



Submission to

Department of Education, Employment and
Workplace Relations

on the

Discussion Paper Dealing with the
National Employment Standards Exposure Draft

April 2008

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building australia



1.0 INTRODUCTION

- 1.1 This submission is made by Master Builders Australia Inc (Master Builders).
- 1.2 Master Builders represents the interest of all sectors of the building and construction industry. The Association consists of nine State and Territory builders' associations with over 31,000 members.
- 1.3 Master Builders is a member of the Australian Chamber of Commerce and Industry (ACCI). Master Builders provided input to the ACCI submission which is endorsed.
- 1.4 The construction workforce currently represents over 9 per cent of the total Australian workforce with the number of jobs expected to increase by more than 200,000 to around 1.2 million employees over the next decade.
- 1.5 A summary of the main recommendations made in this submission appears at the end of the text.

2.0 PURPOSE OF THIS SUBMISSION

- 2.1 On 14 February 2008, the Australian Government released an exposure draft of the proposed National Employment Standards. This is set out in a Discussion Paper entitled *National Employment Standards Exposure Draft* (the Discussion Paper). The National Employment Standards (NES), once finalised and implemented through legislation, will underpin the modern award system, albeit that they will be separately enforceable. In addition the NES will apply to award-free employees (as to which see section 4 below relating to coverage). The NES would comprise minimum employment entitlements guaranteed by legislation and would effectively replace the Australian Fair Pay and Conditions Standard introduced by the WorkChoices amendments to the *Workplace Relations Act, 1996* (Cth) (the Act).
- 2.2 Master Builders is committed to working co-operatively with the Government in implementing its industrial relations policy contained in the comprehensive documents "Forward with Fairness" (FWF) and "Forward with Fairness Policy Implementation Plan" (FWFPIP). The NES emanates from proposals set out in these policy documents.

- 2.3 As indicated in those documents, the commencement date for both the NES and modernised awards will be 1 January 2010. The Discussion Paper, therefore, contains details about a vital component of the new workplace relations system in this country that will dramatically affect all employers and employees. Master Builders accordingly sets out comments on the NES responding to the questions posed in the Discussion Paper and also raising other issues that we consider important in shaping the NES. The general comments that are made outline Master Builders' policy position. The questions posed in the Discussion Paper are then answered by reference to the policy position outlined. The questions from the Discussion Paper appear at the end of the relevant substantive section or sections of the submission and are answered by reference to the particular policy points raised.
- 2.4 These are matters of great significance and the deadline for submissions on 4 April 2008 should not, in Master Builders' view, signify the end of dialogue on such an historic change to the employment safety net. There should be, in addition, an opportunity to comment upon the draft legislation that is prepared following the receipt of submissions by the Government. This is not contemplated by the process outlined under paragraphs 13-16 of the Discussion Paper. Master Builders would strongly urge second round consultations given the importance of this issue.
- 2.5 Master Builders is particularly concerned about the rising costs of employment in an environment where the building and construction industry labour costs are in any event increasing at a pace that is much higher than experienced by other sectors. Further pressure on employment costs through an increase in the safety net can only add to inflationary pressures. This is especially the case in the light of the release of recent data about average weekly earnings.¹ The average weekly wage for all sectors grew by 4.7% for the year ended November 2007 but in the building and construction industry that figure was 11.6%. Increasing the cost of employment via an increase in the legislated safety net without a concomitant increase in productivity will add to building cost pressures and lead to higher inflation.

¹ ABS catalogue 6302.0

3.0 MINIMUM WAGES

- 3.1 We note that in paragraph 7 of the Discussion Paper, the NES does not deal with minimum wages “as these will be protected by modern awards and in a manner that ensures that all employees have the benefit of a minimum wage.” It is unclear how this will be achieved. This is especially the case when the Discussion Paper articulates in paragraph 36 that certain categories of employees will not be covered by modern awards. It is assumed that the new awards will be equivalent to a common rule status. Obviously, a common rule award applies generally to an industry or vocation. However, even if this mechanism were to be used, it would not deliver a universal minimum wage. Clearly this is because not all employees will be covered by awards.
- 3.2 The Discussion Paper at paragraph 38 suggests that a solution to the problem of employees not being covered by a modern award is to have an award of universal application. This award would apply to all employees not otherwise covered and also, presumably, establish a federal minimum wage for those employees. Any consideration of a federal minimum wage must be, in our submission, inclusive of the special categories now set out in section 197 of the Act. This provision permits a lower wage than the federal minimum wage to be set for junior employees, those with a disability and those to whom training arrangements apply.
- 3.3 Master Builders submits that an award of universal application is not needed. The equivalent of the current federal minimum wage should continue to be legislated. Awards should then detail minimum wages for all other categories of employee currently with award coverage. The federal minimum wage should remain as the safety net for those not covered.
- 3.4 For new categories of industry and/or occupation the NES would apply and, if an award was required, Fair Work Australia would need to be satisfied that there was no current award that could apply to the relevant employees. Once so satisfied, it would have carriage of the creation of the relevant Award. Industrial parties would be given the right to make submissions about the form of the award, dependent upon the industry or vocation to be regulated. The inter-relationship of minimum wages and coverage would be clear: award minimum wages would be underpinned by a federal minimum wage that would act as the safety net for categories of employee not covered by awards. In general, minimum wages would be in awards

but in the absence of award coverage the federal minimum wage would apply. More arguments about this subject are taken up in the next section of this submission.

4.0 COVERAGE

- 4.1 Workplace level bargaining is the central feature of the FWFPIP and at the nub of the Government's workplace relations policies. Where flexibility is sought FWFPIP (at page 14) has set out protections that will be available to employees as follows:

The matters covered and the scope of the flexibility clause will be considered by Fair Work Australia when approving the collective agreement to ensure:

- *The clause provides for genuinely agreed individual flexibilities.*
- *The collective agreement, as a whole, is better off overall than the relevant award.*
- *An individual employee cannot be disadvantaged with respect to the collective agreement by entering into an individual flexibility arrangement.*

- 4.2 As a matter of general principle, Master Builders submits that these protections should permit employees to trade quantifiable components of the NES for other benefits under a collective agreement. Any such agreement, where approved by Fair Work Australia, should be capable of excluding the NES to the extent of the agreement reached. This is contrary to current item 3(1) of the NES. Accordingly, we submit that there should be a third sub-item where Fair Work Australia is given the power to exclude the NES subject to the protections mentioned in paragraph 4.1, that is where other benefits substitute for the terms of the NES.

- 4.3 Furthermore, those employees who have traditionally been award free should not be swept into the award system. There should be no trigger in the NES which would mean all employees must be Award covered. We submit that the rules for those earning above the \$100,000 per annum threshold mentioned at pages 9-10 of FWFPIP should be fleshed out in the next iteration of the substance of the NES. This would assist in clarifying how the "grandfathering" provision for those currently employed under Awards and earning more than \$100,000 per annum will be administered.

- 4.4 The NES would cover those employees who were operating outside of the award system. The NES would reflect that where an employee earns more than \$100,000 per year they would be free to enter into a common law agreement that did not reflect the detail of the NES. Accordingly, Master Builders submits that the Discussion Paper at paragraphs 21 and 22 does not fully reflect the intent of FWFPIP. Whilst FWFPIP makes it clear that the award safety net is preserved “for those who really need it” the exclusionary provisions for those on over \$100,000 may be framed “by reference to” the ten NES. This should not mean that they are inviolable and FWFPIP uses the term “by reference to” rather than a term that suggests the NES cannot be changed. For example, if a project manager receives say \$150,000 for being responsible for a particular building site on the basis of a sixty hour week during periods when there are sensitive operations being undertaken on that site, then the level of remuneration should be a factor in assessing whether or not those hours are reasonable.
- 4.5 It is therefore Master Builders’ submission that there should be an appropriate exclusion for those earning over \$100,000 per annum as envisaged in FWFPIP, defined with precision as to this level of remuneration. Master Builders believes that this figure should be calculated by reference to all monies earned, not just by reference to ordinary time earnings. The NES should reflect the need for flexibility in arrangements for those outside of the award system as defined by this criterion. It is clear that with the higher levels of remuneration offered to these employees they are compensated for the irregular hours generally required of managerial and other senior staff. The hours provision of the NES should, at the least, take this matter into consideration. It is not a matter that sits readily with the structure of awards, particularly as it has the character of an exclusionary provision.

Discussion Paper - Questions Arising

1. *What types of flexibilities might be needed in respect of the operation of the proposed NES for employees such as managerial employees and high-income employees?*

The principal flexibility is that related to the additional hours that managerial employees and other higher paid personnel are expected to work, given their levels of remuneration. Other flexibilities that are needed are highlighted in this submission when responding to the specific components of the proposed NES.

2. *What is the best way of providing those flexibilities for those employees, having regard to the principle that the proposed NES are intended to be minimum standards for all employees?*

There should be an exclusion in relation to the reasonable hours criteria for those workers earning over \$100,000 subject to an overriding consideration for the safety of the employee. The contract of employment for workers who are remunerated at this level can be framed by reference to the NES without it being imposed inconsistently with the requirements of a position that commands this level of remuneration. The \$100,000 can be indexed to ensure currency.

3. *Are additional rules required for the proposed NES to operate effectively for employees such as managerial employees and high-income employees?*

The rules about minimum wages referred to in section 3 of this submission should be clear: that there is a legislated federal minimum wage that acts as a safety net for those who are not traditionally award covered. The NES should recognise the flexibilities that are required from higher remunerated workers by, in its terms, recognising that the rules should be altered or applied differently for this category of employee as indicated in this submission. This is particularly the case in relation to hours of work. The NES should by its terms recognise the exclusion of the normal hours rules for those earning in excess of \$100,000. In respect of other matters that are quantifiable, those earning in excess of \$100,000 should be permitted to trade terms of the NES against other benefits.

4. *What is the best way of ensuring adequate protection and flexibility under the NES for employees in emerging industries and occupations that may not be covered by a modern award?*

Fair Work Australia should be required to be satisfied that there is no current industry or occupational award that would cover the relevant employees. If so satisfied, it should receive submissions from affected parties about the content of the award. The award which would then be able to be made subject to it being quarantined to the categories of employee identified as requiring award coverage. Fair Work Australia should be satisfied that the making of an award will not intrude on the categories of employees mentioned in paragraphs 36(a) and 36(b) of the Discussion Paper. The decision of Fair Work Australia in the relevant regard should be subject to appeal to a court, such as the Federal Magistrates Court.

5. MAXIMUM WEEKLY HOURS

- 5.1 The provisions relating to hours are expressed to be “maximum” hours for a week. The provisions are not intended to impose a cap on hours and therefore the term maximum is not in fact an accurate expression of the intent of the provisions; the intent is set out at paragraph 39 of the Discussion Paper. That paragraph clearly expresses the intention as one of balancing the need for employer flexibility “while ensuring that a

maximum 38 hour week remains the standard for full time employees.” The provisions do not set a legal maximum number of hours that cannot be exceeded. Master Builders supports the notion of the balance that is articulated in paragraph 39. The provisions should, therefore, be retitled “reasonable weekly hours.”

- 5.2 Business operates efficiently when working arrangements are based upon objective criteria. In that regard, the reasonable hours provisions that were introduced by WorkChoices have been viewed as causing difficulties. These difficulties are largely centred upon the fact that the tests to be applied to determine whether or not working additional hours are reasonable is assessed subjectively and the lack of a provision which permits agreement in advance concerning additional hours where the patterns of work so demand. This latter aspect has, to some extent, been alleviated by the ability of employers to average the hours in accordance with section 226(1)(a)(ii) of the Act.
- 5.3 The terms of item 9(4) of the NES are substantially the same as the criteria for assessing whether or not the additional hours would be reasonable as are set out in section 226(4) of the Act. Items 9(4)(d) and 9(4)(g) are additional criteria. The former introduces a criterion that requires an assessment of “whether the employee is entitled to receive overtime payments, penalty rates or other compensation for working the additional hours.” Master Builders submits that there should be a change to this provision or the item generally. It should be clear that employees cannot trade away, for example, penalty rates in agreements for a higher rate of pay under the no disadvantage test and then also be entitled to refuse to work required additional hours on the basis that this criterion is not satisfied. In other words, the potential for “double dipping” (that is being compensated in advance in an agreement and then having the capacity to decline to work additional hours which have been agreed in the workplace agreement) should be eliminated. This could either be achieved via a change to the specific criterion by adding words such as “(including compensation payable for working additional hours as part of a workplace agreement)” after the current word “compensation” or by a more general provision that acknowledges the rights of employers and employees to agree to work additional reasonable hours in advance so long as no occupational health and safety issues arise.

- 5.4 Similarly, where an award free employee is engaged on a salaried basis, the employer should not be disadvantaged by an employee's refusal to work additional hours where the salary has already taken into account such additional hours. There should be a reverse onus of proof in this context. In other words, where a salary is paid, it would be incumbent upon the employee to show that the additional hours were unreasonable.
- 5.5 Master Builders opposes the introduction of the second new criterion that is a requirement to examine "any other relevant matter." The application of this criterion will engender disputes. This is especially the case if the courts or relevant tribunals interpret this provision to be a subjective issue. This is currently the interpretation of the majority of the other criteria comprising the required assessment. By way of example, this would mean that an employee could assert that, in his or her mind, the fact a favourite television programme was screened at a particular time was relevant to their personal circumstances and should not be missed. They would therefore be justified on subjective grounds to decline to work the additional hours as they would be upset at missing the programme. In addition under the ejusdem generis rule, it is difficult to argue that these words add any significant, additional protection to employees: a fact that in itself will create disputes. Put more simply, this rule of statutory interpretation means that where specific criteria are set out before a more general criterion, the otherwise wide meaning of the general criterion must be restricted to the same class as the specific words or categories that precede the general words. As stated, how this restriction would be applied in the current draft provision is likely to cause disputation.
- 5.6 Master Builders supports the inclusion of general averaging provisions in the NES. There is no evidence that the current provisions relating to averaging in section 226 of the Act have been the cause of detriment to employees. The retention of averaging provisions will assist with the introduction of appropriate regulation of those not in the award system, identified elsewhere in this submission and in the Discussion Paper. Further, it will mean that Awards can appropriately build upon the more general provision in the NES without excluding the ready availability of averaging from some industries, including the building and construction industry where there has been a plethora of litigation about hours provisions and categories of work. Awards should not be instruments of

constraint but should reflect the balance between employer flexibilities and employee rights expressed in paragraph 39 of the Discussion Paper. For example, averaging provides scope to reform existing inclement weather provisions in building industry awards that provide in various ways for daily hire. A further possibility is that averaging may have an application in circumstances where there are breaks between finishing one job and starting another or to account for time not able to be worked due to wet weather. The inability to average ordinary hours will also hamper the capacity for an employer to introduce family friendly work practices and flexible return to work arrangements for parents.

Discussion Paper – Questions Arising

1. *Should the maximum hours NES expressly provide that an employer will not be in breach of the NES where an employee works additional hours of their own volition?*

Yes – an elemental concept in the law of contract is that of consent. If an employee of their own free will wishes to work additional hours then the employer should not be held to account for that employee's decision to freely choose to work those hours. The only exception would be in respect of occupational health and safety considerations which Master Builders submits is a paramount matter.

2. *Should the proposed maximum hours NES address the issue of unreasonable additional hours by reference to the hours normally worked by an employee? What issues might arise from adopting such an approach?*

There are a number of occupations where the hours are irregular and the flow of work diverse. A criterion such as that implied by the first of these related questions would not assist these categories of employee, particularly where there is an element of seasonality in the pattern of hours. In addition, if an employee who normally works for 15 hours a week wishes to work an additional 15 in that week then there should be no legal barrier to the employer offering the additional work and the employee accepting it. This is particularly the case where overtime is payable for work outside of the normal hours of work. The employee should, however, have a right to refuse to work the additional hours if the request is, under the circumstances, unreasonable.

3. *Given that the NES are intended to provide minimum entitlements for all employees, how should the proposed maximum hours NES deal with the long and irregular hours worked by high income employees?*

This question is answered in paragraph 4.2 of this submission. There should be the ability to reach an agreement with employees who are paid more than \$100,000 per annum so that the provisions of the NES do not apply and that they are paid to achieve an

outcome rather than by the hour. Again, the only constraint on this exception should be the issue of occupational health and safety. No agreement should be able to preclude the maintenance of a safe working environment.

4. *Should additional rules be included in the NES to deal with the application of the proposed maximum hours NES to pieceworkers?*

Master Builders notes that a number of occupations in the building and construction industry, e.g. tilers, gyprock fixers and steel fixers, may be remunerated on a piece work basis. Obviously, the piecework rates generally are not paid on the basis of hours worked but are based upon output. The rate that is struck for a pieceworker should not be a matter that is contingent upon them working more than 38 hours to obtain the same level of remuneration as a worker paid by the hour. Accordingly there should not be different rules about reasonable hours of work, save where the activity is not at trade level and the worker is undergoing training. In this circumstance, additional hours may be needed before the worker is competent to move to a piece rate basis of work.

5. *Are there any other matters that need to be taken into consideration when finalising the proposed maximum hours NES?*

This part of the safety net would benefit from being triggered only where an employee makes a complaint. Currently, the sub-items in 9(4) would be a matter that the employer is required to consider in respect of the subjective conditions of each employee on a weekly basis where those employees work more than 38 hours. Where an employee does not wish to work reasonable additional hours the considerations listed should then be brought to bear to determine whether or not that refusal is reasonable. That is then an issue which should be settled by Fair Work Australia on a rapid, low cost basis.

6 REQUESTS FOR FLEXIBLE WORKING ARRANGEMENTS

- 6.1 Master Builders notes that this part of the NES is consistent with the FWF promise set out at page 8 of that document as follows:

A Rudd government will guarantee a right for parents to request flexible work arrangements until their child reaches school age. Employers will only be able to refuse any request on reasonable business grounds.

- 6.2 Master Builders supports family friendly workplace agreements. In an environment where skills shortages are a major constraint on growth, building and construction industry employers are increasingly designing workplace arrangements that are tailored to facilitate the retention of employees, staff loyalty, and higher levels of motivation. In addition, Master Builders is aware of research that shows a positive correlation between family friendly workplace provisions and better financial outcomes.

For example, Whitehouse et al² found that increased incidence of family-friendly provisions in private sector workplaces was positively associated with managers' perceptions of improved financial performance over the time period under study, demonstrating that increasing provisions in the relevant way are compatible with improving financial performance.

- 6.3 Having made those comments there are, however, a large number of employers, particularly small businesses in the industry, who are unable to financially accommodate the restructure of employment arrangements. This is because of the size of their business or the limited time frame that is available to the business to complete work without the triggering of, for example, liquidated damages in building contracts, one of a number of factors that make building and construction work unique and time critical. Historically it has also occurred because of imposed inflexible work practices emanating from "stand and deliver" bargaining by unions in the industry. Paragraph 60 of the Discussion Paper acknowledges that "whether a flexible working arrangement requested by an employee can be accommodated by an employer will vary depending upon the circumstances of the particular business".
- 6.4 In this regard, it is therefore now relevant to consider the employment characteristics of the industry. The industry is extremely diverse, with employment in businesses ranging from a few people in family owned firms, to hundreds of people in major firms who perform work domestically and internationally. However, nearly all firms are small businesses (404,352 non-employing firms or firms employing between 1-19 people), with some medium sized firms (2,709 firms employing between 20-199) and a small number of large firms (127 firms employing 200 or more people³). The construction industry is project based and exhibits highly volatile characteristics which have a profound affect on its structure and the way it operates. Intense price competition and low profit margins keep fixed overhead costs low and have spawned the growth of the sub-contracting system. This system enables firms to take advantage of specialist skills, and to expand or contract operations rapidly as required.

² G Whitehouse, M Haynes, F MacDonald and D Arts *Reassessing the Family Friendly Workplace: Trends and Influences in Britain 1998-2004* Department for Business, Enterprise and Regulatory Reform July 2007

³ ABS Cat No 8155, November 2007 Table 2.1, page 22

- 6.5 In the context of this structure, it is important that building and construction businesses, particularly small businesses, are not penalised for misunderstanding or not complying with some of the detail of the proposals in the item. For example, there should be some flexibility in the requirement for the employer to provide an employee with a written response to the request for a more flexible arrangement within 21 days as set out in the Discussion Paper. This is especially important given the fact that literacy amongst small businesspersons in particular is not something that can be taken for granted. The business concerned would often need to take advice on receipt of the relevant written request for example from a number of advisers, employer association, accountant, lawyer etc. Master Builders supports Fair Work Australia acting to provide information and assistance to employers in this area (per paragraph 72) but many employers will be wary of seeking assistance from an organisation that also has the capacity to prosecute them for a breach of workplace law, especially if it is of the kind just discussed.
- 6.6 Many small businesses have fluctuating fortunes dependent upon flow of work, success in tendering, legal action under a building contract, or a range of factors in what is a volatile industry, including having staff who are competent and who remain with the business. Because of these factors, the flexible working arrangement, if granted should not “lock in” the particular employer but should be able to be reviewed if the business of the employer changes such that the employer is no longer able to accommodate the arrangement. Similarly, there should be no constraints on hours expressed in a modern award that would constrain employers and employees from reaching flexible working arrangements.

Discussion Paper Questions Arising re Requests for Flexible Working Arrangements

6. *Should the proposed flexible working arrangements NES include additional provisions to define the term ‘employee with responsibility for the care of a child’? If so, what additional rules should be included?*

The request should be limited to the mother or father (including adoptive parents) of the relevant child. The alternative is to have too wide a class of potential employee who has assumed responsibility for the child concerned but is perhaps a member of an extended family.

7. *Should the proposed flexible working arrangements NES expressly define what constitutes reasonable business grounds? If so, how can this best be achieved? What additional rules, if any, should be included in the NES?*

Master Builders submits that the test is appropriately broad and that there should not be limiting factors imposed upon employers as to what may or may not constitute “reasonable business grounds” for refusal of a flexible work arrangement request.

8. *Are there any other matters that need to be taken into consideration when finalising the flexible working arrangements NES?*

For the reasons outlined in paragraph 6.5 of this submission, the duration of the arrangement should be able to be revisited at reasonable intervals. There should be no implication that the arrangement must last until the child becomes of school age, a phrase which should be defined with greater clarity. An employer’s business circumstances may change so that the arrangement is no longer able to be accommodated. This should be recognised in the NES.

7. PARENTAL LEAVE AND RELATED ENTITLEMENTS

- 7.1 This matter is dealt with in FWF and accordingly Master Builders understands that the substantial extensions to the current safety net proposed in the NES derive from the Government’s policy commitment as follows (FWF pages 7-8):

Labor recognises that many families want to have a parent provide all or most of the care for a child during the first two years of the child’s life. A Rudd Labor Government will guarantee that both parents have the right to separate periods of up to 12 months of unpaid leave associated with the birth of a baby. Where families prefer one parent to take a longer period of leave, that parent will be entitled to request up to an additional 12 months of unpaid parental leave from their employer. The employer may only refuse the request for the additional 12 months’ leave on reasonable business grounds. This will guarantee that Australian working families have the flexibility of up to 24 months unpaid leave to provide care for their child.

- 7.2 As indicated earlier in this submission, there are a large number of small employers in the building and construction industry. The tenor of the comments that follow therefore are in relation to a number of matters that will be of concern to small business, particularly the extent of administration of the provisions. Further, the concurrent leave proposed to be available under Item 15(5) of the Exposure Draft increases the amount of unpaid leave available to a father from one to three weeks (see current section 282(1)(a)).

Whilst the three week period is consonant with the period for short adoption leave set out in section 300(1)(a), it is an unwarranted increase in the safety net that was not foreshadowed in the FWF documents. It should be reduced to one week, save for adoption, so that the entitlements remain the same as are reflected in the current law.

- 7.3 The Discussion Paper at paragraph 109 outlines that a female employee who is eligible for unpaid parental leave is also entitled to be transferred to an appropriate safe job, where she gives her employer evidence that she is fit to work but should not continue in her present position, because of risks arising out of her pregnancy or out of hazards connected to that position. Further, where there is no safe job available, the employee is entitled to paid leave for the period where she is at risk with pay at the base rate for her ordinary hours of work. This entitlement could prove costly for small business and, in the building and construction industry, affect the already small incidence of employment of women. This is especially the case where the woman employed would be one employee of a small team, with a great deal of building and construction work requiring physical effort and manual dexterity. Master Builders submits that there should be an exemption for small business from this requirement where an employer employs fewer than 15 employees. This will mean that a disincentive to employ women in the rapidly growing small business sector is removed.
- 7.4 We submit that the current sections 273 and 274 of the Act should be retained. Section 273 requires an employee to take six weeks leave from the date of the birth of a child. Section 274 permits an employer to require an employee who would otherwise be on “no safe job leave” to begin a period of maternity leave within a six week period before the expected date of birth. These reasonable provisions represent measures which protect the health of the mother of the child while protecting the interests of the employer. Because these provisions confer mutual benefit on employers and affected employees, they should be retained as part of the NES.
- 7.5 The level of administration required when dealing with the new entitlement means also that most small businesses will turn to professional assistance when administering the provisions, particularly when calculating the entitlements set out in the example that appears at page 16-17 of the Discussion Paper. Master Builders notes that the evidentiary and administrative requirements are a substantial red tape burden on business,

and will likely induce the cost increases mentioned in paragraph 2.5 of this submission.

Discussion Paper Questions Arising re Parental Leave and Related Entitlements

9. *Should the proposed parental leave NES allow an employer to request evidence that an employee is fit for work where the employee wishes to continue working close to the expected date of birth of their child or where the employee wishes to return to work within a short time after the birth?*

Yes: as mentioned elsewhere in this submission occupational health and safety considerations must be paramount. The employer should have the right to determine the fitness for work of a pregnant employee via external, objective evidence about her fitness to perform relevant tasks. The employer should be provided with the right to obtain that evidence and to seek her to take "no safe job" leave or to remain on unpaid maternity leave following the birth of the child. Matters concerning the impact of work on the health of employees should be able to be assessed by an employer with an attendant right to require the production of material evidence.

10. *In what circumstances might the rules relating to notice and evidence be inadequate or too onerous for employers and employees?*

Item 22 of the Exposure Draft and paragraph 117 of the Discussion Paper deal with the issue of consultation during parental leave. Master Builders notes that the duty is to consult. Consultation is not something that at law leads to a result. For example, In *Dixon v Roy*⁴ Young J, in the Supreme Court of NSW noted that consultation involves, at the very least, a three-pronged process of:

- (a) providing information to the person who is to be consulted;
- (b) receiving a response to that information; and
- (c) considering that response.

Dixon v Roy was of course a judgment dealing with the notion of consultation in a different context. However, the decision makes it clear that the process to be followed must amount to compliance with statutory requirements. If there is no end result set out in the statute then the duty to consult does not lead to any manifest action. Presumably, however, the employer would be required to keep evidence of attempts at contacting the employee, the nature of the communication, and a record of the discussions. This appears to be an undue red tape burden for little outcome.

In the context of Item 22 of the Exposure Draft consultation seems pointless. There is no obligation for the employer to consider the response and there is no required outcome from the discussions. Under Item 23 the employee's return to work entitlement is unaffected by the discussions and they seem to have no purpose

⁴ [1991] AC: Rep 355 NSW 55,

linked to the other provisions dealing with this subject matter. Master Builders submits that this provision should be deleted as being unnecessary and administratively burdensome. There are also logistical problems with its terms. For example, supposing that an employee has, during the course of up to 24 months, changed address but has not provided the employer with notification of that change of address. There is no requirement that any such change be notified to the employer, and the employer would be faced with a requirement to consult with difficulties in locating that employee.

11. *What, if any, additional rules could be included in the proposed parental leave NES in order to address the issues arising in those circumstances?*

As indicated above, we do not believe that the consultation process is warranted. It would lead to the same result to have a process of notification.

12. *In what situations should examples of reasonable business grounds be included in the proposed parental leave NES?*

As indicated at paragraph 120 of the Discussion Paper, the NES entitlement to request additional parental leave of up to 12 months does not define the term reasonable business grounds. A refusal may be made by the employer to the extension on this basis. We note that the Hon Craig Emerson MP said the following concerning this matter:

“If a small business cannot accommodate a request for an extension of parental leave, it need only write a letter giving its reasons. That’s the end of the matter. There’s no adjudication, no legal process and no union official under the bed. Any adverse impacts on business practices are grounds to refuse flexible work arrangements or a 12-month extension of parental leave.”⁵

Accordingly, we would suggest that any information provided by Fair Work Australia reflect the substance of Dr Emerson’s comments which should also be replicated in the relevant Bill’s Explanatory Memorandum.

13. *What types of examples could be included in the NES in order to address any issues arising from these situations?*

We reiterate that the substance of Dr Emerson’s comments should be set out in the advisory and statutory material and that disruption of work planning or scheduling of any kind would constitute the basis for declining the relevant extension.

14. *Are there any other matters that need to be taken into consideration when finalising the proposed parental leave NES?*

We refer to the issue of consultation and believe that the relevant provision should either be deleted or replaced with a notification from the employer to the employee at their last known address.

⁵ Dr Craig Emerson, *Extension of Parental Leave – ACCI Leaves out the Crucial Detail*, Media Statement – 2nd May 2007, <http://www.alp.org.au/media/0507/mssbic020.php>, accessed 5/03/08

8. ANNUAL LEAVE

- 8.1 Master Builders notes that the annual leave standard is not fundamentally changed from the current safety net standards in the Australian Fair Pay and Conditions Standard (AFPCS). However, there is no provision in the proposed NES for the cashing out of annual leave akin to the provisions in current section 233. This matter per Item 30 of the Exposure Draft will be left to modern Awards, a matter that may vary from sector to sector. This is unsatisfactory. The cashing-out facility should be available to all employers and employees, especially as there is no evidence of detriment from the application of the current law and this facility is regularly requested by employees of Master Builders' members.
- 8.2 Indeed, on the face of it the cashing out of annual leave is inconsistent with the NES' other provisions, a matter proscribed by the Award modernisation request published in the Explanatory Memorandum to the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* and formally issued by the Minister on 28 March 2008. Paragraph 28 states that a provision of a modern Award cannot operate inconsistently with a term of the proposed NES. In a literal sense, for example, an averaging of hours over 12 months is inconsistent with the hours' provision of the NES; similarly, cashing out of annual leave is inconsistent with the principal manner in which the NES sets out that annual leave is to be taken. Accordingly, the NES by its terms should recognise the potential for flexibility where that notion would enhance productivity and matters such as averaging of hours, flexibility of rostered days off and cashing out of annual leave should be permitted to operate across all industries.
- 8.3 Master Builders appreciates the acknowledgement of daily hire engagement set out at paragraph 133 of the Discussion Paper. We note that for the purpose of establishing the rate of pay in respect of annual leave, the definition of ordinary hours of work will be defined by reference to, amongst other things, a definition of same in the modernised award. The building and construction industry is characterised by the fact that the predominant method of engagement in the industry is by daily hire. This form of employment is established in building and construction industry awards, including the *National Building and Construction Industry Award 2000* (NBCIA). It envisages that employment may be terminated at the end of each day or shift by the employer giving the employee one day's notice

and vice versa. The engagement of workers is often terminated at the end of a project and the workers engaged for another project. Such employees are compensated for this type of engagement by the award providing for the payment of a follow-the-job loading. Currently, there is no explicit recognition of this form of engagement in the AFPCS. While no provision of the AFPCS currently derogates from this form of engagement, it would be useful for the NES to reflect that it is a legitimate and ongoing method of employment, as many of the “normal” methods for calculating entitlements are affected by the concept of daily hire engagement. There should be explicit recognition of daily hire in the NES. We return to this point later in this submission.

8.4 The NBCIA contains the following clause:

32.9 Annual close down

32.9.1 Notwithstanding anything contained in this award an employer giving any leave in conjunction with the Christmas-New Year holidays may, at the employer's option, either:

32.9.1(a) stand off without pay during the period of leave any employee who has not yet qualified under 32.1 hereof, or

32.9.1(b) stand off for the period of leave any employee who has not qualified under 32.1 hereof and pay the employee (up to the period of leave then given) at a rate of one-twelfth of an ordinary week's wages in respect of each 38 hours' continuous service (excluding overtime).

32.9.2 Provided that where an employer at their option decides to close down their establishment at the Christmas-New Year period for the purpose of giving the whole of the annual leave due to all, or the majority of their employees then qualified for such leave, the employer shall give at least two months' notice to their employees of their intention so to do.

8.5 Businesses have long closed on an annual basis during periods of low demand/the holiday season. This is often called the Christmas Closedown. To do this companies have scheduled annual leave for all employees, including more recent employees who may not yet have accrued sufficient annual leave to cover the full closedown period.

8.6 However, under section 236(5) of the Act an employer can only direct an employee to take leave during a shut down period, where the employee has sufficient annual leave credited to them. There is, therefore, currently considerable uncertainty among employers regarding scheduling of annual

- leave for employees during workplace shut downs, particularly over the Christmas/New Year period.
- 8.7 This issue arises primarily in the construction industry. Section 236(5) appears to require employers to pay employees that have insufficient annual leave accrued, while those employees with sufficient entitlements must use these entitlements. This is a real problem for employers wanting to continue the shutdown for commercial reasons.
- 8.8 Additionally, in the construction industry, the work is very specialised and interlinked. For one contractor to continue with the relevant work, he/she is dependent on the other contractors, particularly subcontractors, to continue with or complete their part of the project. This work is dependent on a permanent labour supply. The Christmas Closedown provides a period for the industry to shut down their sites for long periods and provide their employees with a long holiday that is difficult to do, at other times of the year. This extended leisure period is conducive to family friendly arrangements over the Christmas period, and assists employees in managing fatigue.
- 8.9 Further, in the construction industry many employees may have 2 or 3 employers annually as they follow the work flow and are engaged on a daily hire basis as indicated earlier. Consequently, their previous employer will pay them their pro-rata annual leave, so employees will not be 'out of pocket' if their current employers puts them on leave without pay for the Christmas Closedown. To deal with this problem, employers may choose to only hire employees at the beginning of the year, restrict the taking of annual leave by employees, or hire only casual or labour hire workers.
- 8.10 Annual closedowns were possible prior to WorkChoices. This has been a long established and well accepted practice in the industry for the last 30 years. Shut down provisions in industrial awards, agreements and State annual holidays statutory provisions have traditionally been utilised in relation to well-planned and well publicised periods, such as Christmas/New Year. Under these provisions, where an employee had not accrued sufficient leave, leave would be taken without pay or employees would draw forward on their future leave entitlements as set out in Clause 32.9 NBCIA reproduced in paragraph 8.4 above.

- 8.11 The NES should reflect this industry practice so that an employee could use existing annual leave credits over the shut down period and any remaining leave required during close down would be treated as leave without pay. However, this would not break an employee's continuity of service. This option would avoid difficulties arising from the employee having to accrue sufficient leave credits to cover the advance payment made. Hence, an employee should be able to draw forward on their future annual leave entitlements where an employee has insufficient leave credited to take leave during a shut down period. Relatedly, where employment is terminated, prior to accumulation of the amount of leave drawn forward, an equivalent amount could be deducted from whatever remuneration is payable on termination.
- 8.12 If these provisions are not included in the NES and are instead confined to the modernised Award, their prima facie inconsistency with the NES should be accommodated so that these arrangements may continue for the benefit of all industry participants. Overwhelmingly, there should be the ability for an employer to direct employees to take annual leave. This should be the case not just for Award employees, particularly in the context of the Christmas shut down, but also for non-Award employees. It will cause very real difficulties and adversely affect the productivity of the sector if employers are not permitted the right to direct employees to take annual leave, especially during shut down periods. It will also cause disruption to long established family holiday arrangements.

Discussion Paper Questions Arising re: Annual Leave

15. *Is it appropriate for the definition of shift worker to be contained in modern awards or should the proposed annual leave NES define 'shift worker'?*

Master Builders has not experienced any difficulties with the definition of shift worker contained in 228(1) of the Act. This definition should be retained.

16. *If so, how can this be achieved while accommodating industry-specific needs?*

The current section 228(2) permits regulations to be made to deal with this issue and that provision has not caused any difficulties.

17. *Are there any issues with this approach to 'ordinary hours of work' for particular kinds of working arrangements?*

The award or awards covering the building and construction industry will need to deal with the issue of daily hire workers as explained in paragraph 8.3 of this submission.

18. *If so, how should those issues be addressed?*

This point is addressed in paragraph 8.3 above so far as daily hire employment is concerned.

19. *What considerations need to be given to the interaction of the NES with other kinds of leave or absences provided by a contract of employment or industrial instrument?*

It should be clear in the modern award that will govern the particular employment arrangements that annual leave does not accrue when the other types of leave are invoked, such as where leave without pay occurs. The manner in which this should be done is in the definition of either of the terms "service" or "ordinary hours of work" within those instruments. Alternatively, the NES should state the broad proposition that ordinary hours of work cannot encompass the particular form of alternative leave as that form of leave is articulated.

20. *Are there any issues that may arise from this approach?*

Currently, the law requires the progressive accrual of annual leave. In part this question arises from the proposed annual leave NES providing for the progressive accrual of annual leave. There should be no capacity to double dip and obtain sick leave entitlements with a re-crediting of annual leave should an employee fall ill whilst on annual leave.

21. *If so, how should those issues be addressed?*

There should be an express provision in the NES to avoid double-dipping referred to in the answer to question 20.

22. *What specific issues might arise for particular types of employees from the base rate of pay definition in the proposed annual leave NES?*

We agree with the terms of Item 29(1) of the Exposure Draft. There are issues for building workers who may have a number of employers, especially given the daily hire character of building work. Clause 32.3.3 NBCIA is as follows:

"Notwithstanding anything contained in this subclause an employee who has worked for twelve months in the industry with a number of different employers without taking annual leave, shall be entitled to take annual leave and be paid one-twelfth of an ordinary week's wages in respect of each completed 38 hours of continuous service with the current employer."

Provisions of this kind should be allowed to continue in the modernised award. This reinforces the utility of a Christmas closedown.

23. *What types of additional rules, if any, might be appropriate for inclusion in the proposed annual leave NES to address those issues?*

It should be clear that employers have the right to direct employees to take annual leave. The NES and Awards should not restrict annual leave being taken in blocks or as single days where mutual agreement is reached.

24. *Are there any other matters that need to be taken into consideration when finalising the proposed annual leave NES?*

Not to our knowledge or are addressed in the ACCI submission.

9. PERSONAL/CARER'S LEAVE AND COMPASSIONATE LEAVE

- 9.1 We agree with the exclusion of casual employees from paid personal/carer's leave.

- 9.2 The proposed NES removes the existing cap on an employee taking a maximum of ten days of accrued personal leave per year of service as carer's leave. The notion of providing a cap was introduced by the Australian Industrial Relations Commission in the Carer's Leave Test Case⁶ on the following basis:

Those parties who advocated the imposition of a cap on the use of sick leave for family leave purposes advanced two main grounds:

- the need to minimise the economic impact of the decision; and*
- in the absence of a cap employees could use all their sick leave for family purposes and not have any entitlement which could be used when they are ill themselves.*

In our view there is merit in adopting a cap on access to the aggregated entitlement for carer's leave purposes. We have decided that a cap of 5 days per annum would be a fair balance between the provision of greater flexibility for employees to enable them to better balance their work and family responsibilities and the concerns expressed by ACCI and others about the need to limit the cost of any new entitlement.

A 5 days per annum cap is also consistent with the available evidence regarding the number of working days per annum used by employees to care for ill family members.

- 9.3 Obviously, the amount of days capped has increased but there is no evidence to support the proposition that it should be removed. To the contrary, it would potentially increase costs for the community.

⁶ Print M6700 28 November 1995

Discussion Paper Questions Arising re: Personal/Carer's Leave and Compassionate Leave

25. *In what circumstances might the rules relating to notice and evidence be inadequate or too onerous for employers and employees?*

Currently sections 254 (sick leave) and 256 (carer's leave) of the Act deal with the required documentation to justify an entitlement to personal/carers leave. As outlined in paragraph 202 of the Discussion Paper, an employee is required to provide evidence that would satisfy a "reasonable person" of their entitlement to leave. Obviously under the NES, the standard of proof is watered down unsatisfactorily. This provision is far too broad and will engender disputes. Sections 254 and 256 should be retained as part of the NES.

26. *What, if any, additional rules could be included in the NES in order to address the issues arising in those circumstances?*

See answer to previous question.

27. *Do any issues arise from this approach to the taking of paid and unpaid carer's leave?*

Master Builders is concerned about the removal of the cap on taking carer's leave to the full complement of the personal/carers leave entitlement, as outlined in paragraph 9.2 of this submission.

28. *What other matters should be taken into consideration when finalising the proposed personal/carers and compassionate leave NES?*

As outlined in the ACCI submission.

10. COMMUNITY SERVICE LEAVE

- 10.1 This new form of leave is concerned with two subjects: emergency services leave (unpaid) and jury leave (paid).

- 10.2 Master Builders commends the spirit of volunteerism that is part of the Australian culture. Master Builders therefore supports the proposition set out at paragraph 205 of the Discussion Paper, that employees who fight bushfires and provide emergency relief should not be prejudiced or adversely affected in their employment. In this regard, Master Builders has no issues with the proposed NES. The only caveat to this comment is that the leave should be capped, for the benefit of both the employer and the employee, to a maximum of 30 days per annum unless in the circumstances of the employee or employer this maximum would be unreasonable. This would for example prevent the employer being required to provide long terms of leave and, at the same time, require the employee to balance their commitment to an emergency service against

their other more formal commitments. This could possibly require a modification of the unlawful termination provisions that already reflect the test of reasonableness because the absence must be “reasonable having regard to all the circumstances” (section 659(2)(i) of the Act). This cap fits in with the reasonableness test set out in the Item and articulated at paragraph 215 of the Discussion Paper.

- 10.3 The jury service component of the NES is a potentially very large increase in the safety net which is a cost to be met by employers. Government should reconsider this entire issue because business should not be required to subsidise the justice system. A number of legal cases may last for many months or even years. The cost of meeting the employee’s base rate of pay for their ordinary hours of work without any work being undertaken by the particular employee could be a very severe cost for a small business, especially where the builder must also supplement his/her workforce to meet the skills that the employee would otherwise bring to bear. Master Builders recommends that the requirement to make the requisite payment be capped. A maximum of 5 days is a sufficient subsidisation of the system of justice by, in particular, a small employer.

Discussion Paper Questions Arising re: Community Service Leave

29. *What issues might arise in association with the taking of community service leave by shift workers, particularly afternoon and night shift workers?*

The provision states that there should be “reasonable rest time” immediately following the relevant activity and this should be sufficient to accommodate shift workers.

30. *Should the proposed community service leave NES contain express provisions dealing with these types of employees?*

No

31. *Having regard to the Government’s view that paid jury service leave should be a minimum entitlement of all employees, should additional rules be included in the proposed community service leave NES to address a small business’s obligation to pay jury service leave?*

The leave should be capped as proposed in paragraph 10.3 of this submission or there should be a small business exemption, given the potential liability that the provision would impose on a small business proprietor.

32. *If so, what additional rules should be included?*

See answer to question 31.

33. *What other issues should be taken into consideration before finalising the community service leave NES?*

The leave should be capped as set out in paragraphs 10.2

11. LONG SERVICE LEAVE

11.1 The volatility and fluctuating nature of the industry means that there is reduced scope for any degree of permanent employer/employee relationships when compared with other sectors. This has been recognised over the years, both by the industry and legislatures, through the establishment of State/Territory industry-based benefit schemes such as portable long service leave funds and centralised redundancy funds. These measures produce the twin effects of greater security of employment for workers and comparatively higher employment costs for employers. However, the underlying volatility of the market means that many industry participants choose to gain continuity of engagement by running their own business and who voluntarily enter into contractual arrangements. This is one factor contributing to the movement towards the expanding subcontract system.

11.2 It is also highly relevant to the history of long service leave in the construction industry. There are individual State and Territory schemes which provide portability for daily hire and other building workers and, in a number of instances, subcontractors. It is in this latter regard that uncertainty currently applies:

It would also seem that the Independent Contractors Act may affect the schemes in each state and territory that create "portable" entitlements for building workers to long service leave (and in some instances other benefits as well, such as superannuation and redundancy pay).

Under legislation such as the Building and Construction Industry Long Service Payments Act 1986 in New South Wales, building employers pay levies into a fund administered by a statutory authority (in that state the Long Service Payments Corporation). Workers who fall within the scheme are able to claim benefits even though they may have worked for a number of different employers, whether as employees or contractors.

It is the application of such legislation to contractors that potentially creates the problem, since the legislation arguably seeks to “confer or impose rights, entitlements, obligations or liabilities on a party to a services contract in relation to matters that, in an employment relationship, would be workplace relations matters”, within the meaning of s 7(1)(b) of the Independent Contractors Act. Leave entitlements are specifically defined to be “workplace relations matters” by s 8(1)(b).⁷

- 11.3 The legal interpretations set out in paragraph 11.2 would mean that employers are no longer required to make payments to the long service leave funds established in the industry in respect of independent contractors. In our understanding, this has not occurred in practice. In the context of establishing a new safety net for employees, Master Builders submits that independent contractors should be expressly excluded. It should not be mandatory for employers to make long service leave payments for those other than their employees. It is not appropriate for such payments to extend beyond employees.
- 11.4 The long service leave funds established in each State and Territory for daily hire and other building industry employees should be excluded from the national scheme to be established under the NES. This is because the benefits (albeit not consistent) provided to employees are specific to the building and construction industry and are specifically tailored to its needs.
- 11.5 The history of long service leave generally and in respect of the building and construction industry in particular is set out in the *Final Report of the Royal Commission into the Building and Construction Industry*⁸ (the Cole Report). The Cole Report makes it clear that the following key factors led to the introduction of the relevant schemes:
- The strategic nature of the building and construction industry;
 - High union density and industrial strength;
 - A well-established industry focus; and
 - Patterns of employment in the industry.⁹

⁷ Stewart et al *Understanding Independent Contractors* CCH 2007 at p 128

⁸ Commonwealth of Australia, February 2003

⁹ *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Funds*, Vol. 10 page 219

The following Table is reproduced from Volume 10 of the Cole Report¹⁰:

**TABLE 1 –
Building and construction industry long service leave legislation
(by jurisdiction) derived from the Cole Report**

Jurisdiction	Legislation
New South Wales	<i>Building and Construction Long Service Payments Act 1986 (NSW)</i>
Victoria	<i>Construction Industry Long Service Leave Act 1997 (Vic)</i>
Queensland	<i>Building and Construction Industry (Portable Long Service Leave Act) 1991 (Qld)</i>
Western Australia	<i>Construction Industry Portable Paid Long Service Leave Act 1985 (WA)</i>
South Australia	<i>Construction Industry Long Service Leave Act 1987 (SA)</i>
Tasmania	<i>Construction Industry Long Service Leave Act 1997 (Tas)</i>
Australian Capital Territory	<i>Long Service Leave (Building and Construction Industry) Act 1981 (ACT)</i>

11.6 The following is a comprehensive table which outlines the various benefits and differences between the various schemes established under the legislation outlined in Table 1. The table is reflective of law and policy as at 1 July 2007. This table shows a manifest lack of consistency in both the level of benefits and the funding arrangements for each of the schemes.

¹⁰ Id

QUICK COMPARISON OF INTERSTATE LSL CONDITIONS AS AT JULY 2007

State/Territory	ACT	NSW	VIC	QLD	SA	WA	TAS	NT
1 Leave/Payment Scheme	Leave	Payment	Payment	Payment	Leave	Leave	Payment	Leave

CONTACT PHONE & FAX NUMBERS

Phone	02 6247 3900	131 441	03 9664 7677	07 3212 6811	08 8271 1222	08 9476 5400	03 6233 7670	08 8923 9300
Fax	02 6257 5058	02 9287 5685	03 9663 7088	07 3212 6844	08 8373 2740	08 9321 5404	03 6233 7224	08 8923 9318
Freecall	1800 655 060	131 441	1800 805 844	1800 803 491	1800 182 124	1800 198 136		1300 795 855
Email	construction@actlsib.act.gov.au	info@lspc.nsw.gov.au	info@coinvest.com.au	member.services@qleave.qld.gov.au	enquiries@cbserv.com.au	lsstaff@walsboard.com.au	secretary@tasbuild.com.au	info@ntbuild.com.au

LONG SERVICE LEAVE ACCRUAL

Long service leave	13 weeks after 10 years. May now opt for payment in lieu of leave by request.	13 weeks after 15 years 8.67 weeks after 10 years	13 weeks after 15 years (at 30 June 2002 then 13 weeks after 10 years from 1 July 2002)	8.67 weeks after 10 years	13 weeks after 10 years 9.1 weeks after 7 years	8.6 weeks after 10 years Further 4.3 weeks after 15 years	13 weeks after 10 years (as at 1 January 2006. Prior was 13 weeks after 15 years to 31 December 2005)	13 weeks after 10 years
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STANDARD INDUSTRY LSL ACCRUAL

	6.06 weeks after 7 years	13 weeks after 15 years	13 weeks after 15 years (min)	8.67 weeks after 10 years	13 weeks after 10 years	8.6 weeks after 10 years	13 weeks after 10 years	13 weeks after 10 years
	Pro-rata after 5 years in certain cases	8.67 weeks after 10 years	8.6 weeks after 10 years (min)	Pro-rata after 7 years	9.1 weeks after 7 years	(Further) 4.3 weeks after 15 years	Pro rata after 55 days, 2 years and 7 years	Pro-rata after 7 years in certain cases (NT LSL Act)
			Payment after 7 yrs if leaving employer					

MINIMUM SERVICE FOR CLAIMING

Long service leave	10 years	10 years	7 years-	10 years	10 years	7 years	10 years	10 years then every 5 subsequent years. (multiple claims allowed but must claim 5 days or more credit per claim)
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MINIMUM SERVICE FOR CLAIMING (Cont'd)

State/Territory	ACT	NSW	VIC	QLD	SA	WA	TAS	NT
Leaving industry	5 years(must wait 20 weeks after last day worked)	5 years	7 years	7 years*	7 years	7 years	**7years	7yrs if ceasing construction work, 5yrs if deregistered
Employer terminates	-	-		-	-	7 years	**7 years	---(refer Leaving Ind.)
Incapacity	55 days	55 days	7 years	7 years*	7 years	7 years	2 years on permanent incapacity. 7 years normal.	---(refer Leaving Ind.)
Age retirement	55 days	55 days	7 years	7 years*	7 years	7 years	2 years	---(refer Leaving Ind.)
Death	55 days	55 days	55 days	7 years*	7 years	7years	55 days	1 day
Domestic necessity	---	5 years	7 years	10 years*	7 years	-	**7 years	---

CONTRIBUTION RATE

	1% of pay	0.35% of project cost of \$25,000 or more.	2.0% of pay	0.125% of building project costs above \$80,000	2.5% of pay	1.25% of pay	0.3% of pay	0.5% of construction cost of \$200,000 or more – excluding class 10(a) building under building code of Aust

CREDITED SERVICE

Recorded in:	Credited days 220 = 1 yr	Credited days 220 = 1 yr	Credited days 220 = 1 yr	Credited days 220 = 1 yr	Credited days 260 = 1 yr	Credited days 220 = 1 yr	Credited days 260 = 1 yr	Credited days 260 = 1 yr
Can be converted to 220 credited days by:					Days ÷ 260 x 220		Days ÷ 260 x 220	Days ÷ 260 x 220

MAXIMUM BREAK IN SERVICE

State/Territory	ACT	NSW	VIC	QLD	SA	WA	TAS	NT
If less than 5 years service	4 years	4 years	4 years (from Dec 97). 2 years (Aug 83/ Dec 97). 9 months (pre Aug 1983). Infinite if union employee working for construction industry union	4 years	3 years (after 1985) if > 5 years service 2 years if < 5 years service. 18 months (pre 1985)	2 years (if less than 5 yrs service) 4 years (if over 5 yrs service)	4 years	4 years

CONTRACTORS

Covered?	Yes	Yes	Yes (self cont.)	No***	Yes	No	Yes	Yes (labour only contractors)
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QLD Leaving the Industry claims allowable if employee has been registered with any scheme for 7 years and has at least 1155 service credits or at least 1100 service credits and any part of the service is 'retrospective' service (1540 service credits = 7 years full time, 1155 = 7 years part time)

QLD Labour only subcontractors eligible

TAS May only claim if employee can show he/she was unable to obtain relevant employment for a period of 2 months, or if there are sound reasons for not engaging in relevant employment.

- 11.7 Master Builders contends that whatever the safety net which is developed as part of a new national scheme, portable long service leave for the building and construction industry as established under state/territory legislation should be specifically excluded. Seeking to harmonise these complex laws and to regularise the benefits which would accrue to employees is a task that will merely confound the boundaries of the safety net scheme. Clearly, there are a number of portable schemes which currently benefit the majority of building and construction industry workers and these benefits should not be subsumed into a scheme which is likely to be non-portable. Building workers covered by these schemes are rewarded for service within the industry rather than on the basis of service with one employer.
- 11.8 The question therefore arises as to whether or not the interest of the industry would be advanced by the creation of a harmonised national scheme for portable long service leave. The answer to that question would depend upon a number of substantive elements relating to any proposed scheme. Master Builders recommends that there be an inquiry into this issue where investigation of the matter should be undertaken by a Council of Australian Governments (COAG) supervised committee. That committee should be asked to consider the costs and benefits of establishing a national scheme, inclusive of the following features:
- One central administrative authority
 - Single funding method at one rate
 - State and Territory Branches
 - No right of State and Territory governments to repatriate monies from the fund
 - Common benefit level, with grandfathering of prior entitlements
 - Combined liabilities and assets
 - Investment economies
 - Administration by a trustee company supported by federal legislation
 - Appropriate phasing in arrangements.
- 11.9 In the short term, any national scheme should exclude the current arrangements for portable long service leave in the building and construction industry. Undoubtedly, these schemes will exceed the minimum requirements of any new federal scheme, especially having regard to the notion of portability itself. For those not presently covered by the scheme, any safety net minimum that was applied universally would have effect.

Having said that, however, Master Builders is concerned about the costs of moving to a federal long service leave scheme where that scheme would increase employment costs. Certainly, the lack of uniformity in current benefits that apply across States and Territories means that a decision must be made about an appropriate level of benefits to rationalise arrangements. We would be opposed to a move to the highest common denominator given the pressure this would put on inflation, interest rates and the economy as a whole, particularly as it affects infrastructure costs. This latter concern should be a governing criterion for the committee concerned with harmonising portable long service leave.

Discussion Paper Questions Arising re: Long Service Leave

34. *What issues arise from the preservation of long service leave entitlements including machinery rules from industrial instruments and the intention that workplace agreements will not be able to override state and territory long service leave laws?*

Why should long service leave be treated as if it were no longer capable of being bargained away? This is especially the case as the Discussion Paper clearly points out that the measures are “stop gap” until the national scheme proposed comes into operation. Master Builders’ policy is for there to be constraints on bargaining only where the public interest is affected, such as with pattern bargaining, union bargaining fees or non-pertaining matters¹¹. If individual employees wish to bargain utilising their rights to long service leave as a means to engender other benefits and freely choose to do so, then that right should not be restricted. We recommend that the NES not contain the restriction imposed. Companies that have a multi-State exposure should be permitted to introduce agreements that simplify and harmonise their long service leave arrangements with employees.

35. *What additional rules, if any, should be included in the proposed long service leave NES to deal with those issues?*

See previous answer.

36. *What other matters should be taken into consideration before the proposed long service leave NES is finalised?*

The majority of the discussion under this heading is related to answering this question, including the need to establish a regime that recognises the unique circumstances of the building and construction industry.

¹¹ “Matters pertaining” assists with excluding from statutory agreements, a prohibition on engaging independent contractors, a vital issue for the building and construction industry, a matter reiterated and expanded upon in Regulation 8.5 (1)(h) of the *Workplace Relations Regulations* 1996 which expands the restriction to prohibit any matter dealing with requirements relating to the conditions of engagement of independent contractors.

12 PUBLIC HOLIDAYS

- 12.1 Currently, employees, other than those who are covered by a pre-reform AWA, pre-reform certified agreement, section 170MX award¹² or preserved state agreement¹³ have a legislated right not to work on certain designated public holidays, which are the following:
- 1 January (New Year's Day)
 - 26 January (Australia Day)
 - Good Friday
 - Easter Monday
 - 25 April (Anzac Day)
 - 25 December (Christmas Day)
 - 26 December (Boxing Day)
 - substitute holidays, declared by state or territory law for one of the above listed public holidays (e.g. if Christmas Day falls on a Sunday)
 - on any other public holiday declared by or under a state or territory law (e.g. Queen's Birthday), to be observed generally or in a region, other than a union picnic day.
- 12.2 These provisions largely emulate the proposed NES at Item 47 (a)-(c) save that there is no reference to a union picnic day in the proposed item. Instead, there is to be an exclusion to be defined by reference to the regulations. We believe that the current provision has worked well and the reference to union picnic days should remain. The regulation making power should ensure that the Commonwealth has power to exclude State or Territory public holidays that are inconsistent with the general thrust of the NES.
- 12.3 The terms of Item 48 are similar to the current section 612 save that it seems strange that there is a twin requirement to assess the employee's refusal and the employer's request. Either the employee's refusal is reasonable or it is not and that should be the end of the matter. In addition, section 613 has been truncated and not entirely replicated in the NES. This should not be the case and the issue of unforeseen or emergency circumstances are very important in the building and construction industry (eg emergency work to shore up foundations following flooding) and the terms of section 613(k) should therefore be part of the NES.

¹² clause 30A of Schedule 7 to the WR Act.

¹³ clause 15F of Schedule 8 to the WR Act; but the preserved State agreement will include preserved terms from State public holiday legislation: clause 14 of Schedule 8 to the WR Act.

- 12.3 In paragraph 261 of the Discussion Paper, it is recognised that an employer and employee may agree to “swap” another day for a public holiday. The NES must make it clear that the day so swapped is regarded as the public holiday for all purposes (including penalty rates in a modern award). The time worked on the swapped day would similarly be treated as an ordinary day of work for all purposes. Consistent with this approach, the NES should expressly acknowledge that any swapped day stands as an ordinary day. However, for the protection of employees, this must have been agreed in advance.
- 12.4 Casual employees are already paid a loading which compensates them for public holidays worked. The NES as presently drafted does not deal with this issue.

Discussion Paper Questions Arising re: Public Holidays

37. *Do the range of factors provide an appropriate, simple guide to determining reasonableness or is there a need for additional express factors to be included to ensure that particular matters must be considered?*

The factors appear adequate. However, as indicated in paragraph 12.3, there should not be a need for an assessment of an employee’s refusal and an employer’s request. Either the employee’s refusal was reasonable or it was not.

38. *What specific issues could arise in connection with the ‘ordinary hours of work concept’ for particular kinds of working arrangements?*

As stated, casual employees should be expressly excluded from the public holiday provisions of the NES.

39. *What specific issues might arise for particular types of employees from the ‘base rate of pay’ rule in the proposed public holiday NES?*

We agree that absences on a public holiday should be paid at the employee’s base rate of pay.

40. *Should additional rules be included in the proposed public holiday NES to address those issues?*

These issues should be dealt with in modern awards.

41. *Are there any other matters that need to be taken into consideration when finalising the public holiday NES?*

As discussed in this section of the submission.

13 NOTICE OF TERMINATION AND REDUNDANCY PAY

- 13.1 Master Builders has concerns about the notice provisions of the NES. The first is that it should be clear that engagement and re-engagement under a daily hire system does not qualify an employee for the requisite notice.
- 13.2 Payment can be made in lieu of notice under the NES. However, the rate of pay made in substitution of working the requisite period is linked to the employee's rate of pay inclusive of allowances, loadings and monies that would accrue from expected work patterns. This is an unjustifiable cost burden. Payment should be at the employee's ordinary rate of pay, as the disabilities for which penalty rates are paid would not apply. Similarly, the circumstances which give rise to allowances being paid would not be experienced. This is consistent with the payment that would be received for taking leave. We submit that these arguments are more compelling than the argument articulated at paragraph 278 of the Discussion Paper. Increasing costs in the manner proposed far outweighs any equity effect of the kind set out in paragraph 278. This is particularly the case given that in a tight labour market, an employee could be immediately employed in another position following receipt of the relevant payment. This is substantiated by the order issued by the AIRC in the *Redundancy Provisions Test Case 2004*.¹⁴

T.1.4 In calculating any payment in lieu of notice, the wages an employee would have received in respect of the ordinary time they would have worked during the period of notice had their employment not been terminated will be used.

- 13.3 The proposed NES provisions are expressed to apply to apprentices (see paragraph 280 of the Discussion Paper). An apprentice is engaged under a contract of training, which does not permit termination without approval of a training authority or until the conclusion of the apprenticeship period. Employers who engage apprentices should not be required to provide them with the requisite notice under the NES.
- 13.4 In addition, we have a number of issues that arise from the new safety net of redundancy pay for all employees, including non-Award employees. This is because it consists of a very large proposed increase to the safety net and a high uncosted liability for the building and construction industry.

¹⁴ PR032004 dated 26 March 2004

- 13.5 On the face of it Clause 16 of the NBCIA establishes a redundancy standard well beyond that enjoyed by the community generally. The definition of redundancy in the industry consistently, since 1990¹⁵, stretched the meaning of that term, being: *“a situation where an employee ceases to be employed by an employer, respondent to this award, other than for reasons of misconduct or refusal of duty. “Redundant” has a corresponding meaning.”*¹⁶ Despite this provision having been inserted as a result of “consent” arrangements into the NBCIA, the Master Builders Board has consistently adopted a policy of rejecting this extended and misleading definition of redundancy. Accordingly, Master Builders welcomed the provisions of WorkChoices that made parts of Clause 16 non-allowable and which substituted elements of the community standard relating to redundancy for the prior provisions: see sections 513 and 525 of the Act. The operation of these provisions was, however, not entirely clear, especially having regard to Item 5A of Schedule 4 of WorkChoices. The extent to which this item saved the provisions of Clause 16 was unclear to Master Builders so an opinion on the issue was obtained from senior counsel.
- 13.6 On the basis of senior counsel’s opinion about the operation of WorkChoices, Master Builders re-drafted the provisions of Clause 16 NBCIA. Clause 16 as so amended appears as Attachment A to this submission. Notwithstanding those amendments, the statement at paragraph 290 of the Discussion Paper is correct in relation to the building and construction industry, i.e. that the entitlements are greater or structured differently from the community standard. They especially differ in relation to the provisions extending to those who employ fewer than 15 employees. Certainly it is common in the building and construction industry for monies to be paid into a redundancy fund, including at a weekly or fortnightly rate considerably in advance of the Clause 16 entitlement. However, these arrangements are generally agreed via workplace agreements and are not part of the underlying safety net save that this mechanism for satisfying the payment is authenticated in the Award. The NES should make it clear that there should be no ability to receive the payments into a fund and then subsequently qualify under the broader standard described in the

¹⁵ Final Report of the Royal Commission into the Building and Construction Industry <http://www.royalcombci.gov.au/> Volume 10 Chapter 13 page 255 contains a history of the litigation in the industry that led to the consent arrangement that was adopted by Commissioner Grimshaw in orders issued in 1990: see esp. para 27 of that Chapter, page 259.

¹⁶ Clause 16 *National Building and Construction Industry Award 2000*

Discussion Paper. At the least, this understanding must be reflected in any modernised Award but for certainty the NES should reflect this issue. Master Builders' position is that the NES must prohibit any double dipping.

13.7 Paragraph 287 of the Discussion Paper outlines a series of exemptions from severance pay, as follows:

- .1 Employees employed under a contract of employment for a specified period of time or a specified task.
- .2 Employees serving a period of probation, or a qualifying period.
- .3 Employees whose employment is terminated because of serious misconduct.
- .4 Casual employees (including long term casuals).
- .5 Seasonal employees.
- .6 Trainee and apprentice employees.

Employees who are covered by a redundancy standard which are "structured differently and/or are more beneficial than the NES" (Discussion Paper paragraph 290) should be added to the list of exemptions from the NES. In addition, there should be an exemption for termination which occurs in the ordinary and customary turnover of labour. This is consistent with the AIRC's decision in the *Redundancy Provisions Test Case 2004*¹⁷.

13.8 The inclusion of non-Award employees in the safety net is an issue that is potentially extremely costly and should be deferred until there is a complete cost/benefit analysis of taking this step. It might appropriately be referred to a Government Committee or the Productivity Commission before it is implemented in order to fully and properly assess the related cost to employers and to the community.

Discussion Paper Questions Arising re: Notice of Termination and Redundancy Pay

42. *Does the redundancy pay NES need to address the issue of different types of redundancy schemes?*

Yes and it must be assured that no "double dipping" of entitlements may occur as set out in paragraph 13.3 of this submission.

¹⁷ PR032004 dated 26 March 2004

43. *If so, how should the redundancy pay NES address this issue and what additional rules, if any, need to be included in the NES?*

The NES should reflect that if the terms of a modern Award differ from the NES this is a matter where the safety net should be permitted to be founded on a different basis when considering the particular industry. Master Builders submits that this is the case with redundancy and long service leave only, not in relation to other matters set out in the NES.

44. *What types of express provisions, if any, should be included in the proposed redundancy pay NES for the purpose of identifying the employees who are to be included in determining the application of the small business exemption?*

The small business exemption should apply across the board to all employers who employ fewer than 15 employees save where, as in the building and construction industry, this entitlement already exists for particular employees.

45. *Are there any other matters that should be taken into consideration when finalising the notice of termination and redundancy pay NES?*

Master Builders would like to reserve a response to this question dependent upon the outcome of the finalised relationship between the NES and the award modernisation request. However, an issue arises in relation to the relationship between the scale of severance payments and the payment of pro rata long service leave on termination. The scale developed by the AIRC included higher payments in years 7, 8 and 9 on account of variances across State and Territory long service leave provisions. The scale of severance pay should be adjusted to reflect any adjustments to an employee's qualification for payment of pro rated long service leave that might be introduced under a federal scheme.

14 FAIR WORK INFORMATION STATEMENT

- 14.1 Master Builders opposes the introduction of these information statements. As indicated earlier, the many small businesses within the sector mean that the burden of red tape and paper work is a real cost, eating into small business efficiency. Given that the information will be generic and not tailored to particular sectors (see paragraph 297 of the Discussion Paper) there seems little benefit to be had in requiring employers to provide these statements as opposed to them being attached to current government forms such as the Tax Declaration form or provided directly by Government. This proposition is made if the Government is unwavering in its commitment to bring about this requirement. Master Builders does not support a tailoring of the Statements to an industry – we make the points set out in this paragraph only to illustrate the deficiencies in the Statement's concept.

- 14.2 This obligation should be dropped. What benefits does it confer upon employees? There is no suggestion that the provision of the previous Government's Fact Sheet on WorkChoices added value. What evidence exists to suggest that a similar form would provide employees with a benefit that outweighs the cost of administration, particularly for small business?

Discussion Paper Questions Arising re: Fair Work Information Statement

46. *Should changes be made to the proposed information in the workplace NES to allow an employer to provide the Information Statement prior to the employee commencing employment (eg at the time an employee considers a letter of offer)?*

See the submission made by ACCI.

47. *Are there any other matters that need to be taken into consideration when finalising the information in the workplace NES?*

See the submission made by ACCI.

15 CONCLUSION

- 15.1 Master Builders is concerned about future cost increases which have been foreshadowed in this submission that would result from the implementation of the NES in its current form. There should be a second round of consultations with all affected parties, following detailed calculations made for the purposes of a draft regulatory impact statement. The draft regulatory impact statement (RIS) should then be released for public comment along with a modified NES draft.

- 15.2 The NES should by its terms make it clear that collective agreements are able to exclude its provisions subject to the protections outlined in this submission. The NES should also contemplate that modern awards and contracts for employees who earn in excess of \$100,000 will have the capacity to operate inconsistently with the NES in relation to hours of work, redundancy and the other areas outlined in this submission.

- 15.3 Master Builders commends the process of releasing a discussion paper and an exposure draft of the proposed NES provisions. This process is extremely worthwhile in isolating issues and in clarifying policy intent. The process should be adopted in relation to the substantive legislation. As mentioned earlier, there should be a second round of consultation including the exposure of an amended NES and a draft RIS.

- 15.4 Master Builders looks forward to discussions on any of the issues raised.

SUMMARY OF MAIN RECOMMENDATIONS

Paragraph 1.4: second round consultations and the opportunity to comment upon draft legislation should be provided.

Paragraph 3.2: any consideration of a federal minimum wage must be inclusive of the special categories now set out in Section 197 of the Act.

Paragraph 3.3: the equivalent of the current federal minimum wage should continue to be legislated.

Paragraph 4.2: employees should be able to trade quantifiable components of the NES for other benefits under a collective agreement, subject to a number of protections.

Paragraph 4.4: there should be an appropriate exclusion from the Award system for those earning over \$100,000 per annum and the NES should be able to be applied flexibly to those so excluded. For instance, there should be an exclusion in relation to the reasonable hours criteria for these workers, subject to an overriding consideration for the safety of the employee.

Hours of Work

Paragraph 5.1: The provisions relating to hours currently expressed to be “maximum” hours for a week, should be retitled “reasonable weekly hours”.

Paragraph 5.3: It should be made clear that employees cannot trade away, for example, higher penalty rates in agreements for a higher rate of pay under the no disadvantage test, then be entitled to refuse to work required additional hours.

Paragraph 5.4: Similarly, for award free salaried employees, there should be a reverse onus of proof, so that where a salary is paid, it is incumbent on the employee to show that additional hours were unreasonable.

Paragraph 5.5 and 5.6: Master Builders opposes the introduction of the new criterion that is a requirement to examine “any other relevant matter” in assessing the reasonableness of hours. This part of the safety net would benefit from being triggered only where an employee makes a complaint.

Paragraph 5.6: Master Builders supports the inclusion of general averaging provisions in the NES.

Paragraph 5.6: The NES should expressly provide that an employer will not be in breach of the NES where an employee works additional hours of their own volition.

Requests for Flexible Working Arrangements

Paragraph 6.5: Employers, particularly small businesses should not be penalised for not complying with small administrative details in relation to requests (by parents) for flexible working arrangements. For instance, there should be some flexibility in the time frames imposed on employers to respond to a written request. This will assist employers with the additional administrative burdens imposed by the proposed provisions.

Paragraph 6.6: The flexible working arrangement, if granted, should not “lock in” the particular employer but should be able to be reviewed if the employer is no longer able to accommodate the arrangement. The duration of the arrangement should be able to be revisited at reasonable intervals.

Paragraph 6.6: There should be no provisions in Awards that would constrain employers and employees from reaching flexible working arrangements in relation to these type of requests.

Paragraph 6.6: The ability to make the request should be limited to the mother or father of the child.

Paragraph 6.6 and 7.5: In terms of what constitutes reasonable business grounds, the proposed test is appropriately broad. There should be no limiting factors imposed on employers as to what may or may not constitute “reasonable business grounds” for refusal of a request.

Paragraph 6.6: The notion of when a child becomes ‘of school age’ should be defined with greater clarity than is currently set out in the NES.

Parental Leave and Related Entitlements

Paragraph 7.2: In relation to parental leave, the concurrent leave period available to the father should be reduced from up to three weeks to one week (except where it relates to an adoption).

Paragraph 7.3: At present there is an entitlement for a pregnant female employee who should not continue to work in her present position because of risks or hazards arising from her pregnancy or that position, to be transferred to an appropriate safe job, or where there is no safe job available, to be given paid leave. Master Builders submits that there should be an exemption for small business from this requirement where an employer employs fewer than 15 employees.

Paragraph 7.4: Master Builders submits that the current sections 273 and 274 of the Act should be retained. These provisions essentially relate to when the period of maternity leave begins, and confer mutual benefit on employers and affected employees.

Paragraph 7.5: Employers should have the right to determine the fitness for work of a pregnant employee, and to require that employee to provide medical evidence of fitness for work. Employers should have the right to seek that the employee take 'no safe job leave' or to remain on unpaid maternity leave following the birth of the child, to ensure the safety of the employee.

Paragraph 7.5: Master Builders submits that Item 23 of the Exposure Draft relating to consultation be deleted as it is administratively burdensome, and unnecessary. There are also logistical problems at present with its terms. It could be replaced with a notification from the employer to the employee at their last known address.

Annual Leave

Paragraph 8.2: Cashing out of annual leave appears, on the face of it, to be inconsistent with the NES' other provisions. The NES should recognise the potential for flexibility where that notion would enhance productivity. Matters such as averaging of hours, flexibility of rostered days off and cashing out of annual leave should be permitted to operate across all industries.

Paragraph 8.3: Master Builders appreciates the references to 'daily hire engagement' in the Discussion Paper. The NES should explicitly recognise 'daily hire engagement', as a legitimate and ongoing method of employment as many of the 'normal' methods for calculating entitlements are affected by this type of engagement.

Paragraph 8.11: s236(5) of the Act relating to leave during shut down periods is problematic for the building and construction industry. The NES should reflect the following industry practices: firstly, employees should be able to draw forward future annual leave entitlements where an employee has insufficient leave credited to take paid leave during a shut down period. Where employment is terminated, an equivalent amount where applicable, could be deducted from final remuneration payable on termination. Secondly, employees could use existing annual leave credits and any remaining leave could be treated as leave without pay.

Paragraph 8.12: There should be no capacity to double dip and obtain sick leave entitlements with a reaccrediting of annual leave should an employee fall ill while on annual leave.

Personal/Carer's Leave and Compassionate Leave

Paragraph 9.2, 9.3: Master Builder's opposes the removal of the cap on carer's leave.

Paragraph 10.2: Master Builder's recommends that emergency services leave be capped, to a maximum of 30 days per annum unless in the circumstances of the employee or employer this would be unreasonable.

Paragraph 10.3: Master Builder's recommends that the requirement to make the payment for jury service be capped, to a maximum of 5 days.

Paragraph 10.3: Master Builders does not consider it necessary to have express provisions in the NES dealing with the taking of community service leave by shift workers.

Long Service Leave

Paragraph 11.3: In the context of establishing a new safety net for employees, independent contractors should be excluded.

Paragraph 11.4, 11.7: The portable long service leave funds established in each State and Territory for building and construction industry employees should be excluded from the national scheme to be established under the NES.

Paragraph 11.8: Master Builders recommends a COAG inquiry into whether or not the interests of the industry would be advanced by the creation of a harmonised national scheme for portable long service leave. We would be opposed to a federal scheme which is based on the highest common denominator because of increased costs without any related productivity increase.

Public Holidays

Paragraph 12.3: The NES should acknowledge expressly that any swapped day stands as an ordinary day, agreed in advance.

Notice of Termination and Redundancy Pay

Paragraph 13.8: Master Builders considers that the notice provisions of the NES should be clarified so that it is clear that engagement and re-engagement under a daily hire system does not qualify an employee for the requisite notice.

Paragraph 13.9: Redundancy pay in the NES should address the issue of different types of redundancy schemes to ensure no double dipping of entitlements.

Fair Work Information Statement

Paragraph 14.1: Master Builders opposes the introduction of these information statements.

Other

Paragraph 15.2: The NES should make it clear that collective agreements are able to exclude its provisions subject to the protections outlined in this submission.

16. REDUNDANCY**16.1 Definition**

Redundancy means a situation where the employment of an employee is terminated and where the termination is either at the initiative of the employer and on grounds of operational requirements or because the employer is insolvent. .

Comment [I1]: S513(1)(k) and S513(4) & (5) and Sch 6, cl 17 (1) (m) provides redundancy pay within the meaning of cl 17(3) & cl 17(4).

16.2 Redundancy pay

16.2.1 A redundant employee shall receive redundancy/severance payments, calculated as follows, in respect of all continuous service (as defined by this award) with the employer:

Comment [I2]: Redundancy Pay includes > 15 employees definitions.

Period of continuous service with an employer	Redundancy/severance pay
1 year or more but less than 2 years	2.4 weeks pay plus for all service in excess of 1 year, 1.75 hours pay per completed week of service up to a maximum of 4.8 weeks pay
2 years or more but less than 3 years	4.8 weeks pay plus, for all service in excess of 2 years, 1.6 hours pay per completed week of service up to a maximum of 7 weeks pay
3 years or more than but less than 4 years	7 weeks pay plus, for all service in excess of 3 years, 0.73 hours pay per completed week of service up to a maximum of 8 weeks pay
4 years or more	8 weeks pay

16.2.2 Provided that an employee employed for less than twelve months shall be entitled to a redundancy/severance payment of 1.75 hours per week of service if, and only if, redundancy is occasioned otherwise than by the employee.

16.2.3 **Week's pay** means the ordinary time rate of pay at the time of termination for the employee concerned.

16.2.4 If an employee dies with a period of eligible service which would have entitled that employee to redundancy pay, such redundancy pay entitlement shall be paid to the estate of the employee.

16.2.5 Any period of service as a casual shall not entitle an employee to accrue service in accordance with this clause for that period.

16.2.6 Service as an apprentice will entitle an employee to accumulate credits towards the payment of a redundancy benefit in accordance with this clause if the employee completes an apprenticeship and remains in employment with that employer for a further twelve months.

16.2.7 An employer bound by this award may utilise a fund to meet all or some of the liabilities created by this clause. Where an employer utilises such a fund:

16.2.7(a) payments made by a fund designed to meet an employer's liabilities under this clause, to employees eligible for redundancy/severance pay shall be set off against the liability of the employer under this clause, and the employee shall receive the fund payment or the award benefit whichever is the greater but not both; or

16.2.7(b) where a fund, which has been established pursuant to an agreement between unions and employers, does not make payments in accordance with this clause, contributions made by an employer on behalf of an employee to the fund shall, to the extent of those contributions, be set off against the liability of the employer under this clause, and payments to the employee shall be made in accordance with the rules of the fund or any agreement relating thereto and the employee shall be entitled to the fund benefit or the award benefit whichever is greater but not both.

16.2.8 Service as an employee for the Crown in the Right of the State of Western Australia, the Crown in the Right of the State of New South Wales, Victorian Statutory Authorities, or the Crown in the Right of the State of Victoria shall not be counted as service for the purpose of this clause.

16.3 Employee leaving during notice period

An employee whose employment is to be terminated in accordance with this clause may terminate their employment during the period of notice and if this occurs, shall be entitled to the provisions of this clause as if the employee remains with the employer until expiry of such notice, provided that, in such circumstances, the employee shall not be entitled to payment in lieu of notice.