



**Australian Government**

**Department of Education, Employment  
and Workplace Relations**

# **Discussion Paper**

## National Employment Standards Exposure Draft



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## **ABBREVIATIONS AND GLOSSARY**

AIRC	Australian Industrial Relations Commission
NES	National Employment Standards
Standard	Australian Fair Pay and Conditions Standard
WR Act	<i>Workplace Relations Act 1996</i>

## **MAKING A SUBMISSION**

### **How to make a submission**

Written submissions are sought on this paper. The closing date for submissions is 4 April 2008. Submissions can be provided electronically to the following email address: NES\_comment@deewr.gov.au.

Unless marked 'confidential', submissions will be treated as public and posted on workplace.gov.au as soon as practicable.

While electronic submissions are preferred, submissions may also be mailed to:

NES Exposure Draft submission  
GC 31  
Workplace Relations Policy Group  
Department of Education, Employment and Workplace Relations  
GPO Box 9879  
CANBERRA ACT 2601

This paper is available on the internet at [workplace.gov.au](http://workplace.gov.au).

If you have difficulties in accessing this paper online, please contact Paul Williamson on (02) 6121 7772.

# INTRODUCTION

## What are the National Employment Standards?

1. The Government is committed to the establishment of a fair, flexible and productive workplace relations system for Australia.
2. A key component of the Government's new fair and balanced workplace relations system is an enforceable safety net that protects fair minimum wages and conditions for all working Australians.
3. The Government's safety net will be in two parts:
  - 10 National Employment Standards (the NES) in legislation - which will apply to all employees
  - modern awards which may provide industry-relevant detail and build on the NES (to ensure a fair minimum safety net for the employees covered by the modern award) and may contain up to a further 10 minimum standards which can be tailored to the industries and occupations to which they apply.
4. The NES represent key minimum entitlements for all employees in the new system. They will be guaranteed in legislation so that they cannot be excluded or modified in a way that undermines the safety net.
5. The matters dealt with by the NES are:
  - (a) Maximum weekly hours of work
  - (b) Requests for flexible working arrangements
  - (c) Parental leave (and related entitlements)
  - (d) Annual leave
  - (e) Personal/carer's leave and compassionate leave
  - (f) Community service leave
  - (g) Long service leave
  - (h) Public holidays
  - (i) Notice of termination and redundancy pay
  - (j) Fair Work Information Statement.
6. The draft provisions of the NES are annexed to this discussion paper.
7. Please note that the NES do 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.

## **What is the purpose of an Exposure Draft of the NES?**

8. As outlined above, the NES will play a central role in the Government's new workplace relations system. It is a priority for the Government to successfully deliver NES that are fair to working people, flexible for business and promote productivity and economic growth for the future prosperity of our nation.

9. The NES will be relevant to all employees and employers in the workplace relations system, which will be fully operational by 1 January 2010.

10. The Exposure Draft of the NES has been released following the introduction of the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 to allow all stakeholders and interested parties the opportunity to consider and contribute to the final content and operation of the NES.

11. The purpose of this discussion paper is twofold:

- to assist stakeholders and the general public to understand the operation of the proposed NES and their role in the Government's new workplace relations system
- to seek comments and submissions about the operation of the NES.

12. This discussion paper outlines each entitlement of the NES in detail and highlights some particular areas that stakeholders and interested parties may wish to comment on. However, stakeholders and interested parties are free to comment on any aspect of the NES. The Government is particularly interested in hearing about the interaction of the NES with diverse or atypical working arrangements as well as award-free employees.

## **What happens after the Exposure Draft process?**

13. The Government will consider the submissions received and may make amendments to enhance the operation of the NES or to address any unintended consequences that arise from the drafting of the proposed NES.

14. The finalised NES will be included in the Government's substantive legislative reforms to be introduced into Parliament later this year.

15. The finalised NES will also be provided to the Australian Industrial Relations Commission (AIRC) to assist it with the preparation of modern awards.

16. The NES will commence operation on 1 January 2010.

## **Overview of the operation of the NES**

17. The proposed NES comprise key minimum conditions applicable to all employees who will be covered by the federal system when the NES commence on 1 January 2010. The extent of coverage of the NES will be finalised in the context of the Government's substantive workplace relations reforms. Rules identifying the extent of coverage of the NES are therefore not included in the Exposure Draft of the NES.

18. The proposed NES are intended to be as simple as possible so that all employees and employers can understand and comply with their rights and obligations.

19. It is intended that the proposed NES contain only those application and machinery rules that are essential to the effective operation of an entitlement, rather than lengthy, detailed and inflexible rules.
20. The modern awards that will be developed by the AIRC may provide industry-relevant detail about entitlements in the NES and could build on the NES to ensure fair minimum safety net conditions in particular industries.

### **Interaction rules**

21. The NES will be legislated minimum entitlements that cannot be excluded or modified to the detriment of an employee by a contract of employment or another industrial instrument (such as a modern award or workplace agreement).
22. It will always be open to an employer to offer an employee, by way of contract or agreement, entitlements that are more generous than those contained in the NES. This is consistent with the role of the NES as minimum standards.

### **How do the NES interact with modern awards?**

23. Modern awards will be created by the AIRC over the period leading up to 1 January 2010. Modern awards will commence operation on 1 January 2010 at the same time as the NES.
24. Modern awards are intended to complement the NES. Together, the NES and a modern award guarantee a safety net of fair minimum wages and conditions for working Australians who are covered by the award system.
25. Modern awards will contain minimum terms and conditions of employment for particular industries and occupations in relation to 10 matters including minimum wages, penalty rates, overtime and allowances.
26. Subject to certain limitations as outlined below, modern awards may also contain terms that relate to matters contained in the NES.
27. A modern award may contain machinery provisions about how the NES entitlements can operate in a particular industry. A rule that enables an employee to take double the period of annual leave at half pay by agreement with their employer is an example of a machinery provision that might be included in a modern award.
28. Modern awards may include industry detail about matters in the NES. For example, the proposed maximum weekly hours entitlement expressly allows modern awards to include provisions for the averaging of hours of work up to 38 hours a week over a specified period set out in the award. This means that a modern award can provide for industry-specific arrangements about the averaging of hours (including rostered day off arrangements or flex-time arrangements).
29. Modern awards may also build on entitlements in the NES. In creating the modern awards, the AIRC may build on the NES if it considers it necessary to do so in order to ensure the maintenance of a fair minimum safety net for the employees who are to be covered by a modern award, having regard to existing award entitlements for those employees.

30. For example, the AIRC might consider that employees who work in a particular industry require in excess of the NES entitlement of 10 days' personal leave if, due to the nature of the work in that industry, a higher quantum of personal leave is necessary to ensure a fair minimum safety net for employees.

31. In addition, in limited circumstances, the proposed NES expressly allow a modern award to deal with a matter that could otherwise be seen as modifying or excluding an employee's NES entitlement. For example, the annual leave entitlement allows a modern award to include provisions about the cashing out of annual leave or directing employees to take annual leave in particular circumstances (such as a Christmas shut-down period).

32. The proposed NES entitlements are different from award entitlements and will be separately enforceable. It is not intended that NES entitlements will be included in modern awards as a matter of routine, although the AIRC will have discretion to replicate a provision of the proposed NES where it considers this essential for the effective operation of a particular provision in a modern award. A modern award may of course cross-reference the provisions of the NES.

33. Other than as set out above, the AIRC must not include a term in a modern award on the basis that it would be an allowable modern award matter, where the substance of the matter is dealt with under the proposed NES. For example, although 'leave' is an allowable modern award matter, there would be no scope for the AIRC to include recreation leave in an award because paid annual leave is already included in the NES. The AIRC could only build on the annual leave entitlement in a modern award if it was necessary to do so to ensure the maintenance of a fair minimum safety net for employees who are to be covered by the modern award.

34. Although the NES cannot be modified or excluded in a workplace agreement, terms and conditions of employment contained in modern awards may be varied or excluded in a workplace agreement subject to the workplace agreement meeting the 'Better Off Overall Test' that will be conducted by the new independent umpire, Fair Work Australia.

## **Compliance and remedies**

35. The proposed NES do not set out a compliance regime for the NES as these matters will be settled in the context of the Government's substantive workplace reforms and the establishment of the new independent umpire, Fair Work Australia.

## **Possible issues for discussion**

### **What happens to an employee that is not covered by a modern award?**

36. Certain types of employees may not be covered by a modern award on and from 1 January 2010. These include:

- (a) employees, such as managerial employees who, because of the nature or seniority of their role, have traditionally been award-free
- (b) high-income employees who negotiate with their employer about their terms and conditions of employment under the new workplace relations system

- (c) employees who, because they work in an emerging industry or occupation, do not fall within the scope of a modern award but who perform work of a similar nature to work that has historically been regulated by awards in Australia.

37. Consideration needs to be given to the best way of ensuring that the proposed NES operate effectively for the employees referred to above and their employers, having regard to the principle that that the NES are minimum entitlements.

38. One approach for the employees referred to in paragraphs (a) and (b) above may be to have a set of specific 'default' rules included in the legislation for those employees. An approach for the employees referred to in paragraph (c) above may be for the AIRC to determine a 'catch-all' award for those employees. That award would have interim operation until a modern award was made.

### **Preliminary questions**

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

## **MAXIMUM WEEKLY HOURS**

### **Objective of entitlement**

39. The Government considers that the proposed maximum hours NES strikes a balance between providing flexibility for business while ensuring that a maximum 38 hour week remains the standard for full-time employees.

40. A 38 hour week for full-time employees is the accepted community standard and has been a feature of many Australian workplaces since its introduction in the 1980s.

41. Long working hours can affect the health, safety and well-being of employees while also having a detrimental impact on their families and the community.

42. The Government also recognises that, due to business requirements, employees may be required to work in excess of the standard 38 hour week.

43. Therefore, under the proposed NES, an employee may be required to work reasonable additional hours in excess of a 38 hour week but cannot be required to work unreasonable additional hours.

### **Outline of entitlement**

44. The proposed maximum hours NES provides that an employee's hours of work for an employer must not exceed 38 hours in a week. This provision is subject to the rule that an employer may require an employee to work reasonable additional hours in the week.

45. An employee may refuse to work additional hours if the hours are unreasonable.

46. A list of factors must be taken into account in determining whether additional hours are reasonable or unreasonable including whether the employee is entitled to receive overtime payments, penalty rates or other compensation for working the additional hours.

47. In determining the number of hours an employee has worked in a week, any hours of authorised leave taken by the employee in the week are taken into account.

### **What factors must be considered in determining whether additional hours are reasonable?**

48. The proposed maximum hours NES sets out a range of factors that must be considered in determining whether additional hours are reasonable or unreasonable. These are:

- any risk to employee health and safety from working the additional hours
- the employee's personal circumstances, including family responsibilities
- the needs of the workplace or enterprise in which the employee is employed

- whether the employee is entitled to receive overtime payments, penalty rates or other compensation for working the additional hours
- the notice (if any) given by the employer of any request or requirement to work the additional hours
- the notice (if any) given by the employee of his or her intention to refuse to work the additional hours
- any other relevant matter.

#### **Example**

Boris is rostered to work 38 hours per week. In one week Boris takes 7.5 hours leave so he only works 30.5 rostered hours that week. However, Boris' employer requires him to work six additional hours in order to complete an important project.

For the purposes of the proposed NES entitlement to maximum hours, the authorised leave is counted towards the hours worked so Boris' hours of work for that week are still 38.

Whether the additional six hours are reasonable or unreasonable requires a consideration of all of the relevant factors such as the needs of the workplace, the notice given by Boris' employer and whether Boris would receive overtime payments for working the additional hours.

#### **Do the NES allow for averaging of hours?**

49. The proposed maximum hours NES does not include rules dealing with the averaging of hours. The Government considers that averaging arrangements are better dealt with under modern awards which can set out industry-specific arrangements. Therefore, the proposed NES expressly allows modern awards to deal with averaging of hours arrangements.

50. The Government's intention is that, during the award modernisation process, the AIRC may include averaging arrangements in modern awards that are tailored to particular industries and occupations.

#### **Where there is an averaging arrangement, how are reasonable additional hours determined?**

51. An averaging arrangement in a modern award would be a relevant factor in determining whether additional hours in excess of 38 per week were reasonable or unreasonable.

### **Example**

The modern award regulating Alex's employment includes averaging arrangements in relation to hours of work so that full-time employees would ordinarily work 152 hours over four weeks (an average of 38 hours per week). Over a four week period, Alex's work pattern was as follows:

Week 1 – worked 21 hours

Week 2 – worked 60 hours

Week 3 – worked 38 hours

Week 4 – worked 33 hours.

While the averaging arrangement would be relevant to determining the reasonableness of the additional 22 hours that Alex was required to work in week 2, other factors such as Alex's family responsibilities, his health and safety and the notice he was given of having to work those additional 22 hours would also be relevant.

Under the current Standard, the additional 22 hours worked by Alex in week 2 would not even be considered to be additional hours because of how averaging arrangements operate. This means that no question would arise as to whether the additional 22 hours in a single week were reasonable, having regard to, for example, Alex's family responsibilities, his health and safety or the notice he was given of having to work those additional hours.

## **Possible issues for discussion**

### **Construction of the hours standard**

52. The proposed maximum hours NES operates to prevent an employee from being required to work more than 38 hours per week, other than where the additional hours are reasonable. The intention is that, where an employee works additional hours of their own volition, those additional hours would not constitute a breach of the proposed maximum hours NES by the employer.

### **Question**

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?

### **Operation of the entitlement in relation to employees who work less than 38 hours per week**

53. The proposed maximum hours NES reflects the Government's concern about excessively long working hours and applies to full-time, part-time and casual employees. This means all employees are guaranteed maximum working hours of 38 hours each week (plus additional reasonable hours).

54. However, for a part-time employee who normally works relatively few hours per week (e.g. 15 hours), working a significant number of additional hours (e.g. 20 hours) may be considered unreasonable for that employee.

**Question**

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?

**High income employees**

55. Many employees (e.g. professionals) earn high levels of remuneration that reflect the long and irregular hours in excess of the standard 38 hour week worked by such employees.

**Question**

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?

**Pieceworkers**

56. Some employees are not remunerated on an hourly basis but instead are considered pieceworkers and are paid according to their output (e.g. the number of garments produced). Pieceworkers may also include those who are paid by commission (e.g. real estate agents).

57. It is intended that, irrespective of the manner in which an employee is remunerated, the employee should not be required by the employer to work unreasonable hours.

**Question**

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

**General issues**

**Question**

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

# REQUESTS FOR FLEXIBLE WORKING ARRANGEMENTS

## Objective of entitlement

58. The Government is committed to effective measures that will help all working families balance their work and family responsibilities. The Government is also committed to helping businesses to manage their workforce to encourage greater workforce participation.

59. The Government recognises that working families can find it particularly difficult to balance work and family responsibilities when a child is not old enough to attend school. It is for this reason that the proposed NES will include a right for certain employees to request flexible work arrangements from their employer until their child reaches school age. An employer can only refuse a request on reasonable business grounds.

60. The Government considers that implementing family friendly arrangements is best dealt with at the workplace level. Whether a particular flexible working arrangement requested by an employee can be accommodated by an employer will vary depending on the circumstances of the particular business.

61. Whether a business has reasonable business grounds for refusing a request for flexible working arrangements will not be subject to third party involvement under the NES. The United Kingdom experience has demonstrated that simply encouraging employers and employees to discuss options for flexible working arrangements has been very successful in promoting arrangements that work for both employers and employees.

## Outline of entitlement

62. The proposed flexible working arrangements NES applies if the employee:

- is a parent of a child under school age
- has a responsibility for the care of a child under school age.

63. The employee must make the request in writing and must set out details of the change sought and the reasons for the change.

64. The employer must give the employee a written response to the request within 21 days.

65. If the employer refuses the request, the employer must provide reasons for the refusal. An employer can only refuse a request on 'reasonable business grounds'.

66. If an employer refuses a request on reasonable business grounds, it will also be open to the employer or employee to suggest a modification to the employee's request that might be more easily accommodated by the employer.

### **What are flexible working arrangements?**

67. The proposed NES does not define ‘flexible working arrangements’ because the Government does not wish to limit the scope or types of arrangements that an employer and employee might agree on to assist the employee to balance their work and family responsibilities.

68. Flexible working arrangements could include a reduction in hours of work (e.g. part-time work), a change to non-standard start or finish times, working from home or another location, working ‘split-shifts’ or job sharing arrangements.

### **What does ‘school age’ mean?**

69. The proposed flexible working arrangements NES does not include a definition of ‘school age’. Instead it relies on state and territory laws that set out when a child must start attending school. This means that the age of a child ‘under school age’ may vary depending on the jurisdiction where the child resides.

### **What does ‘responsibility for the care of a child’ mean?**

70. The proposed flexible working arrangements NES covers an employee who has a responsibility for the care of a child. The right is intentionally not restricted to those with a legal responsibility. This is to ensure that various parent-like relationships involving a responsibility for the care of a child are captured (e.g. guardianship, fostering arrangements).

### **What does ‘reasonable business grounds’ mean?**

71. The proposed flexible working arrangements NES does not define the phrase ‘reasonable business grounds’. Factors that may be relevant in a particular case could include the cost of accommodating the employee’s request, the employer’s ability to reorganise work arrangements and the business needs of the employer.

72. The Government intends that Fair Work Australia will provide general information and assistance to employers as to what may constitute reasonable business grounds.

#### **Example**

Katerina works in a small sandwich shop in the city. Katerina is one of two staff employed in the shop. Katerina has a small child and due to changes in her child’s care arrangements makes a written request for a change in working arrangements. She requests not to work between 11am – 2pm on Tuesdays, Wednesdays and Thursdays.

This is the busiest time of the day for the sandwich shop and the employer is unable to find staff who are willing to work such short hours. Katerina’s employer provides a written response declining the request and setting out the reasons.

### **Does an employer have to grant the request in full or refuse the request?**

73. The proposed flexible working arrangements NES does not require the employer to choose between granting an employee’s request in full or refusing the request. Rather, employers and employees are encouraged to discuss their working arrangements and, where possible, reach an arrangement which balances the employee’s needs with the employer’s business requirements. For example, an employer may be able to accommodate

some of the changes requested while declining others (e.g. agreeing to a reduction in daily hours but with a different span of days worked).

#### **Example**

Thuy wants to leave work at 3pm each day to pick up her three year old child from short-day child care and gives a written request to her employer setting out the details of the change sought and the reasons for the request. The employer considers the request but is unable to grant the changes requested.

Rather than just respond to Thuy on that basis, her employer decides to have an informal discussion with Thuy and explore whether there are possible alternatives. Thuy and her employer settle on an arrangement that allows Thuy to start later and finish earlier on two week days and to work from home on Saturday mornings to make up those hours.

Thuy's employer sets out the reasons for refusing the requested changes and the alternative arrangements that can be accommodated in its written response to Thuy's request.

#### **Can Fair Work Australia impose a flexible working arrangement on an employer?**

No. The proposed flexible working arrangements NES sets out a process for encouraging discussion between employees and employers. The NES recognises the need for employers to be able to refuse a request where there are 'reasonable business grounds'. Fair Work Australia will not be empowered to impose the requested working arrangements on an employer.

#### **Possible issues for discussion**

##### **Responsibility for a child**

74. The proposed flexible working arrangements NES does not restrict the term 'responsibility for the care of a child' to, for example, 'legal' responsibility for the care of a child.

#### **Question**

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?

##### **Reasonable business grounds**

75. The proposed flexible working arrangements NES does not define the term 'reasonable business grounds'. The intention is to avoid limiting by legislation the grounds on which an employer may reasonably refuse to implement the requested working arrangements. Instead Fair Work Australia will provide general information and assistance to employers as to what may constitute reasonable business grounds.

**Question**

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?

**General issues**

**Question**

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

## **PARENTAL LEAVE AND RELATED ENTITLEMENTS**

### **Objective of entitlement**

76. The Government recognises that many families want to have a parent care for a child during the first two years of the child's life. The Government also believes that maintaining the links between new parents and the workforce will ensure strong workforce participation of parents to the benefit of business and the overall economic prosperity of Australia.

77. This is why the Government is enhancing parental leave entitlements to provide each parent with a separate entitlement to up to 12 months' unpaid parental leave in connection with the birth or adoption of their child. This means, for example, that the mother of a child could take 12 months of leave at the time of the birth of a child and then return to work at which point in time the father could take 12 months of leave. Alternatively, where the family prefers one parent to take a longer period of leave, that parent will have the right to request up to 12 months' additional unpaid parental leave.

### **Outline of entitlement**

78. The proposed parental leave NES provides each parent with an entitlement to be absent from work for separate periods of up to 12 months of unpaid parental leave. Unpaid parental leave must be taken in association with the birth of a child to an employee or their spouse or the adoption of a child below school age.

79. A parent who takes 12 months' parental leave may request additional leave from their employer of up to 12 months. The employer may refuse the request on reasonable business grounds.

80. The proposed parental leave NES also entitles an employee returning from parental leave to return to the position they held prior to commencing that leave. Where that position no longer exists, the employee will be entitled to return to a position comparable in status and pay with that former position.

81. If a female employee had been transferred to a different position or reduced her hours of work prior to taking parental leave for reasons associated with her pregnancy, she would be entitled to return to the position and hours of work she held prior to that transfer or reduction.

82. The proposed parental leave NES also provides the following related entitlements:

- special maternity leave
- pre-adoption leave
- transfer to a safe job and associated leave
- consultation about workplace change.

83. These related entitlements are discussed at paragraphs 105 -117 of this paper.

### **Who is eligible for parental leave?**

84. Unpaid parental leave is available to a full-time or part-time employee who has completed at least 12 months of 'continuous service' with an employer. A casual employee employed on a regular and systematic basis over at least a 12-month period prior to the expected date of birth is also entitled to unpaid parental leave.

85. To be eligible for parental leave, the employee must have (or have future) responsibility for the care of the child.

86. In order to access parental leave, an employee will be required to:

- provide 10 weeks' notice of intention to take unpaid parental leave, unless this is not reasonably practicable
- provide reasonable evidence of eligibility (e.g. a medical certificate confirming pregnancy) on their employer's request.

### **What does 'continuous service' mean?**

87. Under the proposed parental leave NES, continuous service for the purposes of unpaid parental leave means all periods of employment other than any unauthorised absences (e.g. a period of unprotected industrial action).

### **When can an employee take parental leave?**

88. The proposed parental leave NES sets out different arrangements for taking unpaid parental leave depending on whether:

- there is only one employee who intends to take parental leave
- there are two employees, each the spouse of the other, and they both want to take parental leave.

89. In each case, a period of parental leave must be taken in a 'single continuous period' (refer to sections 14(2) and 15(2) of the Exposure Draft). This means that an employee cannot commence parental leave, return to work and then recommence parental leave (other than where a parent takes up to three weeks' concurrent leave at the time of the birth or placement of the child).

90. 'Spouse' is defined to include a former spouse, a de facto spouse and a former de facto spouse.

### **When does parental leave commence?**

91. Where parental leave is taken in association with the birth of a child:

- a female employee taking the first period of leave may start parental leave up to six weeks before the expected birth of the child or must start parental leave from the date of birth of the child
- a male employee taking the first period of leave must start parental leave from the date of birth of the child

- an employee taking a period of leave after their spouse has taken leave, must start their leave immediately after the end of the first employee's period of leave.

92. Where the leave is taken in association with the placement of a child for adoption:

- the employee taking the first period of leave must start their leave on the day of placement of the child
- an employee taking the second period of leave must start their leave immediately after the end of the first employee's period of leave.

93. Nothing prevents an employee from electing to take less than 12 months of parental leave.

#### **Is there a mandatory period of parental leave?**

94. The proposed parental leave NES will not set out a mandatory period of parental leave for a female employee due to give birth. Rather, the NES will entitle an employee to elect to commence parental leave at any time within six weeks of the expected date of birth of the child.

#### **Can an employee couple take parental leave at the same time?**

95. Under the proposed parental leave NES, parents are entitled to take three weeks of concurrent leave on the birth or adoption of a child. This is an exception to the rule requiring parental leave to be taken in a single continuous period. Other than at this time, parents cannot take unpaid parental leave at the same time. Any concurrent leave taken will be deducted from an employee's 12-month parental leave entitlement.

#### **Can an employee take other leave during parental leave?**

96. During a period of parental leave, an employee may take other authorised leave, as agreed with their employer. This means that an employee could use paid leave entitlements such as annual or long service leave during a period of parental leave. The taking of paid leave during parental leave cannot extend the employee's right to be absent from work for more than 12 months. However, an employer and employee may agree for the employee to take other leave after a period of unpaid parental leave in accordance with the normal rules for taking that leave.

97. Under the proposed parental leave NES, an employee is not entitled to take personal/carer's leave or compassionate leave or be paid for absence on community service during a period of parental leave. This rule applies even where the employee elects to take paid annual leave during a period of parental leave. This is because any other authorised leave taken in conjunction with unpaid parental leave forms part of the parental leave period. The proposed parental leave NES does not entitle an employee who is absent on parental leave to payment for any public holidays falling within this period.

**Example**

Mei is a pregnant employee entitled to parental leave. She intends to take her full 12-month unpaid parental leave entitlement. However, she also has four months of accrued long service leave and two weeks of accrued annual leave that she would like to take while she is absent on parental leave.

Under the proposed NES Mei is entitled to be absent from work for up to 12 months. During this 12-month period, she may also take her 18 weeks of paid leave at whatever time she chooses during her continuous period of parental leave, subject to agreement with her employer.

It does not matter when during her parental leave she uses the paid leave, as long as the paid leave does not extend her total absence from work beyond 12 months (unless an extension is granted by her employer).

**Can an employee extend a period of unpaid parental leave?**

98. The proposed parental leave NES entitles one parent to request an additional period of unpaid parental leave of up to 12 months, rather than their spouse taking that period of their parental leave entitlement.

**How can an employee request additional leave?**

99. An employee who takes 12 months of unpaid parental leave may request his or her employer to agree to an extension of that leave for up to a further 12 months, immediately following the end of their initial 12-month period. The request must be in writing and be submitted at least four weeks before the end of the initial parental leave period. Any extension that is granted will reduce the parental leave entitlement of the employee's spouse (where both parents are entitled to parental leave).

**When can an employer refuse a request for additional leave?**

100. The proposed parental leave NES allows an employer to refuse a request for additional leave where there are 'reasonable business grounds' for doing so. 'Reasonable business grounds' is not defined in the NES, rather the phrase would be given its ordinary meaning. Factors that may be relevant in a particular case could include the costs to the employer, the employer's ability to reorganise workloads and the availability of replacement staff.

101. The Government intends that Fair Work Australia will provide general information and assistance to employers as to what may constitute reasonable business grounds. Whether a business has reasonable grounds for refusing a request for additional leave will not be the subject of third party involvement or review under the NES.

**Example**

Sara is an employee entitled to parental leave. Her spouse John is also entitled to parental leave. Sara takes 12 months of unpaid parental leave when she gives birth and requests an extension of six months, which is granted by her employer. John took three weeks of concurrent parental leave when Sara gave birth and wishes to take a further period of parental leave to care for the child. The maximum amount of parental leave that John can take is 23 weeks, worked out as follows:

- John and Sara are each entitled to 12 months of unpaid parental leave (52 weeks)

- John's 12-month parental leave entitlement is reduced by the length of Sara's extension, that is, six months (26 weeks)
- John's entitlement is further reduced by the three weeks of concurrent leave he has already taken
- this leaves John with an entitlement to 23 weeks of unpaid parental leave.

### **What notice and evidence obligations must be met to take parental leave?**

102. The proposed parental leave NES contains simple notice and evidence rules for the taking of parental leave. In order to comply with the provisions an employee wishing to take parental leave must give their employer 10 weeks' notice before starting the leave (or if this is not reasonably practicable, as soon as is practicable). The notice must specify the intended start and finish dates of the leave.

103. An employee would have to give reasonable evidence of their entitlement to parental leave (i.e. evidence of the expected date of birth or day of placement) on the employer's request for such evidence.

#### **Example**

Jane is pregnant and intends to take parental leave when her child is born. Terry is intending to adopt a child with his wife and wants to take parental leave starting on the day of placement of the child.

Both Terry and Jane have given 10 weeks' notice to their respective employers of their intention to take leave. Each employer would like evidence of their entitlement to take parental leave. Evidence an employer may request could include:

- from Jane: a medical certificate stating she is pregnant and the expected date of birth of the child
- from Terry: a certificate/letter from the adoption agency stating the date on which a child is to be placed in his care with a view to adoption and a statement that the child will be under school age on the day of placement.

### **What happens when an employee ceases to have responsibility for the care of the child?**

104. A period of unpaid parental leave may come to an end where an employee ceases to have responsibility for the care of the child. This could occur if, for example, the child dies, the parent loses custody of the child, the child is placed for adoption or the family makes other arrangements for the care of a child. In this situation an employer may give written notice requiring the employee to return to work on a specified day at least four weeks from when the notice is given (and, for a female employee, this must not be earlier than six weeks after the date of birth of the child).

## **Other entitlements**

### **Special maternity leave**

105. Under the proposed parental leave NES, a female employee is entitled to unpaid special maternity leave if she is unfit to work because she has a pregnancy-related illness or

she has been pregnant and the pregnancy has ended within 28 weeks of the expected date of birth of the child.

106. Special maternity leave ends when a child is born and any special maternity leave taken would be deducted from the employee's 12-month parental leave entitlement.

107. An employee who wishes to take special maternity leave must, if required by her employer, provide evidence that she is entitled to take the leave, namely evidence that she is unfit for work.

108. Where an employee is on special maternity leave because her pregnancy has ended within 28 weeks of the expected date of birth of the child other than by the birth of a living child, an employee is entitled to remain on leave so long as she remains unfit for work.

### **Transfer to a safe job**

109. 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.

- The proposed parental leave NES provides that the safe job should have the same hours of work as the employee's current position, unless the employee agrees to a change in hours.
- Where a pregnant employee is transferred to a safe job she is entitled to her full rate of pay for the hours worked during the period in the safe job. This means she is entitled to her base rate of pay and all other entitlements from the previous 'unsafe' job based on her actual hours of work.

#### *No safe job leave*

- Where there is no such safe job available, the proposed parental leave NES provides that the employee is entitled to paid leave (called 'no safe job leave') for the specified period (the risk period).
- An employee on paid 'no safe job leave' is entitled to be paid at her 'base rate of pay' for her 'ordinary hours of work'.

### **What does 'base rate of pay' for 'ordinary hours of work' mean?**

110. The proposed parental leave NES does not define 'ordinary hours of work'.

111. A modern award will set out the number of ordinary hours of work for an employee covered by the award for the purposes of calculating payment for ordinary hours of work of an employee while on 'no safe job leave'.

112. Under the NES, 'base rate of pay' excludes incentive based payments and bonuses, loadings, monetary allowances, overtime or penalty rates or any other similar separately identifiable amounts.

113. Where an employee is absent on 'no safe job leave', she is entitled to be paid her base rate of pay in respect of ordinary hours of work that the employee would have

worked, had she not been on leave. This would exclude for example overtime pay and any other separately identifiable amounts the employee may receive in relation to her hours ordinarily or usually worked.

#### **Example**

Mary is a pregnant employee entitled to be transferred to a safe job for a one week 'risk period'. Her current base rate of pay is \$20 per hour, with an additional \$3 per hour to cover her car and meal allowance. Mary works 38 hours each week.

- If Mary's employer transfers her to a safe job for the risk period, at her regular hours of work, she is entitled to her full rate of pay for hours worked. This means she would receive her regular income of \$23 per hour, for 38 hours, or \$874 per week.
- If Mary's employer is unable to transfer her to a safe job, she is entitled to 'no safe job leave'. In this case she will be entitled to her base rate of pay for 'ordinary hours of work'. This means she would receive her base rate of \$20 per hour, for 38 hours, or \$760 per week.

#### **What are pieceworkers paid while absent on 'no safe job leave'?**

114. The proposed parental leave NES does not provide a rate of pay (or a method for calculating such a rate) for pieceworkers. Instead, modern awards could deal with a pieceworker's rate of pay for the purposes of calculating entitlements under the NES. The intention is to allow for a modern award to specify the rates of pay (or a method for determining such rates) for pieceworkers that reflect and are tailored to the particular practice in the industry covered by the modern award.

#### **Pre-adoption leave**

115. The proposed parental leave NES provides for unpaid pre-adoption leave. This leave is available for up to two days where an employee requires it to attend any interviews or examinations necessary to obtain approval for the adoption of a child. Pre-adoption leave may be taken in a single continuous period of two days or in separate periods as agreed with the employer.

116. An employee is not entitled to take pre-adoption leave if they could take other leave (e.g. annual leave) for this purpose and their employer would prefer them to take that other form of leave.

#### **Consultation during parental leave**

117. The proposed parental leave NES creates a new entitlement that requires an employer to consult an employee who is absent on parental leave where the employer has made a decision that is likely to significantly affect the status or pay of the employee's pre-leave position. This would ensure that the employee is aware of any major change to their position and is given the opportunity to discuss the effect of the employer's decision.

## Possible issues for discussion

### Evidence of being fit to work

118. Circumstances could arise where an employee wishes to continue working but their employer does not think it is safe for an employee to do so close to the time when she is expected to give birth. In this case safety concerns must be balanced against an employee's right to work.

#### Question

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?

### Evidence requirement for transfer to a safe job

119. In an effort to provide simple notice and evidence rules for the NES, an employee is required to provide evidence 'to satisfy a reasonable person' of her need to be transferred to a safe job. It would be reasonable for an employer to ask for a medical certificate for this purpose in almost all circumstances.

#### Questions

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

### Refusal on reasonable business grounds

120. The proposed NES entitlement to request additional parental leave of up to 12 months does not define the term 'reasonable business grounds'. The intention is to avoid limiting by legislation the grounds on which an employer may reasonably refuse to implement the requested work arrangements.

121. Instead, Fair Work Australia will provide general information and assistance to employers as to what may constitute reasonable business grounds.

#### Questions

12. In what situations should examples of reasonable business grounds to be included in the proposed parental leave NES?
13. What types of examples could be included in the NES in order to address any issues arising from these situations?

## General issues

### Question

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

## Same sex couples

122. The proposed parental leave NES does not deal with entitlements for same-sex couples. This issue is to be addressed as part of a whole of government response in accordance with the Government's election commitments.

# ANNUAL LEAVE

## Objective of entitlement

123. The Government considers that paid annual leave is a fundamental safety net entitlement. Paid annual leave provides employees with time for rest and recreation and assists employees with achieving a balance between their work and personal/family lives.

124. The proposed annual leave NES entitles a full-time employee to four weeks of paid annual leave (pro-rata for part-time employees) in accordance with the well established community standard.

125. The Government recognises that shift work can place additional burdens on the health and welfare of employees. Certain types of shift workers (as designated under a modern award) will therefore be entitled to an additional week of paid annual leave.

## Outline of entitlement

126. The proposed annual leave NES provides, for each year of service:

- an employee (other than a casual employee) – with four weeks of paid annual leave
- an employee classified as a ‘shift worker’ under a modern award for the purposes of the annual leave NES – with an additional week of leave.

127. Under the proposed annual leave NES, leave accrues progressively during periods that count as ‘service’ in accordance with the employee’s ‘ordinary hours of work’.

128. An employee is entitled to take annual leave subject to agreement with their employer. An employer must not unreasonably refuse an employee’s request to take annual leave.

129. When annual leave is taken, the employee is entitled to be paid at the employee’s ‘base rate of pay’ for their ordinary hours of work in the leave period.

130. An employee is entitled to be paid for any untaken paid annual leave (accrued up to the point of termination) on termination of employment.

## How does annual leave accrue? What do ‘service’ and ‘ordinary hours of work’ mean?

131. Paid annual leave accrues during periods of the employee’s ‘service’. Service is defined as all periods of employment other than:

- unpaid leave (e.g. leave without pay or unpaid parental leave)
- an unpaid absence (other than community service leave)
- an unauthorised absence (e.g. unprotected industrial action).

132. The proposed annual leave NES provides that, except as permitted by a law relating to workers' compensation, an employee cannot take or accrue any paid annual leave while they are absent from work because of an illness or injury for which they are receiving workers' compensation.

133. The proposed annual leave NES does not define 'ordinary hours of work'. A modern award will set out the ordinary hours of work (e.g. weekly or daily hours) for an employee covered by the award for the purposes of calculating the entitlement to annual leave. The ordinary hours of work specified for this purpose could be different from the hours worked by an employee on a particular day.

#### **Example**

A modern award sets out the 'ordinary hours for a full-time employee as 38 hours per week. It also provides for averaging of hours arrangements allowing for 152 hours to be worked over four weeks. In a particular week, under an averaging arrangement, Maria is rostered to work three 12-hour shifts on Monday, Tuesday and Wednesday. Maria has asked to take annual leave for Monday of that week and her employer has agreed.

Under the proposed NES, Maria would be entitled to be paid at her base rate of pay for her ordinary hours of work on that day. This means that Maria would be paid for 7.6 hours, even though her actual hours of work under the averaging arrangement would normally be 12 hours on that day. As Maria works under an averaging arrangement her take home pay would not change for the pay period that included the day taken as annual leave.

#### **Example**

Marcus is a full-time employee who is employed to work 38 ordinary hours per week, although he regularly works up to four additional hours per week as overtime.

Marcus accrues four weeks' paid annual leave for each year of 'service', which in his case means four times his ordinary hours per week, or 152 hours.

Anika works the same job as Marcus but is part-time and only works four full-time days per working week (i.e. 4/5 of the hours of a full-time employee). This means that she accrues 4/5 of the amount of paid annual leave accrued by Marcus.

#### **Example**

Ali is employed full-time to work shifts as an information technology consultant. Ali earns \$120,000 per year and is 'award free'. Ali works three 12-hour shifts per week (i.e. 36 hours per week). These are Ali's ordinary hours of work per week.

Ali accrues an entitlement to four weeks' paid annual leave for year of 'service', which equates to four times three 12-hour shifts (i.e. 12 shifts or 144 hours).

### **What is meant by 'ordinary hours of work' for irregular part-time employees or pieceworkers?**

134. Some employees may not be considered to have ordinary hours of work. For example, some part-time employees may work irregular hours. Under the proposed NES, an employee who does not have ordinary hours of work will accrue paid annual leave on

the basis of their actual hours worked (and any other hours that count as the employee's 'service').

135. Similarly, in these circumstances leave would be taken on the basis of the hours the employee would ordinarily have expected to work on a particular day, or during a particular week. This is a question of fact and, due to the irregularity of the work arrangements, may be difficult to determine in advance.

#### **Example**

Christos is employed as an irregular part-time employee and so does not have regular ordinary hours of work per week.

However, for the purposes of the paid annual leave NES (and in the absence of any evidence to the contrary), Christos' ordinary hours are the hours he actually works per week, plus any other hours that count as 'service' (e.g. hours of authorised leave).

#### **What does 'base rate of pay' for 'ordinary hours of work' mean?**

136. Under the NES, 'base rate of pay' excludes incentive based payments and bonuses, loadings, monetary allowances, overtime or penalty rates or any other similar separately identifiable amounts.

137. Where an employee takes annual leave, they are entitled to be paid their base rate of pay for the ordinary hours of work that they would have worked, had they not been on that leave. This would not include payment in relation to any overtime or any other payment the employee would have received in relation to the hours they would have ordinarily or usually worked.

#### **What are pieceworkers paid while on annual leave?**

138. The proposed annual leave NES does not provide a rate of pay (or a method for calculating such a rate) for pieceworkers. Instead, modern awards could deal with a pieceworker's rate of pay for the purposes of calculating entitlements under the NES. The intention is to allow for a modern award to specify the rates of pay (or a method for determining such rates) for pieceworkers that reflect and are tailored to the particular practice in the industry covered by the modern award.

#### **What does 'shift worker' mean?**

139. The proposed annual leave NES does not define the kinds of shift workers who are eligible for an extra week's paid annual leave. As shift arrangements vary between industries and occupations, the proposed NES annual leave entitlement relies on modern awards to define which shift workers should be entitled to additional leave. This allows for an industry-specific approach.

#### **What does progressive accrual mean? When can an employee take paid annual leave?**

140. Under the proposed annual leave NES, leave accrues progressively rather than for each defined period such as a week or fortnight. This means that an employee does not have to wait until the end of a particular period (e.g. the end of their first 12 months of employment) to be entitled to paid annual leave.

141. This approach avoids the need to include complex rules about the accrual and crediting of annual leave as an employee's leave entitlement can simply be calculated by reference to their relevant period of service and ordinary hours of work (in the same way as an employee's entitlement to annual leave on termination of employment is calculated).

### **What information will an employer be required to give an employee about their accrued annual leave entitlements?**

142. Record-keeping rules will be considered as part of the Government's substantive workplace relations reforms.

143. However it is anticipated that record-keeping rules will not require an employer to continuously update records to reflect the progressive accrual of annual leave. An employer will simply be required to maintain records so as to enable the calculation of an employee's annual leave entitlement and also to provide information to an employee about their accrued annual leave entitlement from time to time.

### **Can the rate of accrual change?**

144. Yes, for example, if an employee converts from full-time to part-time employment, or vice-versa.

145. The proposed annual leave NES does not set out specific rules in relation to an employee who converts from full-time to part-time work, or whose ordinary hours of work otherwise change. Because the accrual and taking of paid annual leave is based on an employee's ordinary hours of work, the basis for the accrual and taking of leave will change where an employee's ordinary hours of work change.

#### **Example**

Lara is a full-time employee who is employed to work 38 ordinary hours per week. However, she has applied to convert to part-time employment, i.e. 15 hours per week.

As a full-time employee, Lara accrued the equivalent of 152 hours paid annual leave for each year of 'service' (or  $152/26 = 5.84615$  hours paid annual leave per fortnight).

As a part-time employee, Lara would accrue  $15/38$  times the full-time rate or 60 hours paid annual leave per year of 'service' (i.e. 2.3077 hours paid annual leave per fortnight).

### **Does the NES restrict how annual leave may be taken?**

146. No. The proposed annual leave NES does not prescribe the ways in which paid annual leave must be taken to ensure maximum flexibility and adaptation to the circumstances of a particular workplace and the employee. This means that, subject to agreement between the employer and the employee, annual leave may be taken in blocks or as single days.

### **When can an employer refuse an employee's request for paid annual leave?**

147. An employer cannot unreasonably refuse an employee's request to take paid annual leave.

148. The proposed annual leave NES does not define what constitutes an unreasonable refusal by an employer and so the phrase is to be given its ordinary meaning.

149. The new independent umpire, Fair Work Australia, will provide general information and assistance to employers about what constitutes reasonable or unreasonable refusal.

### **How does annual leave interact with public holidays and other kinds of leave?**

150. The proposed annual leave NES expressly provides for the interaction between paid annual leave, public holidays and other kinds of leave and absence provided for under the NES.

In particular, an employee is deemed not to be on paid annual leave:

- on a day that is a public holiday (within the meaning of the NES) in the place where the employee is based
- during another kind of leave (other than unpaid parental leave) – including community service leave.

151. This means, for example, that an employee could take paid personal/carer's leave during a period of paid annual leave, subject to satisfying notice and evidence requirements for personal leave under the proposed NES. In that case, the employee would be entitled to be re-credited with any paid annual leave that was to have been taken during the relevant period.

152. The proposed annual leave NES does not expressly provide for the interaction between the NES and leave or absences under other instruments or a contract of employment (e.g. rostered-days off and leave without pay). This issue will be dealt with in the creation of modern awards and as part of the Government's substantive workplace relations reforms.

### **Can accrued annual leave transmit to a new employer on transmission of business?**

153. The proposed annual leave NES does not deal with the transfer of annual leave in a transmission of business situation. Transmission of business rules are to be included in the Government's substantive workplace relations reforms.

154. However, the Government recognises that the preferred approach of many employers and employees is that, in a transmission of business situation, annual leave liability could be carried over to a new employer (rather than paid in lieu on termination of employment by the old employer) where an employee 'transfers' from the old employer to the new employer.

### **How does the NES entitlement to annual leave interact with modern awards?**

155. As noted above, the proposed annual leave NES expressly enable modern awards to provide rules for the cashing out and taking of paid annual leave.

156. A modern award could also provide for flexible options for taking leave by agreement between employer and employee (e.g. twice the leave at half pay).

157. The Government considers that the AIRC is best placed to tailor such rules to meet industry-specific needs through the award modernisation process. For that reason,

modern awards could modify or even substitute rules about these aspects of taking annual leave.

158. The inclusion of these rules in awards rather than in the NES means that they could also be modified in a workplace agreement, subject to the Government's proposed 'Better Off Overall Test' for agreements.

### **Possible issues for discussion**

159. The Government's intention is that the NES annual leave entitlement is sufficiently flexible to work in the diverse range of working arrangements and is easy to understand and apply.

160. The Government therefore seeks general views on whether the proposed NES achieves this objective.

161. Areas that may be of specific interest are also outlined below.

### **What does 'shift worker' mean for the purposes of the extra week of paid annual leave?**

162. The proposed annual leave NES does not define the kinds of shift workers who are eligible for an extra week of paid annual leave. Instead, the proposed NES relies on modern awards to define the relevant group.

#### **Questions**

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

### **The concept of ordinary hours of work**

163. The proposed annual leave NES does not define the meaning of 'ordinary hours of work' as it is intended that 'ordinary hours of work' will be specified for this purpose in modern awards to allow industry-specific working arrangements to be taken into account.

#### **Questions**

17. Are there any issues with this approach to 'ordinary hours of work' for particular kinds of working arrangements?
18. If so, how should those issues be addressed?

### **Interaction between different kinds of leave under the NES and other kinds of absences**

164. The proposed annual leave NES does not expressly provide for the interaction between different kinds of leave under the NES and other kinds of leave or absences (e.g. leave without pay and rostered days off) under other instruments.

#### **Question**

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?

### **The progressive accrual of annual leave**

165. The proposed annual leave NES provides for the progressive accrual of annual leave in order to avoid the inclusion of complex accrual and crediting rules.

#### **Questions**

20. Are there any issues that may arise from this approach?
21. If so, how should those issues be addressed?

### **Payment while absent on annual leave**

166. Under the proposed annual leave NES, leave is paid at the employee's base rate of pay. It would be possible for a modern award to provide that annual leave is to be paid at a rate of pay that includes components of an employee's remuneration not included in the definition of base rate of pay. A modern award could only include such a provision where it is necessary to provide a fair minimum safety net for the employees covered by the award, having regard to existing safety net entitlements.

#### **Questions**

22. What specific issues might arise for particular types of employees from the base rate of pay definition in the proposed annual leave NES?
23. What types of additional rules, if any, might be appropriate for inclusion in the proposed annual leave NES to address those issues?

## General issues

### Question

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

# **PERSONAL/CARER'S LEAVE AND COMPASSIONATE LEAVE**

## **Objective of entitlement**

167. The Government considers that employees should have an entitlement to take leave from work to recover from genuine illness or injury. The Government also believes that it is in an employer's best interests for its workforce to be healthy and productive.

168. The Government also recognises that many working Australians are responsible for the care of others including children, ageing parents and other members of their households. The Government considers that employees should have an entitlement to take leave from work to care for others and to deal with family emergencies and that all employees should have an entitlement to take some leave on the death or serious illness of a family member.

169. Personal/carer's leave and compassionate leave are designed to help an employee deal with personal illness, caring responsibilities, family emergencies and the death or serious illness of close family members.

## **Outline of entitlement**

170. The proposed personal/carer's leave NES provides an employee, other than a casual employee, with an entitlement to:

- 10 days of paid personal/carer's leave for each year of 'service'
- two days of paid compassionate leave 'per occasion' (e.g. on the death or serious illness of a family or household member)
- two days of unpaid carer's leave 'per occasion' for genuine caring purposes or family emergencies if paid carer's leave is exhausted.

171. A casual employee will have an entitlement to:

- two days of unpaid compassionate leave 'per occasion'
- two days of unpaid carer's leave 'per occasion'.

172. Paid personal/carer's leave accrues progressively during periods that count as service in accordance with the employee's ordinary hours of work.

173. To take any personal, carer's or compassionate leave (whether paid or unpaid) an employee must:

- provide notice to their employer of their intention to take leave as soon as is reasonably practicable (which may be a time after the leave has started)
- state the period or expected period of the absence and the reason for the absence

- if required, provide evidence that would satisfy a reasonable person of their entitlement to take the relevant kind of leave.

174. Personal/carer's leave and compassionate leave (other than for a casual employee) is payable at the employee's 'base rate of pay' for their ordinary hours of work in the leave period.

**How does paid personal/carer's leave accrue? What do 'service' and 'ordinary hours of work' mean?**

175. Paid personal/carer's leave accrues during periods that count as an employee's 'service' which is defined as including all periods of employment other than:

- unpaid leave (e.g. leave without pay or unpaid parental leave)
- an unpaid absence (other than community service leave)
- an unauthorised absence (e.g. unprotected industrial action).

176. The proposed personal/carer's leave NES provides that, except as permitted by a law relating to workers' compensation, an employee cannot take or accrue any paid personal/carer's leave while they are absent from work because of an illness or injury for which they are receiving workers' compensation.

177. The proposed personal/carer's leave NES does not define 'ordinary hours of work'.

178. A modern award will set out the ordinary of hours of work for an employee covered by the award for a week or a day which will be used to calculate payment for paid personal/carer's leave or paid compassionate leave.

**Example**

A modern award sets out the 'ordinary hours for a full-time employee as 38 hours per week. It also provides for averaging of hours arrangements allowing for 152 hours to be worked over four weeks.

In a particular week, under an averaging arrangement, Jose is rostered to work three 12-hour shifts on Monday, Tuesday and Wednesday. On Tuesday, Jose advises his manager that he will not be at work, because he is too ill to work.

Under the proposed NES, Jose would be entitled to be paid at his base rate of pay for his ordinary hours of work on that day. This means that Jose would be paid for 7.6 hours even though his actual hours of work under the averaging arrangement would have been 12 hours on that day.

**What does 'base rate of pay' for ordinary hours of work mean?**

179. Under the NES, 'base rate of pay' excludes incentive based payments and bonuses, loadings, monetary allowances, overtime or penalty rates or any other similar separately identifiable amounts.

180. Where an employee takes paid personal/carer's or paid compassionate leave (other than a casual employee), they are entitled to be paid their 'base rate of pay' in respect of ordinary hours of work that the employee would have worked, had they not been on that

leave. This would exclude payment in relation to any overtime or any other payment the employee may have received in relation to the hours they would have usually worked on that day.

### **What are pieceworkers paid while on paid personal/carer's leave?**

181. The proposed personal/carer's leave NES does not provide a rate of pay (or a method for calculating such a rate) for pieceworkers. Instead, modern awards could deal with a pieceworker's rate of pay for the purposes of calculating entitlements under the NES. The intention is to allow for a modern award to specify the rates of pay (or a method for determining such rates) for pieceworkers that reflect and are tailored to the particular practice in the industry covered by the modern award.

### **When can an employee take paid personal/carer's leave?**

182. Under the proposed personal/carer's leave NES, leave accrues progressively rather than for each defined period such as a week or fortnight. This means that employees do not need to wait until the end of a particular period (e.g. their first 12 months of employment) to be entitled to take paid personal/carer's leave.

183. This approach avoids the need to include complex rules about the accrual and crediting of personal leave as an employee's leave entitlement can simply be calculated by reference to the employee's relevant period of service and ordinary hours of work.

### **What information will an employer be required to give an employee about their accrued personal leave entitlements?**

184. Record-keeping rules will be considered as part of the Government's substantive workplace relations reforms.

185. However it is anticipated that record-keeping rules will not require an employer to continuously update records to reflect the progressive accrual of paid personal/carer's leave. An employer will simply be required to maintain records so as to enable the calculation of an employee's accrued paid personal/carer's entitlement and also to provide information to an employee about their accrued entitlement from time to time.

### **Can the rate of accrual change?**

186. Yes, for example, if an employee converts from full-time to part-time employment, or vice-versa.

187. The proposed personal/carer's leave NES does not set out specific rules in relation to an employee who converts from full-time to part-time work or whose ordinary hours of work otherwise change. Because the accrual and taking of paid personal leave are based on an employee's ordinary hours of work, the basis for the accrual and taking of leave will change where an employee's ordinary hours change.

### **What kinds of evidence can be requested by an employer?**

188. Types of evidence commonly requested include a medical certificate or statutory declaration.

189. However, the Government does not consider it reasonable for an employee to be required to provide a medical certificate for every single absence on account of personal illness. Such a requirement could cause significant personal expense or difficulty for an employee and place unnecessary stress on the health system by diverting resources solely to the provision of medical certificates.

190. However, in cases of an absence extending beyond a short period or repeated absences on particular days, it may be reasonable for an employer to request a medical certificate in support of the employee's request for leave.

#### **Is there a cap on the amount of paid carer's leave that can be taken?**

191. No. The amount of accrued paid carer's leave that can be taken each year is not capped. This ensures flexibility in the way that the entitlement can be taken and ensures that employees can provide appropriate care arrangements when a child, spouse or member of their household is ill.

192. An employee must use any paid personal/carer's leave entitlement before accessing unpaid carer's leave.

#### **Does unpaid compassionate leave apply to casual employees?**

193. Yes. For the first time, a casual employee will be entitled to two days of unpaid compassionate leave per permissible occasion (e.g. on the death or serious illness of a family or household member).

194. This entitlement ensures that a casual employee is entitled to leave where a family member or member of an employee's household had died or suffered from a serious illness or injury.

#### **How does paid personal/carer's leave interact with public holidays?**

195. An employee is deemed not to be on paid personal/carer's leave on a day that is a public holiday (within the meaning of the NES) in the place where the employee is based. This means that an employee is entitled to be re-credited any paid personal/carer's leave that would have otherwise been taken on the relevant public holiday.

#### **How does paid personal/carer's leave interact with other kinds of leave?**

196. An employee may take paid personal/carer's leave during a period of paid annual leave and also at any time after they stop engaging in a prescribed community service (e.g. because they are too sick to do so).

197. The proposed personal/carer's leave NES does not expressly provide for the interaction between the NES and leave or absences under other instruments or a contract of employment (e.g. rostered-days off and leave without pay). This issue will be dealt with in the creation of modern awards and as part of the Government's substantive workplace relations reforms.

## **How does the NES entitlement to personal/carer's leave interact with modern awards?**

198. A modern award could provide more beneficial provisions in relation to personal/carer's leave entitlements where this is necessary to provide a fair minimum safety net for the employees covered by the modern award.

199. This means that a modern award could not specify more onerous notice or evidence requirements for taking personal leave than provided under the proposed personal/carer's leave NES. For example, a modern award could not:

- impose a qualifying period before paid personal/carer's leave could be accessed
- enable a fine to be imposed for an employee's failure to provide proper notice of absence
- require a medical certificate for every absence
- provide for employer-directed paid sick leave
- limit accumulation of paid personal/carer's leave
- limit the taking of paid sick leave adjacent to public holidays (for example, by imposing more onerous evidence requirements than those provided under the NES)
- require independent medical assessments from a nominated medical practitioner.

200. The Government considers that the proposed personal/carer's leave NES has appropriate checks and balances to ensure employees may access their leave while minimising potential abuse of the entitlement.

## **Possible issues for discussion**

201. The Government is conscious of the need to accommodate common flexibilities while ensuring an appropriate safety net. Accordingly, the Government seeks views on whether the proposed personal/carer's leave NES strikes an appropriate balance.

## **Evidence and notice requirements**

202. In an effort to provide simple notice and evidence rules for the NES, an employee is required to provide evidence that would satisfy a 'reasonable person' of their entitlement to leave.

**Questions**

- 25. In what circumstances might the rules relating to notice and evidence be inadequate or too onerous for employers and employees?
- 26. What, if any, additional rules could be included in the NES in order to address the issues arising in those circumstances?

**Taking paid personal/carer's leave**

203. The proposed NES does not restrict the amount of paid carer's leave that can be taken. However, an employee must use all of their accrued paid personal/carer's leave before they can access unpaid leave.

**Question**

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

**General issues**

**Question**

- 28. What other matters should be taken into consideration when finalising the proposed personal/carer's and compassionate leave NES?

# COMMUNITY SERVICE LEAVE

## Objective of entitlement

204. Australians have a great history of community service. Employees who serve on juries, fight bushfires or provide emergency relief after a local disaster perform vital services that benefit the wider community.

205. The Government considers that employees who provide these services should not be prejudiced or adversely affected in their employment.

206. At the same time, the Government recognises that employers should not be required to bear the entire burden of ensuring these vital services are provided to the community.

207. The proposed NES provides individuals with a right to be absent from work for the purpose of performing certain community service activities and the right to 'make-up' pay when absent from work for jury service.

## Outline of entitlement

208. The proposed community service leave NES provides an employee with a right to be absent from work to engage in prescribed community service activities such as jury service and emergency service duties (as defined). A regulation-making power allows other community service activities to be prescribed but there is no intention to prescribe additional activities at this time.

209. The entitlement to community service leave covers all periods required to provide jury service or engage in the community service activity and includes:

- reasonable travelling time associated with the activity
- reasonable rest time immediately following the activity and before recommencing work.

210. To be entitled to community service leave an employee must comply with notice and evidence requirements set out in the NES. Notice of absence for community service leave must be provided to the employer as soon as practicable (which in some circumstances may be after the absence has started) and the employee must advise the employer of the period or expected period of absence.

211. The employer may also require the employee to provide reasonable evidence that the employee is absent because the employee is engaging in an eligible community service activity.

212. Other than in respect of jury service, community service leave under the proposed NES is unpaid. In relation to jury service leave, an employee other than a casual employee is entitled to 'make-up pay'.

213. Make-up pay is the difference between what the employee received in respect of jury service (excluding any expense-related allowances) and the employee's 'base rate of pay' for their 'ordinary hours of work' for the period of jury service.

**What kinds of jury service does community service leave cover?**

214. The proposed community service leave NES covers jury service that is required by or under a law of the Commonwealth, state or territory (including a summons made under such a law). Jury service also includes attendance for the purpose of jury selection.

**What kinds of emergency service does community service leave cover?**

215. The proposed community service leave NES enables an employee to take leave to carry out a voluntary emergency management activity where it is reasonable in all the circumstances.

216. Section 659 of the WR Act (which is referred to in the proposed community service leave NES) provides that an employee carries out a voluntary emergency management activity if:

- the employee carries out an activity that involves dealing with an emergency or natural disaster
- the employee carries out the activity on a voluntary basis
- the employee is a member of, or has a member-like association with, a recognised emergency management body
- either:
  - the employee was requested by or on behalf of the body to carry out the activity
  - no such request was made, but it would be reasonable to expect that, if the circumstances had permitted the making of such a request, it is likely that such a request would have been made.

217. An employee carries out an activity on a voluntary basis even if the employee directly or indirectly takes or agrees to take an honorarium, gratuity or a similar payment wholly or partly for carrying out the activity.

218. For purposes of these provisions:

- 'recognised emergency management body' means:
  - a body that has a role or function under a designated disaster plan
  - a fire-fighting, civil defence or rescue body
  - any other body a substantial purpose of which involves:
    - (i) securing the safety of persons or animals in an emergency or natural disaster
    - (ii) protecting property in an emergency or natural disaster
    - (iii) otherwise responding to an emergency or natural disaster

- a body specified in the regulations

but does not include a body that was established, or is continued in existence, for the purpose, or for purposes that include the purpose, of enabling one or more employees to obtain the protection of section 659(2) of the WR Act; and

- ‘designated disaster plan’ means a plan that is:
  - for coping with emergencies and/or disasters
  - prepared by the Commonwealth, a state or a territory.

### **Why doesn’t community service leave cover defence reserve service?**

219. The *Defence Reserve Service (Protection) Act 2001* already provides for leave for employees during defence reserve service and additional protection against discrimination because of an employee’s defence reserve service.

### **Why is reasonable travel and rest time included under community service leave?**

220. The proposed community service leave NES covers reasonable rest time immediately following the activity to ensure that an employee cannot be requested to immediately return to work following a prescribed community service activity.

221. This is particularly important for afternoon and night shift workers who may have completed a community service activity during the day (e.g. jury service) and be faced with having to return to work that evening. The entitlement under the proposed NES ensures that an employee has an adequate period for rest before recommencing work.

#### **Example**

Phil is a night shift worker who usually works the night shift in a bottling plant from Monday to Friday.

Phil is summonsed for jury service and is selected to serve on a jury.

The jury trial runs for five days from Monday to Friday but was adjourned for a half-day from 1pm on Wednesday.

Phil’s entitlement to community service leave would cover the shifts Phil would have ordinarily worked during the week including the Wednesday night shift. That is because the entitlement to community service leave covers reasonable rest time immediately following the activity, taking into account all relevant circumstances (including the expected resumption of Phil’s jury service on Thursday morning).

### **How does the proposed entitlement interact with more beneficial payment rules?**

222. It is not intended that the proposed community service leave NES will override more beneficial entitlements under industrial instruments or state and territory laws (e.g. laws that provide make-up pay for jurors or emergency service volunteers) as the proposed NES provides a minimum entitlement only. Provisions dealing with the interaction of the NES with state and territory laws will be developed as part of the Government’s substantive workplace relations reforms.

### **What are the payment obligations in relation to jury service?**

223. An employer must pay a full-time or part-time employee who has been absent on jury service at their base rate of pay for the employee's ordinary hours of work in the period.

224. However, an employer may require an employee to provide evidence of the amount of jury service pay paid or payable to the employee. If such evidence is required, then the employer may withhold payment until the required evidence is provided. If the employee provides the required evidence, the amount payable to the employee is reduced by the amount of jury service pay paid or payable to the employee.

225. Casual employees are not entitled to any payment in relation to jury service under the proposed NES.

#### **Example**

Kelly (who is a full-time employee) is absent from work for two days to provide jury service.

For ease of administration, Kelly's employer would prefer to pay Kelly her full wage for the relevant week and then be reimbursed for the amount Kelly received as jury service pay.

Because this approach allows Kelly to receive the full amount of 'make-up pay' payable under the proposed NES, there is no breach of the NES.

### **What does 'ordinary hours of work' mean?**

226. The proposed community service leave NES does not define 'ordinary hours of work'.

227. A modern award will set out the ordinary of hours of work for an employee covered by the award for a week or a day which will be used to calculate payment for jury service leave.

### **Example**

A modern award sets out the 'ordinary hours for a full-time employee as 38 hours per week and 7.6 hours per day. It also provides for averaging of hours arrangements allowing for 152 hours to be worked over four weeks.

In a particular week, under an averaging arrangement, Sunita is rostered to work three 12-hour shifts on Monday, Tuesday and Wednesday. However, Sunita has been summonsed to attendance at jury service and is absent from work for those three days.

Under the proposed NES entitlement, Sunita would be entitled to be paid at her base rate of pay for her ordinary hours of work on each day of jury service. This means that Sunita would be paid for 22.8 hours, even though her actual hours of work would be 36 hours on Monday, Tuesday and Wednesday.

If Sunita received an amount of jury service pay, her employer could require evidence of such payment and deduct that from her pay.

### **What does 'base rate of pay' for ordinary hours of work mean?**

228. Under the NES, 'base rate of pay' excludes incentive based payments and bonuses, loadings, monetary allowances, overtime or penalty rates or any other similar separately identifiable amounts.

229. Where an employee (other than a casual employee) is absent on jury service, the employee is entitled to be paid their base rate of pay in respect of the ordinary hours of work that the employee would have worked, had the employee not been absent. This excludes payment in relation to any overtime or any other additional payment the employee would have received in relation to the hours they would have usually worked on that day.

### **What are pieceworkers paid for jury service leave?**

230. The proposed community service leave NES does not provide a rate of pay (or a method for calculating such a rate) for pieceworkers. Instead, modern awards could deal with a pieceworker's rate of pay for the purposes of calculating entitlements under the NES. The intention is to allow for a modern award to specify the rates of pay (or a method for determining such rates) for pieceworkers that reflect and are tailored to the particular practice in the industry covered by the modern award.

## **Possible issues for discussion**

### **Application to afternoon and night shift workers**

231. The proposed community service leave NES provides for reasonable travelling time associated with the community service activity and reasonable rest time immediately following the activity. However, it does not include express provisions relating to shift workers.

### Questions

29. What issues might arise in association with the taking of community service leave by shift workers, particularly afternoon and night shift workers?
30. Should the proposed community service leave NES contain express provisions dealing with these types of employees?

### Small business and jury service leave

232. The Government recognises that some trials can result in employees being absent from work for an extended period of time, placing a significant burden on the employer. Small businesses in particular may struggle with both the absence of an employee and the obligation to pay jury service leave.

### Questions

31. Having regard to the Government's view that paid jury service leave should be a minimum entitlement for 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?
32. If so, what additional rules should included?

### General issues

### Question

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

## LONG SERVICE LEAVE

### Objective of entitlement

233. As part of its commitment to national workplace relations laws, the Government will work co-operatively with the states and territories to develop a uniform minimum long service leave standard. The Government is also committed to consultation with employer and employee representative bodies on this issue.

234. Currently, long service leave entitlements are predominantly contained in state and territory laws and federal awards and agreements. Long service leave provisions are often complex and highly prescriptive, differing considerably in operation and level of entitlement between jurisdictions.

235. This situation can create difficulties for businesses operating across jurisdictions. An employer may be required to maintain different long service leave standards for different sections of their workforce divided along state and territory lines. Confusion and complexity arises where employees move between jurisdictions while working for the one employer. A national system will help to remove any confusion and reduce the administrative burden on employers.

### Outline of entitlement

236. Until a uniform long service leave NES is developed, long service leave entitlements in pre-modernised awards, NAPSAs or state or territory laws will be preserved to ensure they cannot be bargained away.

237. An employee currently covered by a workplace agreement will retain the long service leave entitlement (if any) in that agreement while it remains in operation. Under the proposed NES, an employee's long service leave entitlement in a pre-modernised award or NAPSA will apply unless:

- a workplace agreement or an AWA applies
- another specified instrument (e.g. a pre-reform certified agreement) that deals with the matter of long service leave applies (even if it provides that the employee is not entitled to long service leave).

238. When an existing workplace agreement, AWA or specified instrument ceases to operate, an employee will be entitled to the long service leave entitlement in a pre-modernised award or NAPSA. If no underlying award or NAPSA applies, the employee will be entitled to long service leave under an applicable state or territory law.

### **Will every employee be entitled to long service leave under a pre-modernised award or NAPSA when the NES commence?**

239. No. To avoid interfering with bargained outcomes, the proposed provisions protecting long service leave will not apply to employees covered by certain agreements while they are in operation.

### **Can state and territory long service leave laws continue to apply to federal system employees?**

240. Yes. The proposed long service leave NES does not override state or territory long service leave laws. It is envisaged that the interaction with state and territory laws will generally be dealt with as part of the Government's substantive workplace relations amendments to be introduced into Parliament later this year.

### **Can long service leave entitlements be bargained away?**

241. No. The proposed long service leave NES ensures that long service leave entitlements in pre-modernised awards and NAPSAs cannot be bargained away. The intention is that workplace agreements will not be able to override state and territory long service leave laws.

## **Possible issues for discussion**

### **Simplifying long service leave entitlements**

242. The proposed long service leave NES preserves all machinery and application rules associated with long service leave in a pre-modernised award or NAPSA. In some cases, these rules may be detailed or prescriptive. The Government is aware of the need to minimise this complexity. However, this must be balanced against the need to ensure that long service leave entitlements cannot be bargained away while a minimum uniform long service leave standard is formulated.

#### **Questions**

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

### **General issues**

#### **Question**

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

## **PUBLIC HOLIDAYS**

### **Objective of entitlement**

243. The Government recognises that public holidays are an important feature of Australian life, providing opportunities for families and communities to celebrate important events and days of religious significance together.

244. State and territory governments have power to declare public holidays. Awards and workplace agreements usually recognise declared public holidays and may include special arrangements about working on public holidays.

245. The proposed NES entitlement will protect public holidays declared by state and territory governments for working Australians. The proposed NES entitlement will protect an employee's right to reasonably refuse to work on a public holiday and will guarantee payment where an employee is absent from work because of the public holiday.

246. Modern awards may set out occupational and industry-specific detail in respect of public holidays, including penalty rates for working on a public holiday.

### **Outline of entitlement**

247. The proposed public holiday NES provides an employee with a right to be absent from work on a day that is a public holiday in the place where the employee is based for work purposes.

- An employee who is absent from work on a public holiday is entitled to be paid for his or her ordinary hours that would have been worked at their base rate of pay (which excludes incentive based payments and bonuses, loadings, monetary allowances, overtime or penalty rates or any other similar separately identifiable amounts).
- If an employee would not have worked any ordinary hours on the public holiday, the employee is not entitled to be paid for the public holiday.

248. An employer is entitled to request that an employee work on a public holiday, if the request is reasonable.

249. An employee may refuse the request to work the holiday on the basis that the request is not reasonable or if the employee's refusal to work is reasonable.

- A range of factors set out in the proposed NES must be considered in determining whether a request by an employer to work or a refusal by an employee of a request to work on a public holiday is reasonable.

250. Where an employee works on a public holiday, they may be entitled to penalty rates or other compensation set out in an applicable modern award.

### **What days are public holidays?**

251. Under the proposed public holiday NES the following days are public holidays:

- Christmas Day, Boxing Day, New Year's Day, Australia Day, Anzac Day, Queen's Birthday, Good Friday and Easter Monday
- a substitute public holiday under a state or territory law where, for example, a public holiday falls on a weekend
- any other public holiday under a state or territory law, including a regional public holiday in the place where the employee works.

### **What does 'place where the employee is based for work purposes' mean?**

252. Under the proposed public holiday NES, an employee is entitled to be absent from their employment on a day that is a public holiday in the place where the employee is based for work purposes. The place where the employee is based for work purposes means the employee's usual place of work or, for an employee who moves between different areas or jurisdictions, where the employee would usually sign on for work or receive their instructions for that day.

#### **Example**

##### *National holiday*

Australia Day will be celebrated on Tuesday, 26 January, 2010. This day will be a public holiday for the purposes of the NES.

##### *Substitute public holiday*

Under the relevant State law (the *Bank and Bank Holidays Act 1912* (NSW)) Monday 26 April 2010 is a public holiday substituted for Anzac Day (which falls on Sunday 25 April 2010). For the purposes of the NES, this day will be a public holiday for an employee whose place of work is based in NSW.

##### *Local holiday*

In Victoria, Melbourne Cup Day is celebrated on Tuesday 2 November, 2010 for the Melbourne metropolitan area only (a Schedule to the *Public Holidays Act 1993* (Vic) sets out the metropolitan municipal councils). For the purposes of the NES, this day will be a public holiday for an employee whose work is based in those specified areas only.

### **What does 'base rate of pay' for 'ordinary hours that would have been worked for the day' mean?**

253. The proposed public holidays NES does not define 'ordinary hours of work'.

254. A modern award would set out the number of ordinary hours of work for an employee covered by the award for the purposes of calculating payment on a public holiday. The ordinary hours of work specified for this purpose could be different from the hours that would have actually been worked by an employee on a particular day.

### **Example**

A modern award sets out the 'ordinary hours for a full-time employee as 38 hours per week. It also provides for averaging of hours arrangements allowing for 152 hours to be worked over four weeks.

In a particular week, under the averaging arrangement, Jack is rostered to work three 12-hour shifts on Monday, Tuesday and Wednesday. Labour Day public holiday falls on the Monday of that week. Under the proposed NES entitlement Jack would be entitled to be absent on the public holiday and be paid at his base rate of pay for his ordinary hours of work.

This means that Jack would be paid for 7.6 hours, even though his actual hours of work under the averaging arrangement would be 12 hours on that day. As Jack works under an averaging arrangement his take home pay would not change for the pay period that included the public holiday.

255. Under the proposed public holiday NES, 'base rate of pay' excludes incentive based payments and bonuses, loadings, monetary allowances, overtime or penalty rates or any other similar separately identifiable amounts.

256. Where an employee is absent on the public holiday, they are entitled to be paid their base rate of pay in respect of the ordinary hours of work that the employee would have worked, had that day not been a public holiday. This would exclude payment in relation to any overtime, or any other payment the employee would have received in relation to the hours ordinarily or usually worked.

257. If a public holiday occurs on a Monday but an employee is absent from work on that day because the employee only works on Tuesdays to Thursdays, the employee is not entitled under the NES to payment for the public holiday because the employee does not have any ordinary hours of work on the public holiday.

### **Example**

Erika usually works overtime in addition to her ordinary hours on Tuesdays, receiving penalty rates for the overtime hours under the modern award. Erika is absent on the public holiday on Tuesday, 26 January. Erika is entitled to her base rate of pay for her ordinary hours.

Erika's colleague Toby is a part-time employee who is rostered to work Wednesday and Thursdays only. As Toby's ordinary hours of work do not include Tuesdays, Toby is not entitled to payment for absence on the public holiday.

Another employee Holger is on unpaid parental leave for the first half of 2010. Holger would also not be entitled to payment for his absence on this day.

### **What are pieceworkers paid while absent on a public holiday?**

258. The proposed public holiday NES does not provide a rate of pay (or a method for calculating such a rate) for pieceworkers. Instead, modern awards could deal with a pieceworker's rate of pay for the purposes of calculating entitlements under the NES. The intention is to allow for a modern award to specify the rates of pay (or a method for determining such rates) for pieceworkers that reflect and are tailored to the particular practice in the industry covered by the modern award.

**What factors must be considered in determining whether a request to work or a refusal to work on the public holiday is reasonable?**

259. The following range of factors must be considered in determining whether a request by an employer to work or a refusal by an employee of a request to work on a public holiday is reasonable:

- the nature of the employer’s workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee
- the employee’s personal circumstances (including family responsibilities)
- whether the employee could reasonably expect that the employer might request work on the public holiday
- whether the employee is entitled to receive overtime, penalty rates or other forms of compensation for working on the public holiday
- the amount of notice in advance of the public holiday given by the employer when making the request
- in relation to the refusal of a request – the amount of notice in advance of the public holiday given by the employee in refusing the request
- any other relevant matter.

**Example**

Monday 7 June, 2010 is a public holiday (Foundation Day) in Western Australia. Paige, who works in a Perth-based box factory, is employed under a modern award that makes provision for public holiday pay at penalty rates.

Paige’s employer asks Paige to work the holiday, giving one week’s notice, on the basis that the workplace is normally open for business on public holidays. However, as a relatively new employee Paige was unaware that there would be a requirement to work on the public holiday and had already made travel plans for the long weekend. Paige immediately refuses the request on the basis that the request is unreasonable.

Whether this request or refusal was reasonable requires a consideration of all relevant factors, such as the nature of the workplace, Paige’s personal circumstances, whether Paige could expect the employer might have requested work on the holiday, the amount of notice, and whether Paige is entitled to receive penalty rates for working the holiday.

**Can employees exchange public holidays for other days of significance?**

260. Some laws or instruments currently allow an employee to ‘swap’ a public holiday for a day of cultural or religious significance to the employee. The proposed public holiday NES does not restrict such arrangements where an employee nominates to work a public holiday in lieu of another day of importance to them.

261. The proposed public holiday NES allows an employer to request an employee to work a public holiday. The fact that the employee has agreed to have another day off in lieu of a particular public holiday would be a relevant factor in determining whether any refusal to work on that day is reasonable.

### **Interaction with awards**

262. Matters that could be provided for by the relevant modern award include an appropriate penalty rate or other compensation where an employee works on a public holiday.

### **Possible issues for discussion**

#### **Range of reasonableness factors**

263. The range of factors is based on the factors set out in section 613 of the WR Act but has been simplified to reduce overlap and duplication. ‘Any other relevant matter’ operates as a ‘catch-all’ factor and would include matters such as whether an emergency or other unforeseen circumstances are involved.

#### **Question**

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 concept of ordinary hours of work**

264. The proposed public holiday NES does not define the meaning of ‘ordinary hours of work’ (e.g. weekly or daily hours) as it is intended that ‘ordinary hours of work’ will be specified for this purpose in modern awards to allow industry-specific working arrangements to be taken into account.

#### **Question**

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

#### **Payment while absent on a public holiday**

265. Under the proposed public holiday NES, payment while absent on a public holiday is paid at the employee’s base rate of pay. It would be possible for a modern award to provide that payment is to be paid at a rate of pay that includes components of an employee’s remuneration not included in the definition of ‘base rate of pay’, where this is necessary to provide a fair minimum safety net for the employees covered by the award, having regard to existing safety net entitlements.

## Questions

39. What specific issues might arise for particular types of employees from the 'base rate of pay' rule in the proposed public holiday NES?
40. Should additional rules be included in the proposed public holiday NES to address those issues?

## General issues

### Question

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

# **NOTICE OF TERMINATION AND REDUNDANCY PAY**

## **Objective of entitlement**

### **Notice of termination**

266. The Government considers that all employees should be entitled to fair notice of termination of their employment. The provision of fair notice of termination provides an employee who has lost their job with an opportunity to look for a new job while still employed or to receive monetary compensation to help support them until they find a new job.

267. Where an employee is over 45 years of age and has at least 2 years' continuous service, the employee will be entitled to one additional week of notice. This additional week of notice recognises the difficulties that can be faced by older employees when seeking new employment.

### **Redundancy pay**

268. Under the proposed redundancy pay NES, all employees who are made redundant and who are employed in workplaces with 15 or more employees will be entitled to redundancy pay in accordance with the scale determined by the AIRC in the 2004 Redundancy Test Case.

269. Redundancy pay is designed to compensate employees for the loss of non-transferable employee entitlements such as sick leave and long service leave and the inconvenience and hardship imposed by being made redundant.

270. The Government acknowledges that small businesses with fewer than 15 employees can face particular challenges when managing employee engagement and dismissal. The small business exemption from redundancy payments is in line with existing redundancy pay standards across the federal, NSW, Qld and WA workplace relations systems.

## **Outline of entitlement – notice of termination**

271. The proposed notice of termination NES provides that, in order to terminate the employment of an employee, the employer must give the employee a minimum period of notice in writing.

272. The minimum period of notice is based on an employee's period of continuous service as at the day the notice is given as set out in the following table:

<b>Employee's period of continuous service with the employer at the end of the day the notice is given</b>	<b>Period</b>
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

273. Rather than providing notice to an employee, an employer could provide payment in lieu of that notice or a combination of written notice and payment in lieu.

274. The proposed notice of termination NES provides that an employee must be paid their full rate of pay (which includes any loadings, monetary allowances, penalty rates or any other similar separately identifiable amounts) for the hours the employee would have worked had their employment continued until the end of the notice period. Payment in lieu of notice is intended to reflect everything that the employee would have earned, had the employee remained in employment for the duration of the notice period.

#### **What does 'continuous service' mean?**

275. Under the proposed notice of termination NES, continuous service for the purposes of notice of termination includes all periods of employment other than any unauthorised absences (e.g. unprotected industrial action).

276. Where there has been a transmission of business, a transferring employee's period of continuous service includes prior service with an old employer, except where an employee has previously received notice or payment in lieu in respect of that prior service.

#### **How is 'payment in lieu of notice' calculated?**

277. Once an employee's period of continuous service is known, determining the payment in lieu of notice is a question of determining what hours the employee would have worked until the end of the notice period. This will usually require an examination of the employee's work patterns and a calculation of the various allowances or loadings (if any) that would have applied to those hours.

- For example, if an employee usually worked every Saturday at overtime rates, payment in lieu of notice would include payment for those hours at overtime rates.

278. This approach to calculating payment is to ensure that an employee is not financially worse off should an employer choose to provide payment in lieu rather than allowing the employee to work until the end of the notice period.

### **Example**

Georgio had worked for his employer for less than one year when his employment was terminated. He regularly worked a standard working week, receiving no additional monetary allowances or loadings.

As an employee with not more than one years continuous service with an employer, Georgio must be given at least one weeks notice or one weeks payment in lieu of notice. In this case, Georgio's employer decides to provide payment in lieu of notice. The payment calculation is based on Georgio's standard working week.

Olivia has had 11 years continuous service with her employer. Olivia regularly works overtime, receiving additional loadings and allowances for those hours.

As an employee with more than five years continuous service, Olivia must be given at least four weeks notice or four weeks pay or a combination of notice and pay. Any payment in lieu would be at the full rate of pay for the hours that Olivia would have worked had employment continued until the end of the notice period and would include the overtime loadings and allowances.

### **Why does an employer have to provide notice of termination in writing?**

279. The proposed notice of termination NES requires that an employer give notice of termination in writing to ensure that an employer and employee can easily establish whether the correct period of notice has been given and, if not, the amount of payment that must be made in lieu.

### **Which employees are excluded from the notice of termination NES?**

280. The proposed notice of termination NES applies to all employees (including apprentices) except:

- employees employed under a contract of employment for a specified period of time or a specified task
- employees serving a period of probation or a qualifying period
- employees whose employment is terminated because of serious misconduct
- casual employees (including long term casuals)
- trainee employees
- seasonal employees.

## **Outline of entitlement – redundancy pay**

281. The proposed redundancy pay NES provides that an employee is entitled to redundancy pay if:

- the employee’s employment is terminated at the initiative of the employer because the employer no longer requires their job to be done by anyone
- because of the insolvency or bankruptcy of the employer.

282. However, there is no entitlement to redundancy pay under the NES where the employee is employed by a business with fewer than 15 employees (including the employee whose employment is terminated on the ground of redundancy).

283. The calculation of redundancy pay under the proposed NES is based on an employee’s period of continuous service (as at the day of termination) in accordance with the following table:

<b>Employee’s period of continuous service with the employer on termination</b>	<b>Redundancy pay period</b>
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years but less than 5 years	8 weeks
At least 5 years but less than 6 years	10 weeks
At least 6 years but less than 7 years	11 weeks
At least 7 years but less than 8 years	13 weeks
At least 8 years but less than 9 years	14 weeks
At least 9 years but less than 10 years	16 weeks
At least 10 years	12 weeks

### **How is an employee’s period of ‘continuous service’ determined?**

284. Under the proposed redundancy pay NES, continuous service for the purposes of redundancy pay includes all periods of employment other than unpaid leave or unpaid authorised absence or unauthorised absence.

### **How is redundancy pay calculated?**

285. The redundancy payment is made at the base rate of pay for an employee’s ordinary hours of work.

286. Under the NES, ‘base rate of pay’ excludes incentive based payments and bonuses, loadings, monetary allowances, overtime or penalty rates or any other similar separately identifiable amounts Which employees are excluded from the NES entitlement to redundancy pay?

287. The proposed redundancy pay NES applies to all employees except the following:

- employees employed under a contract of employment for a specified period of time or a specified task
- employees serving a period of probation, or a qualifying period
- employees whose employment is terminated because of serious misconduct
- casual employees (including long term casuals)
- seasonal employees
- trainee and apprentice employees.

#### **Example**

In the process of restructuring their operations a large employer makes a small team redundant because they no longer require the jobs performed by the team to be done by anyone.

Carl and Cathy are both serving a period of probation and are excluded from the redundancy pay entitlement.

Ivana, an employee with at least one year but less than two years service is entitled to be paid four weeks pay. Mandy, an employee with at least nine years and less than 10 years service is entitled to be paid at least 16 weeks pay. Dave, an employee with more than 10 years of service is entitled to at least 12 weeks pay. The reason why Dave is paid less than Mandy is because the redundancy pay scale takes account of the standard long service leave award entitlement to pro rata payment of long service leave after 10 years' service.

Ivana, Mandy and Dave are paid at their base rate of pay for their ordinary hours of work – excluding overtime, penalty rates, allowances, bonuses etc.

#### **Is redundancy pay payable where there is a transmission of business?**

288. An employee would not be entitled to redundancy pay in circumstances where:

- an employee transfers to a new employer under a transmission of business and the new employer recognises the employee's prior service with a previous employer
- a business has been transferred and the employee rejects an offer of employment with a new employer on substantially similar terms and conditions and the new employer recognises the employee's prior service with a previous employer.

#### **Is redundancy pay payable where alternative employment is found or where an employer cannot pay?**

289. The amount of redundancy pay an employee is entitled to may be reduced by the proposed new independent umpire, Fair Work Australia, where the employer obtains suitable alternative employment for the employee or the employer is unable to meet the redundancy pay obligations due to, for example, genuine financial difficulties.

## Possible issues for discussion

### More beneficial redundancy entitlements under awards and state laws

290. The Government's policy is that the redundancy pay NES provides a minimum safety net entitlement. The Government recognises that some awards (e.g. in the building and construction industry) and laws may provide redundancy entitlements that are structured differently from the proposed NES and / or are more beneficial than the NES.

#### Questions

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

### Small business exemption – businesses with fewer than 15 employees

291. Small businesses employing fewer than 15 employees will be exempted from the proposed redundancy pay NES. The intention is that, in determining the relevant number of employees, the following will be included:

- the employee who is made redundant
- any other employee who is made redundant at the same time
- any casual employee who has been engaged by the employer on a regular and systematic basis for at least 12 months.

#### Question

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?

### General issues

#### Question

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

# FAIR WORK INFORMATION STATEMENT

## Objective of entitlement

292. The Government is committed to ensuring that employees have easy access to clear and simple information about their rights and entitlements in the workplace.

293. The Fair Work Information Statement will provide advice on where to go for information and assistance on workplace issues.

## Outline of entitlement

294. The Fair Work Information Statement will be published by Fair Work Australia and will contain information about:

- the NES
- modern awards
- agreement making
- the right to freedom of association
- the role of Fair Work Australia.

295. The Information Statement will also provide contact details for Fair Work Australia so that employees will know where to go to access further information and assistance.

296. An employer must give each new employee the Fair Work Information Statement as soon as practicable after they commence employment.

## Will there be industry specific information statements?

297. No. Fair Work Australia will publish one Fair Work Information Statement for all employers to provide to their new employees. However, Fair Work Australia could publish new versions as necessary (e.g. to change outdated information).

## What does an employer have to do in order to give an Information Statement to a new employee?

298. In order to satisfy its obligations, an employer could deliver a copy of the Information Statement personally, leave it at, or post it to, the employee's address or email it to the employee.

299. For example, an employer could comply with their obligation to give an Information Statement to a new employee by simply giving the statement to the employee with other paperwork, such as a tax file number declaration form, when the employee commences employment.

### **Does an employer have to give the Information Statement to existing employees?**

300. No. The proposed information in the workplace NES does not require the Information Statement to be given to existing employees.

### **Does an employer have to give the Information Statement to casual employees each time they are rostered on to work a shift?**

301. No. The proposed information in the workplace NES makes it clear that the Information Statement would not have to be given to an employee more than once in any 12-month period.

## **Possible issues for discussion**

### **Prospective employees**

302. The proposed information in the workplace NES is drafted by reference to an employee because it is the employment relationship that gives rise to the rights and obligations contained in the NES.

303. Some employers may prefer to provide the Information Statement prior to the commencement of employment when sending a letter of offer to an employee for consideration.

304. Meanwhile, prospective employees could find it valuable to receive a copy of the Information Statement in advance of the commencement of employment so that they would have information about their rights and entitlements in the workplace and where to go for further information when considering a letter of offer or whether to accept a job.

#### **Question**

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 (e.g. at the time an employee considers a letter of offer)?

### **General issues**

#### **Question**

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

## **APPENDIX – DRAFT PROVISIONS**

# The National Employment Standards

## Division 1 - Preliminary

### 1 Definitions

In this Part:

***adoption-related leave*** means leave under Division 4 of either of the following kinds:

- (a) unpaid parental leave taken in association with the placement of a child for adoption (see section 13);
- (b) unpaid pre-adoption leave (see section 24).

***base rate of pay*** of an employee has the meaning given by section 4.

***birth-related leave*** means leave under Division 4 of either of the following kinds:

- (a) unpaid parental leave taken in association with the birth of a child (see section 13);
- (b) unpaid special maternity leave (see section 20).

***compassionate leave*** means compassionate leave to which an employee is entitled under section 38.

***continuous service*** has a meaning affected by section 6.

***day of placement***, in relation to the adoption of a child by an employee, means the earlier of the following days:

- (a) the day on which the employee first takes custody of the child for the adoption;
- (b) the day on which the employee starts any travel that is reasonably necessary to take custody of the child for the adoption.

***de facto spouse*** of an employee means a person of the opposite sex to the employee who lives with the employee as the employee's husband or wife on a genuine domestic basis although not legally married to the employee.

***eligible community service activity*** has the meaning given by section 42.

***employee couple***: a female employee and a male employee are an ***employee couple*** if each of the employees is the spouse of the other.

***full rate of pay*** of an employee has the meaning given by section 5.

***immediate family***: the following are members of an employee's immediate family:

- (a) a spouse, child, parent, grandparent, grandchild or sibling of the employee;
- (b) a child, parent, grandparent, grandchild or sibling of a spouse of the employee.

For this purpose, ***child*** includes an adopted child, step-child, ex-nuptial child or adult child.

***National Employment Standards*** has the meaning given by subsection 2(3).

***paid annual leave*** means paid annual leave to which an employee is entitled under section 26.

***paid no safe job leave*** means paid no safe job leave to which an employee is entitled under paragraph 21(2)(b).

***paid personal/carer's leave*** means paid personal/carer's leave to which an employee is entitled under section 32.

***pieceworker*** means an employee who, in a modern award that applies to the employee's employment, is

defined or described as a pieceworker.

**public holiday** has the meaning given by section 47.

**service** has the meaning given by section 6.

**spouse** includes the following:

- (a) a former spouse;
- (b) a de facto spouse;
- (c) a former de facto spouse.

**unpaid carer's leave** means unpaid carer's leave to which an employee is entitled under section 36.

**unpaid parental leave** means unpaid parental leave to which an employee is entitled under section 13.

**unpaid pre-adoption leave** means unpaid pre-adoption leave to which an employee is entitled under section 24.

**unpaid special maternity leave** means unpaid special maternity leave to which an employee is entitled under section 20.

## 2 Purpose of Part

- (1) The purpose of this Part is to set out minimum standards that apply to the employment of employees.
- (2) The minimum standards relate to the following matters:
  - (a) maximum weekly hours (Division 2);
  - (b) requests for flexible working arrangements (Division 3);
  - (c) parental leave and related entitlements (Division 4);
  - (d) annual leave (Division 5);
  - (e) personal/carer's leave and compassionate leave (Division 6);
  - (f) community service leave (Division 7);
  - (g) long service leave (Division 8);
  - (h) public holidays (Division 9);
  - (i) notice of termination and redundancy pay (Division 10);
  - (j) Fair Work Information Statement (Division 11).
- (3) This Part constitutes the **National Employment Standards**.

## 3 National Employment Standards cannot be excluded

- (1) A term of a modern award, or of an agreement or contract, has no effect to the extent to which it purports to exclude the National Employment Standards or any part of the National Employment Standards.
- (2) Subsection (1) does not affect a term of a modern award that does something that modern awards are expressly permitted to do:
  - (a) by a provision of this Part; or
  - (b) by regulations made for the purpose of paragraph 8(1)(a).

## 4 Meaning of *base rate of pay*

- (1) The **base rate of pay** of an employee, other than a pieceworker, is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:
  - (a) incentive-based payments and bonuses;
  - (b) loadings;

- (c) monetary allowances;
  - (d) overtime or penalty rates;
  - (e) any other separately identifiable amounts.
- (2) The **base rate of pay** of an employee who is a ‘piecemaker’ is the rate of pay specified in the relevant modern award as the employee’s base rate of pay for the purpose of this Part.

### 5 Meaning of **full rate of pay**

- (1) The **full rate of pay** of an employee, other than a pieceworker, is the rate of pay payable to the employee, including all the following:
- (a) incentive-based payments and bonuses;
  - (b) loadings;
  - (c) monetary allowances;
  - (d) overtime or penalty rates;
  - (e) any other separately identifiable amounts.
- (2) The **full rate of pay** of an employee who is a pieceworker is the rate of pay specified in the relevant modern award as the employee’s full rate of pay for the purpose of this Part.

### 6 Meaning of **service**

*In this Part, other than Division 4 and Subdivision A of Division 10*

- (1) For the purpose of this Part, other than Division 4 and Subdivision A of Division 10:
- (a) a period of **service** by an employee with an employer is a period during which the employee is employed by the employer, but not including any excepted period; and
  - (b) an excepted period does not break an employee’s **continuous service** with an employer, but is not to be counted towards the length of the employee’s continuous service.
- (2) For the purpose of subsection (1), an **excepted period** is:
- (a) any period of unauthorised absence; or
  - (b) any period of unpaid leave or unpaid authorised absence, other than:
    - (i) a period of absence under Division 7 (community service leave); or
    - (ii) a period of leave or absence of a kind prescribed by the regulations.

*In Division 4 and Subdivision A of Division 10*

- (3) For the purpose of Division 4 and Subdivision A of Division 10:
- (a) a period of **service** by an employee with an employer is a period during which the employee is employed by the employer, but not including any period of unauthorised absence; and
  - (b) a period of unauthorised absence does not break an employee’s **continuous service** with an employer, but is not to be counted towards the length of the employee’s continuous service.

### 7 Restriction on taking or accruing leave or absence while receiving workers’ compensation

Except as permitted by a law of the Commonwealth, a State or Territory relating to workers’ compensation, an employee is not entitled to take or accrue any leave or absence (whether paid or unpaid) under this Part during a period when the employee is absent from work because of a personal illness, or a personal injury, for which the employee is receiving compensation payable under such a law.

### 8 Regulations about what modern awards can do

- (1) The regulations may:
- (a) permit modern awards to do things that would or might otherwise be contrary to this Part; or

(b) prohibit modern awards from doing things that would or might otherwise be permitted by this Part.

(2) This Part has effect subject to any such regulations.

## **Division 2 - Maximum weekly hours**

### **9 Maximum weekly hours**

#### *Standard hours*

(1) Subject to subsection (2), an employee's hours of work for an employer in a week must not exceed 38 hours.

#### *Reasonable additional hours*

- (2) The employer may require the employee to work reasonable additional hours in the week.
- (3) The employee may refuse to work additional hours (beyond those mentioned in subsection (1)) if they are unreasonable.
- (4) In determining whether additional hours are reasonable or unreasonable for the purposes of subsections (2) and (3), all the following must be considered:
- (a) any risk to employee health and safety from working the additional hours;
  - (b) the employee's personal circumstances, including family responsibilities;
  - (c) the needs of the workplace or enterprise in which the employee is employed;
  - (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for working the additional hours;
  - (e) the notice (if any) given by the employer of any request or requirement to work the additional hours;
  - (f) the notice (if any) given by the employee of his or her intention to refuse to work the additional hours;
  - (g) any other relevant matter.

#### *Authorised leave treated as hours worked*

- (5) For the purposes of subsection (1), the hours an employee works in a week are taken to include any hours of authorised leave the employee takes in the week. For this purpose, **authorised leave** is the employee's leave, or absence, whether paid or unpaid, that is authorised:
- (a) by the employee's employer; or
  - (b) by or under a term or condition of the employee's employment; or
  - (c) by or under a law of the Commonwealth, a State or a Territory or an instrument in force under such a law.

#### *Modern awards may provide for averaging of hours of work*

- (6) Despite subsection (1), a modern award may include provisions for the averaging of hours of work up to 38 hours a week over a specified period.

## **Division 3 - Requests for flexible working arrangements**

### **10 Requests for flexible working arrangements**

- (1) An employee who is a parent, or has a responsibility for the care, of a child under school age may request the employer for a change in working arrangements for the purpose of assisting the employee to care for the child.

Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.

- (2) The request must:
  - (a) be in writing; and
  - (b) set out details of the change sought and reasons for the change.
- (3) The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.
- (4) The employer may refuse the request only on reasonable business grounds.
- (5) If the employer refuses the request, the response must include the reasons for the refusal.

## **Division 4 - Parental leave and related entitlements**

### **Subdivision A—General**

#### **11 General rule—employee must have completed at least 12 months of service**

##### *Employees other than casual employees*

- (1) An employee, other than a casual employee, is not entitled to leave under this Division (other than unpaid pre-adoption leave) unless the employee has, or will have, completed at least 12 months of continuous service with his or her employer immediately before:
  - (a) if the leave is birth-related leave—the date of birth, or the expected date of birth, of the child; or
  - (b) if the leave is adoption-related leave—the day of placement, or the expected day of placement, of the child.

##### *Casual employees*

- (2) A casual employee is not entitled to leave (other than unpaid pre-adoption leave) under this Division unless:
  - (a) the employee has, or will have, been engaged by his or her employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months immediately before:
    - (i) if the leave is birth-related leave—the date of birth, or the expected date of birth, of the child; or
    - (ii) if the leave is adoption-related leave—the day of placement, or the expected day of placement, of the child; and
  - (b) but for the birth or expected birth of the child, or the placement or the expected placement of the child, the employee would have a reasonable expectation of continuing engagement by the employer on a regular and systematic basis.

#### **12 General rule for adoption-related leave—child must be under school age etc.**

An employee is not entitled to adoption-related leave under this Division unless the child that is, or is to be, placed with the employee for adoption:

- (a) is, or will be, under school age as at the day of placement, or the expected day of placement, of the child; and
- (b) has not, or will not have, lived continuously with the employee for a period of 6 months or more as at the day of placement, or the expected day of placement, of the child; and
- (c) is not a child or step-child of the employee or the employee's spouse.

### **Subdivision B—Parental leave**

### **13 Entitlement to unpaid parental leave**

An employee is entitled to 12 months of unpaid parental leave if:

- (a) the leave is associated with:
  - (i) the birth of a child to the employee or the employee's spouse; or
  - (ii) the placement of a child with the employee for adoption; and
- (b) the employee has or will have a responsibility for the care of the child.

Note 1: Entitlement is also affected by sections 11 and 12.

Note 2: For a female employee, the 12 months is reduced by the amount of any unpaid special maternity leave she has taken (see subsection 20(6)).

### **14 The period of leave: other than for employee couples who each want to take leave**

*When this section applies*

- (1) This section applies to an employee who wants to take unpaid parental leave if:
  - (a) the employee is not a member of an employee couple; or
  - (b) the employee is a member of an employee couple, but the other member of the couple does not want to take unpaid parental leave.

*Leave must be taken in single continuous period*

- (2) The employee must take the leave in a single continuous period.

Note: An employee may take a form of paid leave at the same time as he or she is on unpaid parental leave: see section 19.

*When birth-related leave must start*

- (3) If the leave is birth-related leave for a female employee, the period of leave may start up to 6 weeks before the expected date of birth of the child, but must not start later than the date of birth of the child.
- (4) If the leave is birth-related leave for a male employee, the period of leave must start on the date of birth of the child.

*When adoption-related leave must start*

- (5) If the leave is adoption-related leave, the period of leave must start on the day of placement of the child.

### **15 The period of leave: employee couples who each want to take leave**

*When this section applies*

- (1) This section applies to an employee couple if each of the employees wants to take unpaid parental leave.

*Leave must be taken in single continuous period*

- (2) Each employee must take the leave in a single continuous period.

Note: An employee may take a form of paid leave at the same time as he or she is on unpaid parental leave: see section 19.

*When birth-related leave must start*

- (3) If the leave is birth-related leave:
  - (a) one employee's period of leave must start first, in accordance with the following rules:
    - (i) if the female employee's period of leave starts first—her period of leave may start up to 6

weeks before the expected date of birth of the child, but must not start later than the date of birth of the child;

- (ii) if the male employee's period of leave starts first—his period of leave must start on the date of birth of the child; and
- (b) the other employee's period of leave must start immediately after the end of the first employee's period of leave (or that period as extended under section 16).

*When adoption-related leave must start*

- (4) If the leave is adoption-related leave:
  - (a) one employee's period of leave must start on the day of placement of the child; and
  - (b) the other employee's period of leave must start immediately after the end of the first employee's period of leave (or that period as extended under section 16).

*Limited right to take concurrent leave*

- (5) If one of the employees takes a period (the **first employee's period of leave**) of unpaid parental leave in accordance with paragraph (3)(a) or (4)(a), the other employee may take a period of unpaid parental leave (the **concurrent leave**) during the first employee's period of leave, but only if the concurrent leave is in the first 3 weeks after:
  - (a) if the leave is birth-related leave—the date of birth of the child; or
  - (b) if the leave is adoption-related leave—the day of placement of the child.
- (6) Concurrent leave taken by an employee:
  - (a) is an exception to the rule that the employee must take his or her leave in a single continuous period (see subsection (2)); and
  - (b) is an exception to the rules about when the employee's period of unpaid parental leave must start (see subsections (3) and (4)).

## 16 Extending unpaid parental leave for up to a further 12 months

*Employee may request further period of leave*

- (1) An employee who takes 12 months of unpaid parental leave (the **standard period**) may request his or her employer to agree to an extension of unpaid parental leave for the employee for a further period of up to 12 months immediately following the standard period.

*Making the request*

- (2) The request must be in writing, and must be given to the employer at least 4 weeks before the end of the standard period.

*Agreeing to the requested extension*

- (3) The employer must agree to the requested extension, unless the employer has reasonable business grounds for refusing.

*Special rules for employee couples*

- (4) The following paragraphs apply in relation to a member of an employee couple extending a period of unpaid parental leave in respect of a child under this section:
  - (a) the request must specify the amount (if any) of unpaid parental leave and unpaid special maternity leave that the other member of the employee couple has taken, or will have taken, in relation to the child before the extension starts;
  - (b) the period of the extension cannot exceed 12 months, less any period of unpaid parental leave or unpaid special maternity leave that the other member of the employee couple has taken, or will

- have taken, in relation to the child before the extension starts;
- (c) the amount of unpaid parental leave to which the other member of the employee couple is entitled under section 13 in respect of the child is reduced by the period of the extension.

## **17 Notice and evidence requirements**

### *Notice*

- (1) An employee must give his or her employer notice of the taking of unpaid parental leave by the employee.
- (2) The notice must be given to the employer:
  - (a) at least ten weeks before starting the leave; or
  - (b) if that is not reasonably practicable—as soon as is reasonably practicable (which may be a time after the leave has started).
- (3) The notice must specify the intended start and end dates of the leave.

### *Evidence*

- (4) An employee who has given his or her employer notice of the taking of unpaid parental leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person:
  - (a) if the leave is birth-related leave—of the date of birth, or the expected date of birth, of the child; or
  - (b) if the leave is adoption-related leave:
    - (i) of the day of placement, or the expected day of placement, of the child; and
    - (ii) that the child is, or will be, under school age as at the day of placement, or the expected day of placement, of the child.

### *Compliance*

- (5) An employee is not entitled to take unpaid parental leave unless the employee complies with this section.

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

## **18 Employee who ceases to have responsibility for care of child**

- (1) This section applies to an employee who has taken unpaid parental leave in respect of a child if the employee ceases to have any responsibility for the care of the child.
- (2) The employer may give the employee written notice requiring the employee to return to work on a specified day.
- (3) The specified day:
  - (a) must be at least 4 weeks after the notice is given to the employee; and
  - (b) if the leave is birth-related leave taken by a female employee who has given birth—must not be earlier than 6 weeks after the date of birth of the child.
- (4) The employee's entitlement to unpaid parental leave in respect of the child ends immediately before the specified day.

## **19 Interaction with paid leave**

- (1) Subject to subsections (2) and (3), nothing in this Subdivision prevents an employee from taking any other kind of paid leave while he or she is taking unpaid parental leave. If the employee does so, the taking of that other paid leave does not break the continuity of the period of unpaid parental leave.

Note: For example, if the employee has paid annual leave available, he or she may (with the employer's agreement) take some or all of that paid annual leave at the same time as the unpaid parental leave.

- (2) An employee is not entitled to take paid personal/carer's leave or compassionate leave while he or she is taking unpaid parental leave.
- (3) An employee is not entitled to any payment under Division 7 (community service leave) in relation to activities the employee engages in while taking unpaid parental leave.

## **Subdivision C—Other entitlements**

### **20 Unpaid special maternity leave**

#### *Entitlement to unpaid special maternity leave*

- (1) A female employee is entitled to a period of unpaid special maternity leave if she is unfit for work during that period because:
  - (a) she has a pregnancy related illness; or
  - (b) she has been pregnant, and the pregnancy ends within 28 weeks of the expected date of birth of the child otherwise than by the birth of a living child.

Note: Entitlement is also affected by section 11.

#### *Notice and evidence*

- (2) An employee must give her employer notice of the taking of unpaid special maternity leave by the employee.
- (3) The notice:
  - (a) must be given to the employer as soon as reasonably practicable (which may be a time after the leave has started); and
  - (b) must advise the employer of the period, or expected period, of the leave.
- (4) An employee who has given her employer notice of the taking of unpaid special maternity leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason specified in subsection (1).
- (5) An employee is not entitled to take unpaid special maternity leave unless the employee complies with subsections (2) to (4).

#### *Taking of special maternity leave reduces entitlement to unpaid parental leave*

- (6) A female employee's entitlement to 12 months unpaid parental leave associated with the birth of a child (see section 13) is reduced by the amount of any unpaid special maternity leave taken by the employee while she was pregnant.

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

### **21 Transfer to a safe job**

- (1) This section applies to a female employee who is pregnant if:
  - (a) she is entitled to unpaid parental leave; and
  - (b) she has already complied with the notice and evidence requirements of section 17 for taking unpaid parental leave; and
  - (c) she gives her employer evidence that would satisfy a reasonable person that she is fit to work, but that it is inadvisable for her to continue in her present position during a particular period (the **risk period**) because of:
    - (i) illness, or risks, arising out of her pregnancy; or

- (ii) hazards connected with that position.

Note: Personal information given to an employer under this subsection may be regulated under the *Privacy Act 1988*.

- (2) If this section applies to an employee:
  - (a) the employer must transfer the employee to an appropriate safe job for the risk period; or
  - (b) if there is no appropriate safe job available—the employee is entitled to take paid no safe job leave for the risk period.
- (3) For the purpose of subsection (2), an **appropriate safe job** is a safe job that has:
  - (a) the same ordinary hours of work as the employee's present position; or
  - (b) a different number of ordinary hours agreed to by the employee.
- (4) If the employee is transferred to an appropriate safe job for the risk period, the employer must pay the employee for the safe job at the employee's full rate of pay (for the position she was in before the transfer) for the hours that she works in the risk period.
- (5) If the employee takes paid no safe job leave for the risk period, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the risk period.
- (6) If the employee's pregnancy ends before the end of the risk period, the risk period ends when the pregnancy ends.

## 22 Consultation with employee on unpaid parental leave

- (1) If:
  - (a) an employee is on unpaid parental leave; and
  - (b) the employee's employer makes a decision that will have a significant effect on the status or pay of the employee's pre-leave position;the employer must give the employee information about, and an opportunity to discuss, the effect of the decision on that position.
- (2) The employee's **pre-leave position** is:
  - (a) unless paragraph (b) applies, the position the employee held before starting the unpaid parental leave; or
  - (b) if, before starting the unpaid parental leave, the employee:
    - (i) was transferred to a safe job because of her pregnancy; or
    - (ii) reduced her working hours due to her pregnancy;the position the employee held immediately before that transfer or reduction.

## 23 Return to work guarantee

- (1) On finishing unpaid parental leave, an employee is entitled to return to:
  - (a) the employee's pre-leave position; or
  - (b) if that position is no longer available—an available position for which the employee is qualified and suited nearest in status and pay to the pre-leave position.
- (2) The employee's **pre-leave position** is:
  - (a) unless paragraph (b) applies, the position the employee held before starting the unpaid parental leave; or
  - (b) if, before starting the unpaid parental leave, the employee:
    - (i) was transferred to a safe job because of her pregnancy; or
    - (ii) reduced her working hours due to her pregnancy;the position the employee held immediately before that transfer or reduction.

## **24 Unpaid pre-adoption leave**

### *Entitlement to unpaid pre-adoption leave*

- (1) Subject to subsection (2), an employee is entitled to up to 2 days of unpaid pre-adoption leave to attend any interviews or examinations required in order to obtain approval for the employee's adoption of a child.

Note: Entitlement is also affected by sections 11 and 12.

- (2) An employee is not entitled to take a period of unpaid pre-adoption leave if:
  - (a) the employee could instead take some other form of leave; and
  - (b) the employer would prefer the employee to take that other form of leave.
- (3) An employee who is entitled to a period of unpaid pre-adoption leave is entitled to take the leave as:
  - (a) a single continuous period of up to 2 days; or
  - (b) any separate periods to which the employee and the employer agree.

### *Notice and evidence*

- (4) An employee must give his or her employer notice of the taking of unpaid pre-adoption leave by the employee.
- (5) The notice:
  - (a) must be given to the employer as soon as reasonably practicable (which may be a time after the leave has started); and
  - (b) must advise the employer of the period, or expected period, of the leave.
- (6) An employee who has given his or her employer notice of the taking of unpaid pre-adoption leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken to attend an interview or examination as mentioned in subsection (1).
- (7) An employee is not entitled to take unpaid pre-adoption leave unless the employee complies with subsections (4) to (6).

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

## **Division 5 - Annual leave**

### **25 Division applies to employees other than casual employees**

This Division applies to employees, other than casual employees.

### **26 Entitlement to annual leave**

- (1) Subject to subsection (2), for each year of service with his or her employer, an employee is entitled to:
  - (a) 4 weeks of paid annual leave; or
  - (b) if a modern award that applies to the employee's employment defines or describes the employee as a shiftworker for the purpose of this Division—5 weeks of paid annual leave.
- (2) An employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work.

Note: If an employee's employment ends during what would otherwise have been a year of service, the employee accrues paid annual leave up to the time when the employment ends.

### **27 Taking paid annual leave**

- (1) Paid annual leave may be taken for a period agreed between an employee and his or her employer.
- (2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

### **28 Employee not taken to be on paid annual leave at certain times**

- (1) If the period during which an employee takes paid annual leave includes a day that is a public holiday in the place where the employee is based for work purposes, the employee is taken not to be on paid annual leave on that public holiday.
- (2) If the period during which an employee takes paid annual leave includes a period of any other leave (other than unpaid parental leave) under this Part, or a period of absence from employment under Division 7 (community service leave), the employee is taken not to be on paid annual leave for the period of that other leave or absence.

### **29 Payment for annual leave**

- (1) If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.
- (2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee under subsection (1) if the employee had taken that period of annual leave.

### **30 Awards may include certain kinds of provisions**

- (1) An award may include provisions of any of the following kinds:
  - (a) provisions for the cashing out of paid annual leave;
  - (b) provisions requiring an employee (or allowing for an employee to be required) to take paid annual leave in particular circumstances;
  - (c) provisions otherwise dealing with the taking of paid annual leave.
- (2) This Division has effect subject to any such provisions that are included in awards.

## **Division 6 - Personal/carer's leave and compassionate leave**

### **Subdivision A—Paid personal/carer's leave**

#### **31 Subdivision applies to employees other than casual employees**

This Subdivision applies to employees, other than casual employees.

#### **32 Entitlement to paid personal/carer's leave**

- (1) Subject to subsection (2), for each year of service with his or her employer, an employee is entitled to ten days of paid personal/carer's leave.
- (2) An employee's entitlement to paid personal/carer's leave accrues progressively during a year of service according to the employee's ordinary hours of work.

#### **33 Taking paid personal/carer's leave**

An employee may take paid personal/carer's leave if the leave is taken:

- (a) because the employee is unfit for work because of a personal illness, or personal injury, affecting

the employee; or

- (b) to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:
  - (i) a personal illness, or personal injury, affecting the member; or
  - (ii) an unexpected emergency affecting the member.

Note: The notice and evidence requirements of section 41 must be complied with.

### **34 Employee taken not to be on paid personal/carer's leave on public holiday**

If the period during which an employee takes paid personal/carer's leave includes a day that is a public holiday in the place where the employee is based for work purposes, the employee is taken not to be on paid personal/carer's leave on that public holiday.

### **35 Payment for paid personal/carer's leave**

If, in accordance with this Subdivision, an employee takes a period of paid personal/carer's leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

## **Subdivision B—Unpaid carer's leave**

### **36 Entitlement to unpaid carer's leave**

An employee is entitled to 2 days of unpaid carer's leave for each occasion (a *permissible occasion*) when a member of the employee's immediate family, or a member of the employee's household, requires care or support because of:

- (a) a personal illness, or personal injury, affecting the member; or
- (b) an unexpected emergency affecting the member.

### **37 Taking unpaid carer's leave**

- (1) Subject to subsection (3), an employee may take unpaid carer's leave for a particular permissible occasion if the leave is taken to provide care or support as mentioned in section 36.
- (2) An employee may take unpaid carer's leave for a particular permissible occasion as:
  - (a) a single continuous period of up to 2 days; or
  - (b) any separate periods to which the employee and his or her employer agree.
- (3) An employee cannot take unpaid carer's leave during a particular period if the employee could instead take paid personal/carer's leave.

Note: The notice and evidence requirements of section 41 must be complied with.

## **Subdivision C—Compassionate leave**

### **38 Entitlement to compassionate leave**

An employee is entitled to 2 days of compassionate leave for each occasion (a *permissible occasion*) when a member of the employee's immediate family, or a member of the employee's household:

- (a) contracts or develops a personal illness that poses a serious threat to his or her life; or
- (b) sustains a personal injury that poses a serious threat to his or her life; or
- (c) dies.

### **39 Taking compassionate leave**

- (1) An employee may take compassionate leave for a particular permissible occasion if the leave is taken:
  - (a) for the purpose of spending time with the member of the employee's immediate family or household who has contracted or developed the personal illness, or sustained the personal injury, referred to in section 38; or
  - (b) after the death of the member of the employee's immediate family or household referred to in section 38.
- (2) An employee may take compassionate leave for a particular permissible occasion as:
  - (a) a single continuous period of 2 days; or
  - (b) 2 separate periods of 1 day each; or
  - (c) any separate periods to which the employee and his or her employer agree.
- (3) If the permissible occasion is the contraction or development of a personal illness, or the sustaining of a personal injury, the employee may start to take the compassionate leave for that occasion at any time while the illness or injury persists.

Note: The notice and evidence requirements of section 41 must be complied with.

#### **40 Payment for compassionate leave (other than for casual employees)**

If, in accordance with this Subdivision, an employee, other than a casual employee, takes a period of compassionate leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

Note: For casual employees, compassionate leave is unpaid leave.

### **Subdivision D—Notice and evidence requirements**

#### **41 Notice and evidence requirements**

##### *Notice*

- (1) An employee must give his or her employer notice of the taking of leave under this Division by the employee.
- (2) The notice:
  - (a) must be given to the employer as soon as is reasonably practicable (which may be a time after the leave has started); and
  - (b) must advise the employer of the period, or expected period, of the leave.

##### *Evidence*

- (3) An employee who has given his or her employer notice of the taking of leave under this Division must, if required by the employer, give the employer evidence that would satisfy a reasonable person that:
  - (a) if it is paid personal/carer's leave—the leave is taken for a reason specified in section 33; or
  - (b) if it is unpaid carer's leave—the leave is taken for a permissible occasion in circumstances specified in subsection 37(1); or
  - (c) if it is compassionate leave—the leave is taken for a permissible occasion in circumstances specified in subsection 39(1).

##### *Compliance*

- (4) An employee is not entitled to take leave under this Division unless the employee complies with this section.

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

## **Division 7 - Community service leave**

### **42 Meaning of *eligible community service activity***

- (1) For the purpose of this Part, each of the following is an *eligible community service activity*:
  - (a) jury service (including attendance for the purpose of jury selection) that is required by or under a law of the Commonwealth or of a State or Territory; or
  - (b) carrying out a voluntary emergency management activity (within the meaning of section 659); or
  - (c) an activity prescribed in regulations made for the purpose of subsection (2).
- (2) The regulations may prescribe an activity that is of a community service nature as an eligible community service activity for the purpose of this Division.

### **43 Entitlement to be absent from employment for engaging in eligible community service activity**

An employee who engages in an eligible community service activity is entitled to be absent from his or her employment for a period if:

- (a) the period consists of one or more of the following:
  - (i) time when the employee engages in the activity;
  - (ii) reasonable travelling time associated with the activity;
  - (iii) reasonable rest time immediately following the activity; and
- (b) unless the activity is jury service—the employee’s absence is reasonable in all the circumstances.

### **44 Notice and evidence requirements**

#### *Notice*

- (1) An employee who wants an absence from his or her employment to be covered by this Division must give his or her employer notice of the absence.
- (2) The notice:
  - (a) must be given to the employer as soon as reasonably practicable (which may be a time after the absence has started); and
  - (b) must advise the employer of the period, or expected period, of the absence.

#### *Evidence*

- (3) An employee who has given his or her employer notice of an absence under subsection (1) must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the absence is because the employee has been or will be engaging in an eligible community service activity.

#### *Compliance*

- (4) An employee’s absence from his or her employment is not covered by this Division unless the employee complies with this section.

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

### **45 Payment to employees (other than casuals) on jury service**

- (1) This section applies if:
  - (a) in accordance with this Division, an employee is absent from his or her employment for a period because of jury service; and
  - (b) the employee is not a casual employee.

(2) Subject to subsections (3) and (4), the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

(3) The employer may require the employee to give the employer evidence that would satisfy a reasonable person of the total amount (even if it is a nil amount) of jury service pay that has been paid, or is payable, to the employee for the period.

Note: Personal information given to an employer under this subsection may be regulated under the *Privacy Act 1988*.

(4) If, in accordance with subsection (3), the employer requires the employee to give the employer evidence of the total amount referred to in that subsection:

(a) the employee is not entitled to payment under subsection (2) unless the employee provides the evidence; and

(b) if the employee provides the evidence—the amount payable to the employee under subsection (2) is reduced by that total amount, as disclosed in the evidence.

(5) In this section:

***jury service pay*** means an amount paid under a law of the Commonwealth or of a State or Territory for or in respect of jury service, other than an amount that is, or that is in the nature of, an expense-related allowance.

## Division 8 - Long service leave

### 46 Entitlement to long service leave

(1) An employee is entitled to long service leave in accordance with applicable award-derived long service leave provisions (see subsection (2)) unless:

(a) a workplace agreement, or an AWA (within the meaning of Schedule 7A), that came into force before the commencement of this Part applies to the employee's employment; or

(b) one of the following kinds of instrument that came into force before the commencement of this Part applies to the employee's employment and deals with long service leave (even if it provides that the employee is not entitled to long service leave):

(i) a preserved State agreement;

(ii) a workplace determination;

(iii) a pre-reform certified agreement (within the meaning of Schedule 7);

(iv) a pre-reform AWA;

(v) a section 170MX award (within the meaning of Schedule 7);

(vi) an exceptional matters order (within the meaning of Schedule 7);

(vii) an old IR agreement (within the meaning of Schedule 7);

(viii) an employment agreement (within the meaning of section 887).

(2) For the purpose of subsection (1), ***applicable award-derived long service leave provisions***, in relation to an employee, are provisions of an award, or of a notional agreement preserving State awards, as in force immediately before the commencement of this Part:

(a) that would have applied to the employee's employment, if the employee had, at that time, been in his or her current circumstances of employment; and

(b) that would have entitled the employee to long service leave (or that relate to matters that are ancillary or incidental to such an entitlement).

## Division 9 - Public holidays

### 47 Meaning of *public holiday*

For the purpose of this Part, the following are ***public holidays***:

- (a) each of these days:
  - (i) 1 January (New Year's Day);
  - (ii) 26 January (Australia Day);
  - (iii) Good Friday;
  - (iv) Easter Monday;
  - (v) 25 April (Anzac Day);
  - (vi) the Queen's birthday holiday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory);
  - (vii) 25 December (Christmas Day);
  - (viii) 26 December (Boxing Day); and
- (b) a day that, under (or in accordance with a procedure under) a law of a State or Territory, is substituted for a day referred to in paragraph (a); and
- (c) any other day declared by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday, other than a day, or kind of day, that is excluded by the regulations from counting as a public holiday.

#### **48 Entitlement to be absent from employment on public holiday**

- (1) Subject to subsections (2) to (4), an employee is entitled to be absent from his or her employment on a day that is a public holiday in the place where the employee is based for work purposes.
- (2) An employer may request an employee to work on a public holiday if the request is reasonable.
- (3) If an employer requests an employee to work on a public holiday, the employee may refuse the request if:
  - (a) the request is not reasonable; or
  - (b) the refusal is reasonable.
- (4) In determining whether a request, or a refusal of a request, to work on a public holiday is reasonable, the following must be considered:
  - (a) the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;
  - (b) the employee's personal circumstances, including family responsibilities;
  - (c) whether the employee could reasonably expect that the employer might request work on the public holiday;
  - (d) whether the employee is entitled to receive overtime, penalty rates or other forms of compensation for working on the public holiday;
  - (e) the amount of notice in advance of the public holiday given by the employer when making the request;
  - (f) in relation to the refusal of a request—the amount of notice in advance of the public holiday given by the employee when refusing the request;
  - (g) any other relevant matter.

#### **49 Payment for absence on public holiday**

If, in accordance with this Division, an employee is absent from his or her employment on a public holiday, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work on the day.

### **Division 10 - Notice of termination and redundancy pay**

#### **Subdivision A—Notice of termination or payment in lieu of notice**

## 50 Requirement for notice of termination or payment in lieu

### *Written notice specifying day of termination*

- (1) An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given).

Note: Section 56 describes situations in which this section does not apply.

### *Amount of notice or payment in lieu of notice*

- (2) The employer must not terminate the employee's employment unless:
  - (a) the time between giving the notice and the day of the termination is at least the period (the **minimum period of notice**) worked out under subsection (3); or
  - (b) the employer has paid the employee payment in lieu of notice of at least the amount the employer would have been liable to pay the employee at the full rate of pay for the hours he or she would have worked had the employment continued until the end of the minimum period of notice.
- (3) Work out the minimum period of notice as follows:
  - (a) first, work out the period using the following table:

#### **Period**

<b>Employee's period of continuous service with the employer at the end of the day the notice is given</b>	<b>Period</b>
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1 Not more than 1 year	1 week
2 More than 1 year but not more than 3 years	2 weeks
3 More than 3 years but not more than 5 years	3 weeks
4 More than 5 years	4 weeks

- (b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.

## 51 Transmission of business and notice of termination or payment in lieu

- (1) For the purposes of section 50, a transferring employee's period of continuous service includes each period of continuous service of the employee with an old employer in the business being transferred (whether or not the old employer was previously a new employer in connection with the business).
- (2) However, the employee's continuous service with an old employer is disregarded so far as the employee had previously received notice of termination, or payment in lieu of such notice, in respect of that service.

## Subdivision B—Redundancy pay

### 52 Redundancy pay

- (1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:
  - (a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone; or
  - (b) because of the insolvency or bankruptcy of the employer.

Note: Sections 54, 55 and 56 describe situations in which the employee does not have this entitlement.

- (2) The amount of the redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out using the following table at the employee's base rate of pay for his or her

ordinary hours of work:

**Redundancy pay period**

**Employee's period of continuous service  
with the employer on termination**

**Redundancy pay period**

1	At least 1 year but less than 2 years	4 weeks
2	At least 2 years but less than 3 years	6 weeks
3	At least 3 years but less than 4 years	7 weeks
4	At least 4 years but less than 5 years	8 weeks
5	At least 5 years but less than 6 years	10 weeks
6	At least 6 years but less than 7 years	11 weeks
7	At least 7 years but less than 8 years	13 weeks
8	At least 8 years but less than 9 years	14 weeks
9	At least 9 years but less than 10 years	16 weeks
10	At least 10 years	12 weeks

**53 Variation of redundancy pay for other employment or incapacity to pay**

- (1) This section applies if:
  - (a) an employee is entitled to be paid an amount of redundancy pay by the employer because of section 52; and
  - (b) the employer:
    - (i) obtains other acceptable employment for the employee; or
    - (ii) cannot pay the amount.
- (2) On application by the employer, Fair Work Australia may determine that the amount of redundancy pay is reduced to the amount specified in the determination.
- (3) A determination has effect according to its terms, despite section 52.

**54 Exclusions from obligation to pay redundancy pay**

Section 52 does not apply to the employee if:

- (a) his or her period of continuous service with the employer on termination is less than 12 months;  
or
- (b) at the earlier of the following times, the employer employed fewer than 15 employees (including the employee):
  - (i) the time the employee is given notice of the termination as described in subsection 50(1);
  - (ii) immediately before the termination.

**55 Transmission of business and redundancy pay**

*Transferring employee*

- (1) Section 52 does not apply to a transferring employee if his or her employment with the new employer recognises the employee's service with an old employer in the business being transferred (whether or not the old employer was previously a new employer in connection with the business).

*Employee who rejects offer of employment with new employer*

- (2) Section 52 does not apply to an employee in a business being transferred if he or she rejects an offer of employment with the new employer:
  - (a) on terms and conditions substantially similar to, and, considered on an overall basis, no less

- favourable than, the employee's terms and conditions of employment with the old employer immediately before the termination of that employment; and
- (b) recognising the employee's service with an old employer in the business (whether or not that old employer was previously a new employer in connection with the business).
- (3) On application by the employee, Fair Work Australia may, if satisfied that subsection (2) operates unfairly to him or her, determine that the old employer must pay the employee a specified amount of redundancy pay. The amount must not exceed his or her entitlement under section 52 apart from this section.
- (4) The determination has effect according to its terms.

## **Subdivision C—Limits on scope of this Division**

### **56 Limits on scope of this Division**

#### *Employees not covered by this Division*

- (1) This Division does not apply to any of the following employees:
  - (a) an employee employed for a specified period of time or a specified task;
  - (b) an employee serving a period of probation, or a qualifying period of employment, that is determined in advance and is of a duration prescribed by the regulations;
  - (c) an employee whose employment is terminated because the employee is guilty of serious misconduct;
  - (d) a casual employee;
  - (e) a seasonal employee;
  - (f) a trainee employed under an agreement prescribed by the regulations;
  - (g) an employee prescribed by the regulations as an employee to whom this Division does not apply.
- (2) Paragraph (1)(a) does not prevent this Division from applying to an employee if a substantial reason for employing the employee as described in that paragraph was to avoid the application of this Division.

#### *Other employees not covered by notice of termination provisions*

- (3) Subdivision A does not apply to an employee prescribed by the regulations as an employee to whom that Subdivision does not apply.

#### *Other employees not covered by redundancy pay provisions*

- (4) Subdivision B does not apply to:
  - (a) an employee who is an apprentice; or
  - (b) an employee prescribed by the regulations as an employee to whom that Subdivision does not apply.

#### *Definitions*

- (5) In this section:

**seasonal employee** includes an employee whose employment is of a nature prescribed by the regulations.

**serious misconduct** has the meaning given by the regulations.

## **Division 11 - Fair Work Information Statement**

### **57 Fair Work Australia to publish statement**

(1) Fair Work Australia must publish in the *Gazette* a statement called the Fair Work Information Statement.

Note: Fair Work Australia must publish the Fair Work Information Statement in the *Gazette* as occasion requires (for example whenever Fair Work Australia changes the statement); see subsection 33(1) of the *Acts Interpretation Act 1901*.

(2) The Fair Work Information Statement must contain information about the following:

- (a) the National Employment Standards;
- (b) modern awards;
- (c) agreement-making under this Act;
- (d) the right to freedom of association;
- (e) the role of Fair Work Australia.

(3) The regulations may prescribe other matters relating to the content or form of the Fair Work Information Statement, or the manner in which employers may give the Fair Work Information Statement to employees.

(4) A statement published under subsection (1) is not a legislative instrument.

### **58 Giving new employees the Fair Work Information Statement**

(1) An employer must give each employee the Fair Work Information Statement as soon as practicable after the employee commences employment.

(2) Subsection (1) does not require the employer to give the employee the Fair Work Information Statement more than once in any 12 months.

Note: This is relevant if the employer employs the employee more than once in the 12 months.

