance cost established by clause 46. Any greater amount than ordinary pay for a day in lieu should be by agreement between the parties.

### 3.8 Clause 56 – Sick Leave

MIA does not support this clause. The current 5 days per annum for special leave is sufficient for both sickness and bereavement, bearing in mind this is minimum entitlement legislation.

### 3.9 Clause 57 – Notification of Sick Leave

This clause is confusing because the words “as early as possible” has two different applications. Under 57(a) it means “as early as possible unless not practicable and under 57(b) it means as early as possible”. MIA submits that the current provision is clear, works well, and therefore should continue.

### 3.10 Clause 59 – Accumulation of Sick Leave

Although using the permissive “may” this provision effectively establishes mandatory accumulation of sick pay. The provision should be deleted. Accumulation of sick pay should be by agreement rather than by right because accumulation may suit some enterprises but not others. Mandatory accumulation may lead to greater absenteeism and abuse of the minimum entitlement. Mandatory accumulation may also lead to sick employees reporting for work when they should not be.

### 3.11 Clause 61 – Medical Certificate

The current situation should prevail (where it is left open for agreement between the parties). Five days, unless otherwise agreed, is too long a period in which to wait for confirmation by a doctor.

### 3.12 Clause 63 – Bereavement Leave

Three days per bereavement is too long. The current entitlement is sufficient. Further MIA questions also the extent to which an employer can be “culturally responsible”. It is far better to leave such matters to be negotiated between the parties.

### 3.13 Clause 72 – Determinations by Labour Inspector

There must be an appeal mechanism for rulings of the Inspector as it is a fundamental tenet of New Zealand law that no administrative power is unfettered.

## **MIA MEMBERS AS AT 1 APRIL 2003**

Affco New Zealand Ltd  
Alliance Group Ltd  
ANZCO Foods Ltd  
Auckland Meat Processors Ltd  
Ballande New Zealand Ltd  
Bernard Matthews NZ Ltd  
Blue Sky Meats (NZ) Ltd  
Brookland (NZ) Ltd  
CMP Canterbury Ltd  
Columbia Exports Ltd  
Crown Marketing Ltd  
Dairy Meats NZ Ltd  
Davmet New Zealand Ltd  
Fern Ridge Ltd  
Frasertown Meat Company Ltd  
Garrett International Meats Ltd  
Greenlea Premier Meats Ltd  
Harrier Exports Ltd  
Heartland Prime Meat (NZ) Ltd  
Horizon Meats New Zealand Ltd  
Primary Producers Co-operative Society Ltd  
Progressive Mats Ltd  
Richmond Ltd  
Riverlands Ltd  
Tara Exports Ltd  
Taylor Preston Ltd  
TeKuiti Meat Processors Ltd  
Towers Thompson (New Zealand) Ltd  
Universal Beef Packers Ltd  
Wallace Corporation Ltd

## **AFFILIATE MEMBERS**

AgResearch-MIRINZ Centre  
Australia-New Zealand Direct Line (ANZDL)  
Carter Holt Harvey, Packaging  
Centreport  
Columbus Line New Zealand Limited  
Contship Containerlines  
Glovers Food Processors Ltd  
Hapag Lloyd (NZ) Ltd  
Lowe Corporation Ltd  
Maersk New Zealand Ltd  
New Zealand Natural Casing Association Inc  
P&O NedLloyd Ltd  
Port of Napier  
Port Otago  
ProAnd Ltd  
Rissington Breedline Ltd  
Trans Rail Limited