

# Regulatory Impact Statement

## Amendment to the *Minimum Wage Order 2014*

### Agency Disclosure Statement

- 1 This Regulatory Impact Statement has been prepared by the Ministry of Business, Innovation and Employment.
- 2 It provides an analysis of options in response to a recent Employment Court ruling that the period against which compliance with the *Minimum Wage Act 1983* is to be determined for employees on a salary can be no more than one week.
- 3 The analysis is based on the limited data available on the extent of the problem and consultation with key stakeholders in the small number of sectors that we consider are likely to be affected by the ruling. While there is some data that can offer an approximate indication of how many low paid salaried employees there are who work varying hours from week to week, there is no available data on other groups that might be affected, for example employees who receive some form of performance related pay (commission payments, bonuses etc) as part of their remuneration, but whose basic salary is below the minimum wage.
- 4 The submissions received on the consultation gave us a reasonable picture of which sectors might be affected by the status quo and how employers might respond. However they did not give us as clear a picture as we would have liked on the possible impacts of amending the Order. It is possible that some employees may be disadvantaged by amending the Order (both financially and in terms of having to work longer hours for longer periods than under the status quo) but we do not have a clear picture of the extent of this. There is also no clear mitigation to these disadvantages for employees.
- 5 There is a risk that there are impacts that we have not identified. However, this probably applies as much to the status quo as to the other options analysed in this RIS. There is also a risk that amending the Order might impact on any possible appeal to the Employment Court's decision as an amendment could be read as acknowledging that the Court's interpretation is correct. This can be mitigated to some extent by communication around amending the Order that signals that the intent of the amendment is simply to address issues with the lack of flexibility for employers of a weekly assessment period.
- 6 Finally, we acknowledge that none of the options analysed in this RIS provides a durable solution to this issue as they do not address the issue for all employers.

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## Status quo and problem definition

- 7 This Regulatory Impact Statement (RIS) is concerned with the question of what an appropriate period of time is for assessing compliance with the *Minimum Wage Act 1983* (the Act) for employees on a salary. Assessing compliance with the Act in this instance involves determining how much an employee was paid for the hours worked during a set period, and then ensuring that this worked out to at least the minimum hourly wage on average over that period. But what is an appropriate period: a week, a fortnight, a month, a year or some other period?
- 8 An appropriate assessment period appears to provide benefits to both employers (who are able to respond to business demands through having some flexibility in the hours that their employees work) and to employees (who are able to be paid in a more regular fashion and, for instance, manage regular payments more easily). For example, salaried employees are most commonly paid fortnightly, though monthly and weekly pay periods are also not uncommon. It is likely to have been a reasonable assumption of many employers that a pay period is a reasonable assessment period for salaried employees.
- 9 A short assessment period does not give employers enough flexibility to determine the hours their salaried employees work. However, longer periods, though perhaps preferable to employers, can disadvantage employees as it means that an employer can expect them to work long hours for long periods as long as these periods are averaged out with periods of fewer hours within the same assessment period. This can increase health and safety risks (through fatigue and stress) and potentially harm the wellbeing of the employees. This issue is particularly acute when the employee's salary is close to the minimum wage as it effectively means they are working long periods for less than the minimum wage.
- 10 One example of a period that is too long is the 'seasonal averaging' in the dairy sector where the hours worked over busy periods (eg calving) were balanced out by less busy periods (eg during the dry season). It is now accepted that averaging over seasons is not acceptable.
- 11 Prior to the *Woodford House* ruling, there had been a pragmatic approach to determining an appropriate assessment period for employees on salary. The determination would be informed by the specific circumstances of the employment, taking into account the needs of employers and employees, and would have been different in different circumstances.
- 12 For example, the majority of salaried employees receive their pay on a fortnightly basis and many employers would have considered a fortnight as an appropriate assessment period. However, a month may have been more suitable in other cases, such as for employees who are paid monthly, or who receives a basic salary that may be below the minimum wage that is topped up by a monthly commission payment that would bring their pay for the month over the minimum wage.

### The Woodford House ruling

- 13 A recent decision of the Employment Court (the Court) – *Woodford House*<sup>1</sup> – addressed the issue of the application of the *Minimum Wage Act* to the salaried employees (matrons and housemistresses) of two boarding schools whose work included 'sleepovers' at those schools during which time they had responsibilities to the students in their care. The Court ruled that the Act applied to salaried employees and that the 'sleepovers' constituted work. As a result, the employees were entitled to receive at least the minimum wage for all the hours worked, including 'sleepovers'. The Court then described the methodology by which compliance with the

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<sup>1</sup> *Victoria Law (and Others) and Colbert (and Others) v Board of Trustees of Woodford House* [2014] NZEmpC 25 (17 February 2014) ("*Woodford House*")

Act was to be determined for those employees. It is at this point that the case becomes relevant to the issue that this RIS seeks to address.

- 14 The Court ruled that compliance with the Act for employees on an annual salary is to be determined on a week-by-week basis in line with the wording in clause 4(c) of the Order. Clause 4 reads:

***4 Minimum adult rates***

*The following rates are the minimum rates of wages payable to an adult worker:*

- (a) for an adult worker paid by the hour or by piecework, \$14.25 per hour:*
- (b) for an adult worker paid by the day,—*
  - (i) \$114 per day; and*
  - (ii) \$14.25 per hour for each hour exceeding 8 hours worked by a worker on a day:*
- (c) in all other cases,—*
  - (i) \$570 per week; and*
  - (ii) \$14.25 per hour for each hour exceeding 40 hours worked by a worker in a week.*

- 15 The decision means that employees on a salary must be paid at least the minimum weekly rate for up to 40 hours work and the minimum hourly rate for each hour exceeding 40 hours. In effect the decision means that one week is the longest permissible period for assessing compliance with the Act for employees on a salary.
- 16 This ruling does not give employers enough flexibility to determine the hours their salaried employees work. This is because, even if they work fewer hours in one week to make up for having worked more hours the week before, they must still be paid at least the minimum weekly rate for the week they work less.
- 17 As a result, it could impose additional costs on affected employers. These costs arise from:
- a. the administrative burden of ensuring compliance when the hours their employees work may be variable from week to week may, and
  - b. being required, in certain situations, to pay their employees for more hours than they have actually worked.
- 18 In response to this, employers may move their employees into different working arrangements to avoid these extra costs, perhaps paying them an hourly wage instead of a salary. These different working arrangements may disadvantage employees. For example, receiving an hourly wage instead of a salary could mean an inconsistent pay packet (and low pay during periods of less work) making it more difficult to manage regular payments, and greater difficulty understanding and calculating entitlements to various kinds of leave (eg holidays, sick leave).

**What do we know about the extent of the problem?**

- 19 Certain types of employment arrangement are likely to be affected by the Court's decision, including:
- a. low income salary earners whose hours are variable from week to week (either on a rostered or an unrostered basis)
  - b. employees on a commission (or some other kind of incentive scheme) whose basic salary is less than (or near to) the minimum wage, but who receive a commission

payment at regular (or irregular) intervals that brings their the overall level of pay above the minimum wage.

20 We have very limited data on which to base an estimate of how many employees may be affected by the ruling, and submissions received, while indicating sectors that might be affected, did not give much indication about the scale of the issue. We estimate it is highly unlikely than any more than 10,000 employees would fit into the first category above,<sup>2</sup> but we do not have any data relating to the second category.

21 Some industry sectors have higher proportions of low paid salaried workers:

- a. In the combined agriculture, fishing, forestry and mining sector, nearly 23 percent of those employees who reported their earning as an annual salary had a salary within the same range as above. However, this figure will also include employees whose usual working hours are less than 40 hours per week. We also don't know how many of these workers work variable hours from week to week, though we do know that fortnightly rosters in the dairy sector are common.
- b. The combined retail trade and accommodation and food services sector has just over 30% of employees who reported their earnings as an annual salary having a salary within the same range as above. (Again, this figure will also include employees whose usual working hours are less than 40 hours per week.) However, we do not have any data on how many of these workers might work variable hours from week to week.

22 Submissions received in response to the consultation that the Ministry undertook indicated the dairy, sheep and beef farming, horticulture and manufacturing are all sectors that may have employers and employees affected by the ruling. One submission reinforced the view that employees who receive some form of performance related pay may well also be affected.

### Appealing the *Woodford House* decision

23 An application for leave to appeal various parts of the Court's judgment in *Woodford House* – including the present issue – has been filed by the defendants. If granted it is likely to be several months before the results of the appeal are known. However, a stay of the decision was not requested in the leave application and so the current decision stands.

## Objectives

24 The objectives of the policy are:

- 1) that employers have flexibility to determine employees' work patterns (less flexibility is also likely to give rise to increased costs for employers)
- 2) that employees are not disadvantaged (either by employers changing working arrangement or by being required to work long hours for long periods)
- 3) that it is easy to assess compliance with the Act – labour inspectors need to be able to clearly identify the period over which an employee's salary is to be assessed and to do

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<sup>2</sup> This estimate is arrived at from a combination of two different pieces of data. Of the employees who chose to report their earnings as an annual salary as part of the Survey of Working Life 2012, approximately 9% were on a salary of between \$28,080 and \$42,120. We do not know how many of these would work variable hours from week to week but, in the same survey, 5.5% of all employees reported that they did not have a 'usual' number of days they worked each week. To have some confidence in the figure of 10,000 as an upper bound, we derived it by estimating that no more than 10% of the 9% in the above salary band would be likely to work hours that varied from week to week. It is likely that this estimate is high.

this is necessary to be able to clearly match pay periods (ie when employees actually receive their remuneration) with assessment periods

4) that it can be quickly implemented.

25 In terms of the weightings assigned to the different objectives, the fourth objective is considered particularly important due to the concern that employers may change their workforce arrangements in the meantime in ways that may disadvantage employees. The first two objectives (that relate to meeting the needs of employers and employees) are more important than the third (ease of assessing compliance).

26 In relation to assessing options against objective 3, data from the Survey of Working Life 2012 also indicated that, among those employees who chose to report their earnings as a salary:

- a. 58.1% reported being paid fortnightly
- b. 18.6% reported being paid weekly
- c. 15.5% reported being paid monthly.

## Regulatory impact analysis

27 We have identified four options in response to the Court's decision. These are summarised in the table below and compared against the objectives with the preferred option highlighted. The first two objectives are assessed with four ticks, the third with three ticks and the fourth with five ticks to indicate the respective weightings discussed above. Each option is then discussed in the text following.

Options	Objectives			
	(1) Flexibility for employers	(2) Employees are not disadvantaged	(3) Easy to assess compliance	(4) Can be quickly implemented
Option 1 – Status Quo	ü (limits flexibility of employers)	ü (as employers may change workforce arrangements)	üüü (pay periods can easily be broken down into weeks)	üüüüü
Option 2 (preferred) – Amend the <i>Minimum Wage Order</i> to include a fortnightly minimum wage rate	ü ü (though a longer period would provide more flexibility)	üü ü (though some employees may be slightly disadvantaged by the change)	üü (a fortnight is the most common pay period but for someone paid weekly, it may be unclear which fortnight any one week belongs to)	üüüü (only requires a change to the Order)
Option 3 – Amend the <i>Minimum Wage Order</i> to include a monthly minimum wage rate	üü ü (provides more flexibility for employers)	ü (the longer the period, the more employees may be disadvantaged)	ü (it is hard to match weekly and fortnightly pay periods to any one month for assessment purposes)	üüüüü (only requires a change to the Order)

Option 4 – Carry out a review of the legislation to more comprehensively address this issue for all employers	üü üü (this would result in a more comprehensive solution for employers and employees)	üü üü (this would result in a more comprehensive solution for employers and employees)	üü (this is somewhat unclear as outcome is not known, but this would be one objective considered in any review)	ü (would require change to primary legislation)
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28 It is acknowledged that none of the first three options above – including the preferred option – provides a durable solution to this issue. No one period will suit all employers given the range of remuneration arrangements that exist for salaried employees. The minimum wage legislation has not changed a great deal since the original Act in 1945, whereas working arrangements have changed considerably. For example, there is no mention of ‘salaries’ in the legislation. While the fourth option would provide that durable solution, it is clearly a long term solution and does not meet the need to implement a quick response to the concerns this RIS seeks to address.

### Option 1 – Status quo

- 29 The status quo is the requirement that compliance with the Act must be assessed on a weekly basis for salaried employees. This option readily meets objectives 3 and 4, but does not effectively meet objectives 1 and 2.
- 30 A weekly assessment period limits the flexibility employers have to determine the hours their salaried employees work, at least for those who are on a salary close to the minimum wage. Submitters indicated that this would give rise to extra costs for employers (as a result of both administrative complexity and having to pay some employees more to remain compliant with the Act).
- 31 For example (based on the current hourly minimum wage of \$14.25, which translates to an annual salary of \$29,640) :
- a. if an employee worked 50 hours in any one week, they would need to be on an annual salary of at least \$37,050 for compliance with the minimum wage in that week
  - b. if an employee worked 60 hours in any one week, they would need to be on an annual salary of at least \$44,460 for compliance with the minimum wage in that week.
- 32 A one week period does protect employees from working long hours for long periods. However, in response to the issues raised above, employers are likely to move employees onto alternative working arrangements, such as an hourly wage that are not so favourable for those employees as these arrangements may result in more uncertainty around hours of work and inconsistent pay packets.
- 33 Unions that responded to the consultation all supported the retention of the Order in its current form.

### Option 2 – Amend the *Minimum Wage Order* to include a fortnightly minimum wage rate

- 34 In respect of the first two objectives, this option strikes the best balance between meeting the needs for employers to have some flexibility in determining the hours their employees work and providing protection to employees against working long hours for long periods.
- 35 However, compared to a weekly period, it is possible that some employees could be worse off. For example, they might lose out if their employer would have chosen to pay them more under the status quo instead of changing their work arrangements. In addition, some employers who

currently pay their employees according to the Court's decision may find a way of changing them to a fortnightly assessment period, with the possibility that those employees are paid less. It is not possible to determine the extent of the impact of these two situations. Finally, under a fortnightly period, employees can be required to work longer hours for longer periods than under a weekly period, though the risks (eg for health and safety) are unlikely to be significant as periods of longer hours would have to be balanced with periods of fewer hours within the same fortnight period.

- 36 These possible disadvantages for employees need to be balanced against the risk that, with a weekly period (as discussed under option 1), employers change their workforce arrangements in ways that disadvantages employees.
- 37 In response to the consultation, unions raised concerns along the lines of those outlined above. However, all employer representatives that responded supported the inclusion of a fortnightly period.
- 38 This option also reasonably meets the third objective. The key issue with assessment is that it needs to be straightforward for a labour inspector (or Employment Relations Authority member) to be able to identify the relevant period over which compliance is assessed. As most salaried employees are paid on a fortnightly basis, this will be reasonably straightforward under this option.
- 39 Finally, it would be quick to implement as it only requires an amendment to the *Minimum Wage Order*.
- 40 This option strikes the best balance against the three objectives and is our preferred option.
- 41 It should be noted, however, that this option will not necessarily meet the needs of all employers affected by the Court's decision. For example, if an employer paid an employee a base salary that was below the minimum wage, but a monthly commission payment brought their pay above the minimum wage when averaged over the month, they would still be non-compliant with the Act in a fortnight period in which the commission payment was not made. As a result some employers may still incur extra costs under this option.

### **Option 3 – Amend the *Minimum Wage Order* to include a monthly minimum wage rate**

- 42 While this option would provide more flexibility for employers, it increases the length of time that employees could be required to work long hours. This can have a detrimental impact on employees in terms of well-being and health and safety as it can lead to fatigue and stress among other issues. (As an extreme example, an employee could be required to work two 80 hours weeks in a row if they worked only minimal hours for the remainder of the month. As this would average out over the whole month, the employer would still be compliant without having to pay the employee any extra hours.)
- 43 As with option 2 (see para 38 above) some employees could also be financially disadvantaged by this option.
- 44 This option is also likely to be more difficult to assess for compliance purposes than either of the other two options as it may be difficult to match pay periods to a particular month for assessment purposes. As noted above, fortnightly and weekly pay periods are the most common for salaried employees, though monthly periods are not uncommon.
- 45 Finally, it would be similarly quick to implement as option 2 as it only requires an amendment to the *Minimum Wage Order*.

46 Most of the employer representatives that responded to the consultation and that supported a fortnightly assessment period also commented that they would also like to see a monthly period in the Order.

#### **Option 4 – Carry out a review of the legislation**

47 This option would involve a comprehensive review of the minimum wage legislation to determine a durable solution to the issues raised by the Court's decision. The current Act has been in place since 1983 and is broadly based on the original 1945 minimum wage legislation. The structure of the Order – in prescribing minimum hourly, daily and weekly rates – is also largely unchanged since the original legislation.

48 However, many things have changed over this timeframe and it is arguable that the legislation, in some instances, sits awkwardly with current employment practices, including the increase in salarisation. 'Salary' is not defined anywhere in the Act.

49 However, though it would be hoped that any solution resulting from such a process would meet the needs of both employers and employees, it would not be quick to implement as changes to the primary legislation would be required, subject, of course, to the agreement of Cabinet. This would still leave employees exposed to possible changes in workforce arrangements while the current decision of the Court stands.

### **Conclusions and recommendations**

50 On the basis of the analysis above, we recommend that the *Minimum Wage Order 2014* be amended to include a fortnightly minimum wage rate in addition to the hourly, daily and weekly minimum wage rates it currently contains.

51 It is our view that this option strikes the best balance between the needs of employers and employees. Employers will have more flexibility to determine the hours of their employees than the status quo, while the potential disadvantages to employees from either being moved onto alternative employment arrangements (the main risk with the status quo) or from being required to work long hours for long periods (the main risk with longer assessment periods) are minimised.

52 A risk that runs throughout this analysis is the paucity of data on the potential impacts of the various options. There is, therefore, a risk that our recommended option has some unforeseen consequences. However, this risk applies to all the options and so we have reached our conclusion based on the (potential) impacts that we are aware of.

### **Consultation**

53 A consultation letter outlining the issues and discussing the proposal to include a fortnightly minimum wage rate in the Order was sent to key stakeholders – business associations, industry bodies, unions and employers – in affected sectors. The consultation ran from 28 April to 16 May. Ministry of Business, Innovation and Employment (MBIE) officials also met with the Small Business Development Group to discuss the proposal.

54 As we considered that there may be sectors impacted by both the status quo and the proposal that we were unaware of, we also asked Business New Zealand, the Employers and Manufacturers Association and the New Zealand Council of Trade Unions to forward the consultation letter to their members in affected sectors.

55 We received a total of 14 submissions, 10 from employer associations and 4 from unions. All employer associations supported the proposal with most of them adding that they would like to see longer assessment periods such as a month (and even a year in some cases) included in the



Order. Most of them also commented that they felt a review of the legislation was needed. All the unions who submitted on the proposal opposed it. They considered that it would lead to longer and more variable hours for less pay.

## **Implementation**

56 The proposal requires an amendment to the *Minimum Wage Order 2014*. It is anticipated that, if passed, the amendment will come into effect on 26 June 2014, 28 days after publication in the *Gazette*.

## **Monitoring, evaluation and review**

- 57 Due to the relatively small scale of the problem and the issues associated with the lack of reliable data, we consider that there would be little benefit in actively monitoring the consequences of the amendment. As noted above, we consider that a review of the legislation is necessary to find a more durable and comprehensive solution to this, and other issues that have been raised by recent court cases and elsewhere.
- 58 Having said that, both business groups and unions have a strong interest in this proposal and it is highly likely that these groups would raise any significant issues that arose as a result of amending the Order with either the Minister of Labour or MBIE.