



Submission

By the

National Association of Retail Grocers and
Supermarkets of New Zealand

to the

**Transport and Industrial Relations
Select Committee**

on the

**Employment Relations (Rest Breaks
and Meal Breaks) Amendment Bill**

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1. INTRODUCTION

- 1.1 This submission is made on behalf of the National Association of Retail Grocers and Supermarkets of New Zealand (NARGON), an organisation representing approximately 40% of New Zealand's food retailing industry.
- 1.2 NARGON has around 500 retail members who are owner-operators of retail food warehouses, supermarkets and grocery and convenience stores. In the main NARGON's retail members are aligned to a banner advertising group of stores such as Super Value, Fresh Choice, Pak'N Save, New World, Write Price, Four Square and Shoprite.

2. RECOMMENDATION

- 2.1 That the bill proceed but amended in line with the recommendations set out below:

Reword clause 4 (b) as follows and add a further paragraph (c):

(b) Includes (without limitation) a measure that provides the employee with time off during the employee's work period for a meal break, for example, a finish time that incorporates the employee's meal break or such other measure as may be agreed between the employer and the employee, and

(c) in the case of rest breaks, may include payment of an amount equivalent to the time forgone which, but for the nature of the work, would have been taken as a rest break in terms of section ZD(1) .

Reword section 69ZEA (as inserted by clause 5):

(1) An employer is not required to provide rest and meal breaks in accordance with section 69 ZD(1) to the extent that the nature of the

employee's work means the employer cannot reasonably provide the employee with rest and meal breaks and either -

(a) the employer and employee agree that the employee is to be provided with compensatory measures, or

(b) in the event that the employer and the employee are unable to agree on the compensatory measures to be provided, the compensatory measures are to be provided in a form determined by the employer.

(2) Compensatory measures may, as appropriate, involve time off work, a payment equivalent to the payment an employee might otherwise have expected to receive, or be as agreed between the employer and the employee.

3. DISCUSSION

3.1 NARGON is pleased to support the intent of this bill since the nature of many jobs in the food retailing industry means that this is a sector (as the bill's explanatory note recognises) where compliance with the current prescriptive provisions of Part 6D of the Employment Relations Act is not always possible.

3.2 However, NARGON has concerns that certain of the bill's provisions, in the absence of amendment, may lead to difficulties of interpretation which it would seem likely that those who framed the bill did not intend.

3.3 Clause 4 Interpretation (amending section 69ZC)

Compensatory measure

(b) The use of the word 'alternative' would indicate that the bill specifies a particular time (or times) for taking rest and meal breaks whereas clause ZD(1) makes no such provision. Consequently there is no actual time (or times) in relation to which an alternative time can be provided.

3.4 It appears, therefore, that with clause 4(b) the framers of the amendment were continuing to think in terms of a requirement for rest

and meal breaks to be taken at particular periods of the day – clearly not the case in terms of clause ZD(1).

- 3.5 Clause ZD(1) requires the employer to allow rest and meal breaks that provide a reasonable opportunity for rest, refreshment and attending to personal matters and are appropriate for the duration of the employee's work period. When they are to be taken is not stated.
- 3.6 To overcome the difficulty with clause 4(b)'s wording, it is recommended that the words 'at an alternative time' be deleted.
- 3.7 There is also a problem with the examples of compensatory measures provided in clause 4(b). Later start and earlier finish times and an accumulation of time off work do not occur 'during the employee's work period', which is when the clause states that the compensatory measures are to be taken.
- 3.8 A practice that some retailers have adopted is to have the employee agree to an extension of the official hours of work but allow the employee to leave work half an hour before the official work period ends. This practice is a compensatory measure that *can* be taken during the work period and could replace the current cited examples.
- 3.9 The further problem with clause 4 (b)'s current examples is that if they were to replace meal breaks they would simply shorten the employee's working day, thereby reducing wages payable (since meal breaks do not have to be paid breaks).
- 3.10 With respect to rest breaks (which must be paid breaks), it would be appropriate, if there is a good reason why these cannot be provided, to allow the employer and employee to agree to payment of an amount equivalent to the rest period foregone.

3.11 Recommendation

Reword clause 4 (b) as follows and add a further paragraph (c):

(b) Includes (without limitation) a measure that provides the employee with time off during the employee's work period for a meal break, for example, a finish time that incorporates the employee's meal break or such other measure as may be agreed between the employer and the employee, and

(c) in the case of rest breaks, may include payment of an amount equivalent to the time forgone which, but for the nature of the work, would have been taken as a rest break in terms of section ZD(1) .

3.12 Clause 5 (amending section ZEA)

Compensatory measures

Proposed new subsections (1) and (2) at present exhibit an internal inconsistency which is described in the following paragraphs.

- 3.13` Pursuant to paragraph (a) of subsection (1), an employer need not provide rest and meal breaks if compensatory measures are agreed.
- 3.14 Paragraph (b) then states that if the compensatory measures provision does not apply (presumably because no such measures have been agreed), the employer is not required to provide rest and meal breaks if these cannot reasonably be provided because of the nature of the work.
- 3.15 But, in terms of subsection (2), even though sub section (1) (a) requires agreement to compensatory measures, an employer who doesn't have to provide rest and meal breaks (because of the nature of the work) must provide compensatory measures. And the matter is further complicated by the fact that on the basis of the nature of the work,

subsection (1) (b) does not require rest and meal breaks to be provided even if compensatory measures have not been agreed.

- 3.16 Put more simply, the following appears to be the effect of the current compensatory measures provision (new section ZEA):

Compensatory measures agreed – rest and meal breaks not required

Compensatory measures not agreed and nature of the work means these cannot reasonably be provided - rest and meal breaks not required

Rest and meal breaks not required - compensatory measures required.

- 3.17 The paradoxical nature of the above will inevitably cause difficulty and needs to be addressed before the bill becomes law.
- 3.18 The relevant provisions should be reworded to ensure that where the nature of the work means rest and meal breaks cannot be provided, compensatory measures must either be agreed, or, in the event of a failure to agree, determined by the employer. What has been agreed or determined on should then be set out in the employee's employment agreement.
- 3.19 There is a further difficulty if compensatory measures are – as the examples and subsection (3) appear to indicate – to be time based only. Rest breaks (as distinct from meal breaks) are, as noted, paid breaks, so rather than being substituted with time off (which could accumulate a growing time liability) it should (also as previously noted) be possible for the employer and employee to agree to payment of an amount equivalent to the break foregone.

3.20 Recommendation

Reword section 69ZEA (as inserted by clause 5) as follows:

(1) An employer is not required to provide rest and meal breaks in accordance with section 69 ZD(1) to the extent that the nature of the employee's work means the employer cannot reasonably provide the employee with rest and meal breaks and either -

(a) the employer and employee agree that the employee is to be provided with compensatory measures, or

(b) in the event that the employer and the employee are unable to agree on the compensatory measures to be provided, the compensatory measures are to be provided in a form determined by the employer.

(2) Compensatory measures may, as appropriate, involve time off work, a payment equivalent to the payment an employee might otherwise have expected to receive, or be as agreed between the employer and the employee.