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in reply, please quote

GE08/0051

3 April 2008

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

Dear Sir/Madam

Please find enclosed the submission by the Catholic Education Commission of Victoria Limited (CECV) regarding the Exposure Draft for the National Employment Standards.

If you have any queries regarding the details of this submission, please contact Mr Norm Howett, Manager, CECV Industrial Relations Unit, phone 9267 0228 or email <nhowett@cecv.vic.catholic.edu.au>.

Yours sincerely

Stephen Elder
EXECUTIVE DIRECTOR

Attach.



SUBMISSION BY THE CATHOLIC EDUCATION COMMISSION OF VICTORIA LIMITED (CECV) – NATIONAL EMPLOYMENT STANDARDS

The CECV provides the following submission in response to the Government's proposed National Employment Standards. This submission highlights specific issues for workplace relations in Victorian Catholic Schools and possibly for many school systems across Australia.

Recommendations:

- *That National Employment Standards take recognition of the particular needs of the education industry by providing for interplay between the Standards, any proposed modernisation of Awards and Collective Agreements and allowing for compensated flexibilities, required to enable schools to function in a manner that facilitates good educational outcomes for students.*
- *That any proposal regarding the adoption of a 38 hour week incorporate the ability to provide an 'averaging' of hours over an extended period in consideration of the school year and a recognition of 'reasonable overtime' as part of the working week for appropriate classifications.*
- *That requests for part-time work be at 'management discretion' and that any consideration takes into account the 'operational' and 'resourcing' needs of the employer and not just the 'reasonable business grounds' as identified in the NES 'Discussion Paper'.*
- *That the provisions pertaining to Parental Leave provide for the ability to request extended notice periods regarding the employee's return to work and there be flexibility provided in the standards to allow parties to negotiate a code of conditions.*
- *That the ability to undertake alternative employment whilst on Parental Leave should require the current employer's approval but that approval not be unreasonably withheld.*
- *That Personal/Carers Leave cannot be used to replace scheduled Rostered Days Off (RDO's)*

- ***That the Notice of Termination and redundancy pay recognise a similar right of employers to withhold wage or salary where sufficient notice of termination by the employee is not provided.***

This submission is presented in response to the 'Exposure Draft' released by the Federal Government in establishing the National Employment Standards (NES) as part of its proposed changes to workplace relations legislation.

The Education sector by its very nature has unique features that can be distinguished from manufacturing industries or even other public and private sector employment situations. The nature of the work of teachers and ancillary staff of schools deals with children and their educational development. Some of the employment conditions are unique; for example:

- School Holidays involves up to 11 weeks or more where teachers are paid and students are not at school;
- The concept of educational outcomes is entirely different from productivity or profit based concepts that occur elsewhere;
- Students are supervised in residential settings on school camps, excursions and retreats. Teachers are required as part of their profession to be responsible for students in these circumstances even though the normal classroom hours have ended and parent teacher interviews/nights etc;
- Particular issues such as continuity of employment and portability of conditions such as sick leave and long service leave.

The CECV has the responsibility for the distribution of federal and state government funding to Catholic Schools in the State of Victoria. Although Catholic education is part of the private sector it is heavily dependent on Federal and State Government funding and the specific requirements on the use of that funding from Governments. The CECV also provides industrial relations advice and representation on behalf of Catholic Schools in the State of Victoria and holds written authority from Catholic Schools in the State of Victoria to act and file documents on their behalf in regard to industrial matters.

Catholic Education in the State of Victoria encompasses 383 primary schools, ninety-five secondary schools and nine special schools. In 2007 Catholic schools had a total enrolment of 184,304 students and approximately 20,000 staff; which comprises of approximately 14,500 teaching staff. These employees are employed by 311 employers in Catholic schools and Catholic Education Offices.

The industrial instruments that govern employees' entitlements and obligations are the Victorian Catholic Schools and Catholic Education Offices Award 1998 and the Victorian Catholic Schools and Catholic Education Offices Certified Agreement 2004 – 2007. Further to these industrial instruments are individual 'Letters of Appointment' which deals with individuals' specific contracts of employment as well as various workforce policies.

The CECV would wish to emphasise the particular needs not only regarding the terms of employment for staff in schools throughout Australia but also the arrangements for Catholic Schools in Victoria. The educational requirements of students means that

staff is often required to take on roles or perform duties that do not simply fit into the normal 38 hour week. We are unsure exactly what is being proposed regarding the interplay between the NES entitlements and the 'Modernised Awards' and if the Standards can be adjusted on a 'no disadvantage basis' to suit a particular industry. We would request that such an arrangement be enabled given the particular circumstances that schools face. Similar comments would apply to staff not covered by Awards but by individual common law contracts.

We submit that consideration be given to the particular work arrangements that exist in schools. A typical example of this is the working hours and holidays that teachers have as core working conditions. Whilst there are mutually beneficial arrangements regarding these conditions, they operate with the need for flexibility and we are concerned that the proposed legislative provisions and their interpretation by the Workplace Authority would impose entitlements that would restrict the operations of schools to meet the needs of the students which they are committed to.

Maximum Weekly Hours:

The CECV notes in the 'Discussion Paper' that consideration has been given to the issue of 'averaging' hours in identifying 38 hours as the accepted community standard and that there be a recognition of 'reasonable overtime'.

Currently there are no stipulated hours per week for teachers within our Award or Collective Agreement as this has been regulated by 'face to face' teaching hours. Hours of work and annual leave, and school holidays, operate in recognition of our principals, deputy principals and teachers' professional status. Catholic Schools must also comply with state legislation and state Government requirements in relation to curricula and organisational requirements. We endorse the notion that the NES needs to recognise both the requirement for the ability to 'average hours' and enable 'reasonable overtime' to be allowed for. We would request that the averaging period take into consideration that a school term can be up to 12 weeks and that teachers receive 11 to 12 weeks school holidays per school year. As such we would submit that the 'averaging period' be not restricted to a couple of weeks on the basis that our industry is governed by State Government directives around the date of school terms and curriculum.

Further, as you have identified in your discussion paper, there needs to be recognition of the arrangements for high income employees that reflect long and irregular hours. In common with other Schools, the Catholic system relies on the efforts of our Principals and Senior Administrators (many of whom are employed outside of the Award and Collective Agreement) to oversee our operations and to that extent a 'reasonable overtime' arrangement within the NES is imperative.

Requests for flexible working arrangements:

The CECV supports the notion of requests for flexible working arrangements and has incorporated such a right into our Collective Agreement however there are a number of issues that confront us with regard to this matter.

Over recent years there have been a number of legal cases concerning the employers' obligations to provide part-time work with varying outcomes. The CECV is concerned that the NES maybe worded in such a manner that it would place an unreasonable burden on Catholic Schools in Victoria to provide part-time employment where it had neither the resourcing nor organisational capacity to provide such an entitlement. Currently our schools have a high percentage of women working as teachers. Often a school could have multiple requests for part-time work based on family needs and this becomes a significant problem on an organisational and curriculum basis. Further, the CECV is constantly receiving feedback from schools of the significant benefits to students' education where there is a consistency of personnel who provide that education. Where there is a constant change in staffing personnel, this can have negative effects on students. These concerns are held by not just well established Secondary Schools but also from small primary schools that have a limited capacity to provide such arrangements.

Any established standard, whilst recognising the right to request flexible working arrangements, also should stipulate that the option to provide such an entitlement rests with management. Given the nature of school education and the limited resources available, a refusal to provide such a request be also allowed for on the basis of resourcing and operational reasons and not just 'reasonable business grounds' as identified in the 'Discussion Paper'. The educational needs of our students are the paramount concern for our school leaders.

Parental leave and related entitlements

In regard to the current Parental Leave entitlements under the current Workchoices Legislation the CECV has encountered a number of problems with notice compliance. A typical example of this is the amount of notice required from employees of a return to work following a period of parental leave. Under Workchoices the period identified is four weeks. Currently under our Award the period of notification is 7 weeks, preferably commencing back at the school from the beginning of a school year or a school term. The benefit of the Award arrangement is that schools have the ability to employ replacement teachers for term periods rather than having them on arrangements where their employment can be terminated by four weeks notice. In response the Catholic School System has a number of provisions which go to compensating staff for any such arrangements including 3 years parental leave and up to 9 weeks maternity payments.

The other issue of significance for Catholic Education is the ability for teachers to obtain alternative employment during the period of leave. Given the resourcing problems that many schools experience, the CECV believes that any person seeking alternative employment during Parental Leave should first gain the approval of the School employer concerned as in many circumstances there are positions available at the particular School from where the person has taken leave. Whilst recognising the

right of a person on Parental Leave to seek alternative employment, especially in times of financial hardship, the CECV puts that the employee's current school at least be given the priority option of employment if the employee has not resigned.

Personal/Carers Leave

The CECV is currently holding negotiations with the Independent Education Union for a new Multi Employer Agreement. Because employers are Parish Priests, Canonical Administrators or incorporated bodies in Victoria, for practical reasons we have to negotiate a Multi Employer Agreement. In order to do this we have had to gain approval from the Workplace Authority as prescribed under Section 332 of the Workchoices Legislation. As part of the authorisation process under Regulation 8.1, a copy of the proposed Agreement must be attached with the application. The CECV complied with these requirements however the Workplace Authority responded with a number objections based around their interpretation of the 'Australian Fair Pay and Conditions Standard' (AFPCS) as per the Legislation.

The Workplace Authority identified three areas where our proposed agreement was in contravention. One of these objections related to a Clause in our Agreement that employees were not eligible for sick leave in respect of absences on rostered days off.

The following is an excerpt from the correspondence provided by the Workplace Authority;

Clause 55.1.1(1) of the proposed Agreement provides:

'Employees are not eligible for sick leave in respect of absences on rostered days off.'

We are of the opinion the above clause appears to provide a less favourable outcome to an employee when compared to the benefits under the AFPCS. Our reasons are set out below.

The CECV submits that clause 55.1.1(1) of the proposed Agreement is not in breach of the AFPCS for the reason that when taking an RDO an employee is not absent 'because' of illness, but their absence is due to the fact that their employer does not require them to attend work – therefore as an employee is not absent 'because' of illness their entitlement to paid personal leave does not crystallise.

However, this submission fails to address our concern that, pursuant to clause 55.1.1.(1), an employee will be unable to access their accrued personal leave entitlements in circumstances where they, or a member of their immediate family or household becomes ill when the employee is on a RDO. Circumstances may arise where although the initial reason for an employee's absence is a scheduled RDO, the reason for that absence changes into illness related absence where the employee or a member of their immediate family or household becomes ill during that RDO. In such circumstances, upon being able to satisfy the notice and evidence requirements of the AFPCS, the employee is entitled to access credited personal leave under the AFPCS. An employee who has a substantial credit of personal leave may wish to use such an entitlement and bank the RDO which is not a conditional entitlement.

The letter was signed by Graham Robinson, Legal Manager Workplace Authority.

Given there is no clause in the Legislation that the Authority relies on to make this evaluation, the CECV requests that a clause be drafted that clearly states that personal leave cannot be used to replace scheduled RDO's. We would maintain that our interpretation and position is correct in that personal leave cannot replace an RDO and this has been backed by authoritative legal advice.

Long Service Leave

Currently our Collective Agreement provides for a partial payout at the election of the employee under certain preconditions. The CECV believes there are many benefits for both parties for the employee to be able to elect to cash out Long Service Leave and request that this option be available in the NES.

Notice of Termination and redundancy pay

The CECV notes that in the NES discussion paper the notice of termination provisions puts the obligation of notice on the employer and not the employee.

When the CECV sent the draft proposed Collective Agreement as required by the Act to the Workplace Authority they responded with the following:

Clause 25.4.2 'Notice of termination by the Employee'

Clause 25.4.2 of the Agreement provides:

'Where an Employee fails to give at least four weeks' notice or in respect of School Officers and School Services Officers such lesser period of notice as the Agreement requires, the Employer shall have the right to withhold moneys due equal to one week for each week of the required notice not given, up to four weeks at the ordinary rate of pay.'

We are of the view that the above clause could provide a less favourable benefit to an employee when compared to the AFPCS, if the deduction resulted in the employee being paid less than the guaranteed minimum wage in accordance with s.182 of the Act or not being paid for annual leave in accordance with s.235(20) of the Act.

The CECV is concerned that the interpretation by the Workplace Authority now creates a situation where an employee can no longer have wages withheld if they do not provide appropriate notice on terminating their employment. Ever since the 'Termination Change and Redundancy Case (TCR) Test Case of 1984, there has been a mutual obligation to provide appropriate notice by both the employer and employee.

If no penalty exists for not providing that notice then this can only act as an incentive to employees not to provide adequate notice when it suits them. Further this compromises Schools in seeking to provide some continuity for students during the school term.

The CECV requests that NES recognise this mutual obligation in its draft as we are concerned by the interpretation that the Workplace Authority which effectively removes the need for the employee to provide the reciprocal notice when terminating their employment.

If you have any further queries please contact the Manager of Industrial Relations, Mr Norm Howett, phone (03) 9267 0430 or Senior Industrial Officer, Mr Terry O'Loughlin, phone (03) 9267 0432.