

# NATIONAL EMPLOYMENT STANDARDS EXPOSURE DRAFT SUBMISSION

## Submitted by:

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## Submission of the Associations of Independent Schools

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## EXECUTIVE SUMMARY

The Associations of Independent Schools ('the Associations') represent the interests of all independent schools in their respective State or Territory in consultation with governments, statutory authorities and a range of education stakeholders.

The purpose of this Submission is to highlight the aspects of the National Employment Standards ('the NES') that adversely impact upon the education provided to students by independent schools and their employers and employees.

The nature of schooling in Australia, and in particular, the independent school sector is such that the current employment conditions for staff are designed to meet the needs of students and the structure of schooling.

The Associations are particularly concerned about the potential for the NES to necessitate changes to the nature of schooling in Australia that would be detrimental to the education sector. Whilst the Submission focuses upon the potential impact upon independent school employers and their employees, and particularly those employees who are teachers, the impact will be similar for government and Catholic schools operating within the Federal workplace relations jurisdiction.

The NES could unreasonably cause a reduction in the breadth and extent of education in Australia or a need to employ substantially more staff or a significant extension of the school year. These changes would increase the cost of education. The Australian community is not ready to embrace such a radical change in schooling. It may be able to do so, with some preparation. This could take years.

Schools operate in a seasonal pattern, involving approximately 38-40 term weeks and 12-14 non-term weeks. Students do not attend school and teachers are not generally required to undertake work specifically directed by their employers during the non-term weeks. Hours of work during term time vary to meet the educational requirements of students. Any additional hours during term time are understood, by long standing custom and practice, to be offset by the substantial amount of weeks of school holidays. This arrangement is of a significant benefit to both school employers and employees alike. The NES and associated arrangements do not appear to provide sufficient flexibility to recognise that any additional hours during term weeks are adequately compensated by the extra-ordinary paid non-attendance time during term breaks.

It is not currently feasible for schools to operate for 52 weeks of the year and to provide only four weeks' annual leave to their teachers. Parents are not prepared to send their children to school for 48 or 52 weeks of the year. The travel and entertainment industries are geared to school holidays.

Furthermore, there are other persons employed by schools under award-prescribed hours of work per week but who cannot be gainfully employed during non-term weeks. Some State-based awards have traditionally recognised this pattern of work by permitting stand-down arrangements for between eight and ten weeks without loss of conditions but on a without pay basis. There is a possibility that, under the NES, such employees may lose the right to have conditions of employment maintained during a period where they are not being paid. However, the employer

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may be placed in a difficult financial position if the stand-down provision were to be lost and the employer obliged to pay the employee for between eight and ten non-term weeks where the employee cannot be gainfully employed.

State-based awards and some Federal awards have accommodated the non-term weeks by maintaining leave entitlements and averaging the employee's annual salary throughout the year (to maintain regular pay) for those employees not required to work during the non-term weeks. It would be difficult to meet the operational needs of school employers and their employees if the capacity to determine flexible employment arrangements suited to a seasonal work pattern were taken away.

In legislating minimum conditions of employment for all employees in Australia, the intent is to provide a fair, minimum safety net to protect employees. However, where an industry sector operates differently from almost all other industry sectors, such legislation has the capacity to impact adversely upon its traditional operations. Although it may be possible over time to change the operation of the school education sector, any change should be debated by all stakeholders in the education sector rather than as an unintentional result of changes to the workplace relations legislation.

This submission highlights the serious concerns with the practicalities of some of the National Employment Standards ('the NES') in a school setting and provides recommendations for resolving the issues.

Of critical importance and concern to the Associations, and to the independent school education sector are:

- the lack of flexibility within the NES in the area of maximum weekly hours of work to accommodate the working arrangements of school-based employees and high income earners;
- the interaction between the NES, modern awards and workplace agreements;
- the lack of flexibility in the NES for annual leave arrangements;
- the capacity to take personal leave and community service leave during paid annual leave;
- notice of termination provisions in relation to the parental leave provisions; and
- the capacity to interpret the request for flexible work arrangements as inferring an employer obligation to maintain a full time position for an employee until the child reaches school age.

These areas of the NES have potential to impact dramatically on the current structure of the independent education sector and will have serious repercussions for employers, employees and the community.

This Submission also details the Associations' concerns in the following areas:

- the broad application of the term 'employee with responsibility for the care of a child' under the request for flexible working arrangement provisions;
- the inadequate notice and evidence rules relating to an application for parental leave;
- the increased costs for employers associated with the provision of the 'no safe job leave' entitlement;
- the inadequate notice and evidence requirements in relation to personal/carer's leave and compassionate leave;
- the capacity for employees to use their full personal leave accrual for carer's leave purposes;

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- the inability to cash out long service leave in a workplace agreement;
- the omission of provisions that allow an employer to withhold monies from an employee who resigns and fails to provide the required notice period;
- the requirement to make an application to Fair Work Australia to reduce severance pay in circumstances where acceptable alternative employment is obtained by the employer and is accepted by the employee; and
- the lack of ability for employers to determine substitution days for public holidays where a majority of employees agree.

The Associations have elected to focus upon the paragraphs and questions of the Discussion Paper which are relevant to the employment context within independent schools. It is contended that the atypical working arrangements of schools, including independent schools, should be taken into consideration by the Government when drafting legislation pertaining to the NES.

The paragraphs of the Submission include the Associations' recommendations for changes to the NES.

## ABOUT THE ASSOCIATIONS

The Submission is made by the following independent school employer associations ('the Associations'):

- Association of Independent Schools of the Northern Territory;
- Association of Independent Schools of South Australia;
- Association of Independent Schools of Victoria;
- Association of Independent Schools of Western Australia; and
- Independent Schools Queensland.

Each Association represents the interests of all independent schools in its respective State or Territory in consultations with governments, statutory authorities and a range of education stakeholders.

The Associations are member service organisations, developing and delivering a range of quality services and products to enable independent schools to support their students in the changing educational environment.

The Associations work closely with state and federal education departments, academic and professional organisations and individuals, contributing to national and state education policy objectives.

In the context of workplace relations, the Associations' particular responsibilities vary but generally include:

- meeting with unions and/or legal representatives of employees to negotiate workplace agreements;
- developing and/or maintaining awards in the relevant jurisdictions with the unions concerned;
- assisting schools and their employees with contracts of employment and policies; and
- assisting schools and their employees to resolve matters of concern relating to the employment relationship.

## SUBMISSION

### INTRODUCTION

1. The Associations acknowledge and appreciate that the Government is committed to the establishment of a fair, flexible and productive workplace relations system for Australia.
2. However, the Government's enforceable safety net may not meet that commitment. The Government's safety net of ten NES and modern awards may result in either an improvement or a detriment to an employee's conditions of employment, depending upon the industry sector in which the work is performed. Further, there may be broader implications if change is necessitated across that industry sector in order to comply with the NES.
3. The intent of the Government for the proposed NES to be "*as simple as possible*", as expressed in Paragraphs 18 and 19 of the Discussion Paper, is appreciated. However, the NES needs to contain enough information to allow for effective operation of the entitlement and to ensure compliance. Employers and employees do not wish to be inadvertently non-compliant.
4. The Associations contend that some aspects of the proposed arrangements for the NES, modern awards and workplace agreements will adversely affect the employment arrangements of some employees, particularly teachers, in the independent school education sector. For example, the school education sector has a seasonal pattern of work which is different from that of any other industry sector. As stated previously, independent school teachers attend their workplaces for approximately 38-40 weeks of each year and receive approximately 12-14 non-term weeks, which are inclusive of four weeks' annual leave. Hours of work are not defined as 38 per week. No other industry sector has this arrangement.

### MODERN AWARDS AND THE NES

5. It is the proposal that the NES cannot be excluded or modified in any way that has the potential to set inflexibilities that may be damaging and unproductive for the operation of independent schools. Whilst the Government will allow a modern award to build upon particular aspects of the NES, it suggests that the legislation will provide limited scope for an industry sector to modify the NES in a modern award so that it will meet the industry sector's particular operational needs and employment arrangements.
6. Whilst Paragraph 20 of the Discussion Paper will allow industry-relevant detail to be included in modern awards, the limitations upon these inclusions is not able to be discerned from the Discussion Paper. It is possible that modern awards will not be able to include industry-specific details for those industry

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sectors that operate differently from most industry sectors. For example, will it be possible for a modern award to provide school holidays for teachers that are similar to current arrangements? Or, will teachers be restricted to four weeks' annual leave?

7. In response to Paragraph 29 of the Discussion Paper, the capacity of a modern award to be a component of fair safety net of minimum conditions does not exist if the NES does not have relevance in the particular industry sector. For example, the hours of work NES is problematic for some employees, namely teachers, whose hours of work have not been set by awards and whose working hours during term weeks are offset by significant benefits such as no requirement to attend for duty during non-term time.
8. There is also concern that the Australian Industrial Relations Commission ('the AIRC') will develop standard clauses which depending upon rules yet to be developed, may not be able to be modified, or modified sufficiently, in respect to the modern awards of quite different industry sectors.

### WORKPLACE AGREEMENTS AND THE NES

9. The proposed legislation will not allow a workplace agreement to modify or exclude an aspect of the NES. Further, a workplace agreement, if it overrides the relevant modern award, will not have the capacity to include the award-based modification of an NES.
10. This proposal is excessive in that a no-disadvantage test will apply and will compare the provisions of a proposed workplace agreement and the modern award to ensure that there is no disadvantage to employees. The prohibition upon an agreement modifying or excluding an NES is an unnecessary fetter on agreement-making at the workplace level, given that the no-disadvantage test will apply. This approach reduces flexibility in working arrangements at the enterprise level.
11. Many current workplace agreements operate to the exclusion of awards. There is a concern that employees covered under such agreements will not have access to the same flexibilities as if they were bound by an award.
12. To ensure that workplace agreements remain a flexible option for employers wanting to tailor conditions of employment to the specific needs of the business, the same rules applying to the interaction of modern awards and the NES should apply to workplace agreements.

**MAXIMUM WEEKLY HOURS**

**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?***

13. The Associations recommend that the NES expressly provides that an employer will not be in breach of the NES where an employee works additional hours of the employee's 'own volition'.
14. This term is of particular relevance to teachers. Example 1 below illustrates the typical working arrangements of a teacher.

**Example 1**

Under the *Victorian Independent Schools – Teachers – Award 1998*, the *Teachers (Non Government Schools) Award (SA)* and the *Independent Schools Teachers Award (1976) (WA)*, the hours of work for a full-time teacher are not specified. However, there is an understanding amongst employers and teachers about the hours of work. Some arrangements may be specified in a school-based manual or in a workplace agreement.

It is recognised that the hours of work of teachers can be different on any day or in any week.

A typical day for a full-time teacher may be a requirement to be in attendance at the school's premises from 8.30 a.m. to 3.30 p.m. In this example, teachers are required to be at school 15 minutes before the first class and to leave not earlier than 15 minutes after the final class of the day. There is a 10-minute home group meeting before the first class, a 30-minute morning recess and a 50-minute lunch break. On this day, Teacher A is required to be in attendance for 7 hours. Compliance with the legislation would mean that the 50-minute lunch break would be unpaid. However, if yard duty were required, then 20 minutes of the 50-minute break would be regarded as paid time. The total required hours would be either 6 hours and 30 minutes or 6 hours and 10 minutes, with no difference in Teacher A's pay for the day.

Teacher A is a secondary school teacher and teaches four of the six 50-minute classes on this particular day. This teacher has two lessons available during the day to undertake the tasks associated with teaching classes. Such tasks include preparing lessons, assessing student work, meeting with colleagues and students, etc.

On Day 1, Teacher A leaves the school's premises at 3.45 p.m. to collect her own children from school.

Between 8.30 p.m. and 10.00 p.m. that night, she corrects some student tests and prepares lessons for the next couple of days. During this time, she makes a couple of non work-related telephone calls and puts her children to bed.

- Are the 15 minutes between 3.30 p.m. and 3.45 p.m. regarded as work of the teacher's "*own volition*"?

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- Is the time between 8.30 p.m. and 10.00 p.m. regarded as work of the teacher's "*own volition*"? If so, how much of the time is counted?

The employer did not direct Teacher A in relation to either of the above scenarios. However, there is an expectation that Teacher A will be prepared to teach lessons, assess student work, etc.

In the school education sector, there has never been an expectation that a teacher will remain at the school's premises to complete all tasks associated with their job. For example, student tests and lessons can be prepared just as easily in another location such as the teacher's home. Such arrangements have provided flexible work arrangements for teachers and have facilitated managing work/family responsibilities.

On Day 2, Teacher A is required to attend a staff meeting, which finishes at 5.00 p.m., rather than 3.30 p.m. Teacher A has been required by her employer to be at the school's premises from 8.30 a.m. through until 5.00 p.m. with a 50-minute unpaid meal break. The hours of work required by her employer were 7 hours and 40 minutes, as no yard duty was required on this day.

Teacher A did not spend any additional hours at the school's premises on this day nor did she undertake any lesson preparation, etc. at home.

On Day 3, Teacher A could have left the school's premises at 3.30 p.m. However, Teacher A decided to spend 30 minutes assisting two of her year 12 maths students who had missed two lessons due to participating in an interschool swimming carnival.

- Are the 30 minutes between 3.30 p.m. and 4.00 p.m. regarded as work of the teacher's "*own volition*"?

Clearly, her employer did not direct her to assist the two students. However, there is an expectation that teachers will assist students to learn.

On Day 4, Teacher A leaves school at 3.30 p.m. However, at 4.30 p.m., whilst she is watching her daughter's netball match, she telephones a parent of a student in her class to discuss an issue pertaining to the parent's child. The parent was not available at any other time during the day. The telephone conversation lasts 15 minutes.

- Are the minutes of the telephone call regarded as work of the teacher's "*own volition*"?

Again, her employer did not require Teacher A to telephone the parent at 4.30 p.m. The employer has expectations only that Teacher A will communicate appropriately with parents about the children's progress.

15. As Example 1 above illustrates, the pattern of work of teachers is different from that of many other employees. There is a distinct difference between the work that must be done at the school's premises, such as teaching a class of students, and work that may be done in other locations and not necessarily within the defined attendance hours in a day. The professional nature of teachers' work is such that teachers undertake their responsibilities but not within 7.6 consecutive hours, excluding a meal break.

### Question 2

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***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?***

16. The question of reasonable and unreasonable hours needs to be considered in the context of the different industry sectors.
17. The range of factors to be considered should include consideration of the working arrangements typical in the industry in which the employee is employed, for example, the operational arrangements and standards of a particular industry. Example 2 below provides relevant information about the particular working arrangements of teachers.

### Example 2

An employer of teachers will generally not specify how many hours of work are to be carried out by the teacher during any one week.

The teacher is assigned hours of class teaching, which will be quantifiable. However, the teacher is expected to undertake the responsibilities related to teaching a class, such as lesson development, student assessment, report writing and reporting to parents, together with other employer-assigned responsibilities, such as curriculum-planning meetings. The hours of work are not specifically set for these tasks. The time taken by teachers to complete a particular task will vary.

The general view is that the total workload is reasonable. However, the hours spent undertaking these tasks are determined by the teacher. The workload is variable from week to week.

For example, there may be a week-long camp in lieu of classes in one week of Term 2. If the trip departs from the school at 9.00 a.m. on Monday and returns at 2.00 p.m. on Friday, how many hours has the teacher worked that week? Typically, it is regarded as a full-time week of work. However, the teacher has been away from home, may have worked in the evening supervising students, etc.

- **Has the teacher worked any additional hours?**
- **If so, are the hours of work reasonable?**

During a school camp, the hours spent sleeping, eating, etc. are not considered to be hours of work.

- **However, under the legislation would they be counted as hours of work?**

If the hours were to be counted, then it is likely that school camps would be discontinued from schools' educational programmes.

Or, referring back to Question 1 relating to the Maximum Weekly Hours of Work NES:

- **Did the teacher work the hours of his/her "own volition" by agreeing to attend the camp?**

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18. The Associations contend that legislating the maximum hours of work on a weekly basis for teachers and then applying a test to determine whether any additional hours are reasonable, will impact adversely upon the conditions of employment of teachers and may adversely affect the quality of teaching and learning in schools, particularly if the test cannot consider the operational requirements and standards of the school education sector.
19. In relation to the example referring to Alex on page 8 of the Discussion Paper, it seems possible that some averaging arrangements will not be acceptable under the proposed NES. If this is the case, then the NES could significantly alter some current working arrangements. The fluid nature of schooling, for example school camps, recitals and marking of school work, is such that restricting the reasonable additional hours to 'in a week' will limit the flexibility required to provide a comprehensive educational programme. Any reasonable additional hours during term time are understood to be offset by no requirement to attend for duty during non-term time or the school holiday period.
20. Given that the 'reasonable additional hours' concept does not fit the working arrangements of teachers, the Associations recommend that teachers are excluded from the reasonable additional hours in the week provision of the NES or that there is a provision in the regulations that allows exclusion for particular occupational groups from the reasonable additional hours provision upon application.
21. As an alternative to Paragraph 20, the reasonable hours of work provision in the NES should be adapted to enable reasonable additional hours to be considered over a 12 month period and should take into account non attendance time or leave provided in addition to the four week annual leave minimum.
22. Further information about the impact of the maximum weekly hours of work NES is provided in this Submission under the response concerning the annual leave NES. Hours of work and leave entitlements for many school employees, especially teachers, are inextricably linked.

### **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?***

23. Managerial/professional employees and high income employees should be excluded from the operation of the maximum weekly hours NES. These employees have traditionally been award-free and have not had their conditions of employment specified by a collective agreement or an Australian workplace agreement. They have worked pursuant to a common law contract of employment.
24. It is impractical and unfair to require a restrictive and inflexible arrangement, particularly with respect to the maximum weekly hours of work for managerial/professional employees and high-income employees. Such a requirement may result in a reduction in executive salaries and status, as employers reduce hours and consequently salaries to comply with the legislation. This approach would be detrimental to Australia's capacity to attract and retain quality managers of international standing. This is relevant

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with respect to the employment of management personnel in schools such as principals, deputy principals and business managers.

25. It should be possible to take into account an employee's total remuneration when determining whether the additional hours are reasonable. There should not be a requirement to consider only overtime payments, penalty rates or other compensation. For managerial employees and high income employees, the total level of remuneration is payable for all hours worked.
26. For other employees whose hours of work can be irregular and possibly long on occasions, the maximum hours NES should allow for averaging of the hours of work, preferably over a period of up to 12 months excluding periods of unauthorised or unpaid leave. If necessary, this provision could be restricted to those industry sectors where hours of work have not been regulated, even though industrial instruments have applied.

### **Question 5**

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

27. There is concern about the adverse impact of the proposed NES upon the employment arrangements applying to teachers. As illustrated by Example 1, the work of teachers:
  - may vary from week to week, according to the educational programme of the school;
  - contain elements where the teacher, as a professional, will determine the time spent on tasks where that time is not specifically required by the employer;
  - is not always directed by the employer;
  - contains elements that are characteristic of work undertaken of the teacher's "own volition"; and
  - has a seasonal pattern, with the employer setting requirements for term weeks and with the teacher entitled to 'school holidays without deduction of pay' or to non-attendance time during the remaining weeks of the year. This non-attendance time includes four weeks' annual leave. Other than annual leave being deemed to be taken during this period of non-attendance time, the exact timing of the period of annual leave during the school holidays is generally not specified.
28. It is accepted in the school education sector by employers and teachers that the hours of work of some teachers during some term weeks can require variable and atypical hours. In return, teachers are provided with an entitlement to 'school holidays without deduction of pay' or non-attendance time. Access to approximately 13 weeks of non-attendance time is fair and reasonable in the context of a 39-week working year where some of the term weeks will require working hours of more than 38 to fulfil the school's educational programme. It would be reasonable for the NES to consider additional leave/non-attendance time to be compensation for additional hours worked by teachers during term weeks.
29. If the NES has to establish the maximum weekly hours for all employees, then it would be preferable to exempt the NES with respect to teachers, provided there was no change to the current school holiday arrangements. To facilitate this, the Associations recommend that a provision is inserted into

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the Regulations that allow certain industry sectors or occupational groups to be excluded from the maximum hours of work NES upon application.

30. As an alternative to Paragraph 29 of this Submission, the maximum weekly hours NES should allow the averaging of the hours of work over a period of up to 12 months. The regulations to accompany the legislation could restrict the averaging to specifically approved industry sectors. The Associations also recommend that the list of factors used to determine whether additional hours are reasonable or unreasonable be broadened to include 'any paid leave provided by the employer in addition to the minimum four week period of annual leave for each 12 month'.
31. In the event that it is not possible for the NES to allow for averaging, then the legislation should make specific provision for awards to allow averaging of the hours of work over a period of up to 12 months. There is no guarantee that the AIRC will allow modern awards to average the hours of work over 12 months.
32. It has not been necessary to average the hours of work for teachers in the past, as there was no specification of the hours of work. The proposed NES changes the arrangements that have been negotiated by unions, employers and employees which have been in place for many years.
33. If there is no capacity to average the hours of work over a period of up to 12 months, then it may be necessary to restructure schooling in Australia or to reduce the educational programme provided to students during term weeks.
34. Should there be no capacity to average the hours of work over a period of up to 12 months under the NES or a modern award, it may be that:
  - teachers will be employed for 38 hours per week;
  - the reasonable additional hours test may force schools to curtail significantly school camps or other educational activities, such as school theatrical productions, etc. that take place take place, so as to accommodate a 38-hour working week;
  - teachers are required to reduce the assistance that can be provided to students at peak times, such as during the examination periods, and lead to delays in some activities such as assessing student work and providing student reports. This will detrimentally affect the educational programmes of schools, the learning of students, the expectations of parents, etc.;
  - the only alternative is that teachers will either not be entitled to payment for approximately nine weeks of the school year (as they will not be required to work 38 hours per week) or will be required to attend school during the specified non-term weeks in order to be paid; and
  - teachers will be entitled to four weeks' annual leave, which would need to be taken during non-term weeks.
35. The scenario described in Paragraph 34 of this Submission would not be advantageous to teachers, students, schools or the community. Such working arrangements will detract from the professional standing of teaching. Any diminution of teachers' personal autonomy in determining how the workload is managed may adversely impact upon the attraction and retention of teachers. The scenario illustrates just how different the industry sector of school education is from other industries.

36. Also of a matter of concern to Victorian independent schools is Regulation 2.4A of the *Workplace Relations Regulations* 2006 (Cth.). At this stage, if the NES relating to hours of work remains in its current form, the conditions of employment for teachers in Victoria will have to change quite markedly from 1 January 2010. However, in Victoria they may be required to change earlier if Regulation 2.4A is not amended to extend the exclusion of the Australian Fair Pay and Conditions Standard relating to hours of work for award-based employees from 26 March 2009 to 31 December 2009. This will expose Victorian employers to a 'double transition' as far as hours of work are concerned.

## ANNUAL LEAVE

### **Question 17**

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

### **Question 18**

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

37. Whilst the modern awards will define the "ordinary hours of work" for many employees, there will be no definition of "ordinary hours of work" for those employees exempt from award coverage.
38. It is suggested that managerial/professional employees and high income employees should be exempt from the maximum weekly hours NES. This Submission is not suggesting that these employees should be exempt from a four-week annual leave entitlement. However, there may be an issue in not having a definition of "ordinary hours of work" in the NES for the purpose of the annual leave entitlement.
39. The NES could provide a definition of "ordinary hours of work" for award-free employees, managerial/professional employees and high income employees, where the "ordinary hours of work" for the purpose of the annual leave entitlement are not defined by a relevant modern award. This should reflect current legislation which limits the ordinary hours to a maximum of 38 for the purpose of leave accrual.
40. The Associations note that the example involving Christos on page 25 of the Discussion Paper does not adequately explain the 'ordinary hours' expected to be worked. What happens if Christos were not assigned to work any hours in that week, given that he is described as an irregular part-time employee?

### **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?***

41. The proposed NES dealing with personal/carer's leave provides the ability for an employee to take a period of paid personal/carer's leave during annual

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leave. This is a new concept for many industry sectors. This has the potential to create significant additional employment costs for schools in the independent education sector where it is common for employees to accrue large personal leave balances. Introducing this entitlement will also create the potential for abuse where a school employer has a lessened ability to liaise with an employee regarding notice or evidentiary requirements during school holidays/annual leave. It is the Associations' view that this entitlement could increase the occurrences of personal leave abuse.

42. The Associations contend that the NES needs to allow for annual leave to be taken during shut down periods. It is not feasible for schools and their educational programmes if teachers and some other employees for whom there is no work during the non-term weeks are able to take annual leave during term weeks.
43. Teachers at the current time receive non-term time or school holidays, based upon the term weeks worked. The four weeks' annual leave is deemed to be taken during this period. It is recognised that it will be necessary to determine when annual leave is being taken following commencement of the NES. It will also be necessary to have a provision in the NES or in a modern award which will allow employers to direct teachers to take annual leave during shut down periods, namely during school holidays or non-term weeks. If such direction is not possible, then the taking of annual leave during term weeks will be unacceptable to schools, students, parents and the community.
44. The Discussion Paper refers to the taking of paid personal leave or community service leave in lieu of annual leave, provided the employee satisfies the relevant notice and evidence requirements. On the presumption that it will be possible to direct teachers to take annual leave during periods of shut down, it will be problematic to allow personal leave or community service leave to be taken in lieu of annual leave. If personal leave and community service leave is accessed during annual leave there will be no other time to take annual leave other than during term weeks.
45. The NES should be amended to disallow the taking of personal leave or community service leave in lieu of annual leave.
46. If the recommendation in Paragraph 45 is not feasible, the Associations propose that the NES is amended so that where an employee applies to take personal leave in lieu of annual leave, the employer can direct an employee to a medical assessment by a registered medical practitioner nominated by the employer where appropriate. Further to this, the NES should be amended so that:
  - a) access to personal leave or community service leave during a period of annual leave should be prohibited where the annual leave is taken during a shut down period; or
  - b) the NES includes a provision where, if personal leave is taken in lieu of annual leave, then the employer may direct the remaining accrued annual leave to be taken during shut down periods.
47. The Discussion Paper refers to the restriction of taking annual leave during a period of workers' compensation. This situation would not apply in the event of law permitting the accrual, or taking, of annual leave. Such a law does not exist in the context of the legislation in some States, such as Victoria. This

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provision is problematic for schools and persons, particularly teachers, employed by schools in Victoria.

48. Assuming that it will be possible to have annual leave directed to be taken during shut down periods, it will be unmanageable if a teacher cannot take accrued annual leave due to being in receipt of workers' compensation payments. If annual leave, as accrued for that school year, cannot be taken or cannot be deemed to have been taken, then it will accumulate and will need to be taken at some other time, presumably with the only other time being during term weeks. As the State legislation varies with respect to the interaction between workers' compensation and annual leave, the NES should allow for this matter to be dealt with by modern awards and workplace agreements to cover the differences in state-based legislation.
49. The comments made in the above paragraphs relating to annual leave and its interaction with personal/carer's leave, community service leave and periods where workers' compensation payments are being paid to employees also apply to other persons employed by schools. For example, some administrative employees, teaching assistants, library/laboratory employees, preschool teachers and assistants, etc. have no work during school holiday periods. Again, the same arrangements under the NES are required for these occupational groups working within schools. The provisions need to be in the NES, as modern awards may not apply to all employees in receipt of school holidays or non-term time in a school.

### **Question 20**

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

### **Question 21**

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

50. There is concern that the term "*progressive accrual*" under the NES will allow an employee to take annual leave as these days of leave accrue. There is a proposal to allow modern awards to specify when annual leave may be taken. This proposal is important for industry sectors that shut down for particular periods. Schools shut down the educational programme during non-term weeks. There is no other time that some employees, but particularly teachers, can take their annual leave.

### **Question 24**

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

51. It is critical that the NES recognises that regard must be given to the standard operational arrangements of the school education sector with respect to hours of work and leave arrangements. In this respect, leave or non-attendance time in excess of four weeks' annual leave should be able to be taken into account in determining whether additional hours of work are reasonable and for use in averaging arrangements, as appropriate.
52. Paragraph 131 of the Discussion Paper specifies that community service leave is included in the definition of "*service*", although it is unpaid leave. It would be appropriate to place a maximum limit upon the period of time that could be taken as community service leave. There is a possibility that, for some employees, the period of community service leave (although not paid

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for by the employer) could be abnormally high, and yet will accrue considerable periods of leave due to it being defined as “service”.

### REQUESTS FOR FLEXIBLE WORKING ARRANGEMENTS

#### **Question 6**

***Should the proposed flexible work 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?***

53. The term “*employee with responsibility for the care of a child*” is too broad and could be interpreted to capture relationships where the individual is not the parent of the child or circumstances where another person or persons have assumed the role of primary care giver.
54. Awards operating in some States and Territories already mirror the AIRC *Family Provisions Test Case*. The rights to request part-time work as expressed in these awards pertain to employees who are the primary care givers and wish to reconcile work and family responsibilities.
55. Paragraph 70 of the Discussion Paper states, “*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)*”. However, as currently specified, the right to “*request flexible working arrangements*” could capture relationships where grandparents or other relatives have a responsibility for the care of the child but are not the primary carer.
56. Division 3, Section 10(1) of the NES should be amended so that only those with a primary responsibility for the care of a child may request a change in working arrangements for the purpose of assisting the employee to care for the child.
57. Where another person has assumed the role of primary carer for a specific period and is requesting flexible work arrangements, the NES should require the employee to provide reasonable evidence to the satisfaction of the employer. Such evidence could include a statutory declaration.

#### **Question 7**

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

58. The proposed flexible work arrangements NES should not expressly define what constitutes “*reasonable business grounds*”.
59. “*Reasonable business grounds*” in each case will depend upon a range of factors including the following:
  - the requirements and nature of a particular industry or industry subsector;
  - the size of a business; and

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- the nature of particular business's operation within an industry.
60. To seek to define what constitutes "*reasonable business grounds*" at a national level within the NES would not achieve positive outcomes for employers or employees.

### **Question 8**

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

61. Paragraph 60 of the Discussion Paper states, "*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*".
62. Paragraph 60 is recognition of the reality that best practice is not achieved by prescriptive legislation which assumes a 'one size fits all approach' will work in all circumstances.
63. The role of legislation in requests for flexible work arrangements should be limited to mandating and encouraging discussion at the workplace level about what arrangements will best serve the interests of both employers and employees.
64. In drafting Division 3 in the manner outlined a balance will be achieved between enshrining the right to request flexible work arrangements and ensuring discussions for such arrangements are left for the parties at the workplace level.
65. The Associations are concerned about the potential for an employee to preserve an entitlement to return to the position of employment held before the first period of parental leave for many years. For example, an employee taking maternity leave for each of three children may seek to preserve a full-time position of employment until the third child reaches school age. This may be for a period of up to 15 years.
66. The Associations contend that this imposes a requirement to provide and maintain positions for an open-ended period of time. The employment of replacement staff in temporary positions over extended periods of time is not conducive to providing a good educational programme and also restricts permanent employment opportunities for other employees. This increased need to engage replacement employees on a fixed term basis will lead to the casualisation of the workforce in school environments.
67. Therefore, the Associations seek that the request for flexible working arrangements is worded in such a manner to ensure that this right to request flexible working arrangements does not infer a right to maintain the initial position of employment until the child, or the last of the employee's children, reaches school age.
68. The provision in clause 10(3) of the NES states that the employer must give the employee a written response to the request for flexible working arrangements *within* 21 days.

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69. The actual time taken to consider the feasibility of such arrangements in a school context is time consuming. It will involve analysing the school's timetable and determining whether the changes to the timetable will be feasible, considering the impact upon the school community, meeting with other affected teachers, reviewing student enrolment numbers, and meeting with the teacher making the request. To undertake this process within 21 days will be difficult in a school context, where a school may be closed for 12 to 14 weeks of the school year (non-term weeks) and during term weeks. Key staff members may be absent for the reasons of excursions, school camps, conferences, etc. It is possible that an employee will request a flexible work arrangement well in advance of the employee's intended return to work date. This might be more than two years in advance, if the employee is accessing the right to request an additional 12 months' unpaid parental leave. In such circumstances, the employer may be able to agree to a flexible working arrangement in principle but the specific details may need to be determined closer to the return to work date.
70. Therefore, the Associations recommend that the time given for employers to provide a written response to an employee who has requested a flexible working arrangement is increased from 21 days to 42 days.

### PARENTAL LEAVE AND RELATED ENTITLEMENTS

#### **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 birth of their child or where the employee wishes to return to work within a short time after the birth?***

71. Where an employer has reasonable concerns that an employee is unfit to work or the employee wishes to return to work within a short time after the birth, the employer should be able to be satisfied of the employee's capacity to return to work in her pre maternity leave role.
72. Awards currently contain provisions which allow employers to request a medical certificate from a registered medical practitioner where the employee continues to work during the six-week period immediately prior to the expected date of birth, or where the employee elects to return to work within six weeks after the birth of the child. This provision should be incorporated into the NES.
73. Like many awards, Section 273 (Part 7, Division 6) of the *Workplace Relations Act 1996* (Cth) ('the Act') mandates that a period of ordinary maternity leave must include a period of six weeks starting from the date of birth of the child. Section 274 of the Act provides that where an employee continues to work during the period of six weeks before the expected date of birth, the employer may ask the employee to provide a medical certificate. These provisions should be included in the NES.
74. Given the obligation to provide a safe and healthy workplace under occupational health and safety legislation at the State/Territory level and the duty of care that an employer has to an employee at common law, the

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capacity to request a medical certificate from a registered medical practitioner in the circumstances outlined in Paragraph 73 of this Submission should be available to employers.

### **Question 10**

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

75. Division 4, Subdivision B Section 17 deals with the notice and evidentiary requirements pertaining to parental leave. It states that the employee “*if required by the employer*” will give the employer “*evidence that would satisfy a reasonable person*”.
76. Division 4, Subdivision C Section 20(4) specifies the evidence requirements attached to the taking of unpaid special maternity leave and states that “*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)*”.
77. Division 4, Subdivision C Section 21 (1c) specifies the evidence requirements where an employee is seeking to transfer to a safe job in the circumstance where she is fit but it is inadvisable for the employee to continue in her present position. Once again this section states that the evidence must be that which would satisfy a reasonable person.
78. These evidence requirements represent a departure from what is currently contained within the Act and existing awards in operation in the various school education sectors in relation to parental leave entitlements.
79. The nature of the entitlements means more clearly articulated evidence requirements should be specified by the NES as having to be provided by employees to employers. “*Evidence that would satisfy a reasonable person*” is open to wide interpretation and inadequate in the view of the Associations.
80. All three entitlements under this NES - parental leave, unpaid special maternity leave and transfer to a safe job - will have a significant impact on the employer’s workplace in terms of whether or not replacement employees need to be engaged and for what length of time they may need to be engaged. Hiring of additional or replacement employees is a significant task for most employers. When planning and undertaking such a task, employers should be able to base such decisions upon reliable information.

### **Question 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?***

81. In order to address the issue of inadequate evidence requirements, the NES should be amended such that a medical certificate from a registered medical practitioner or statutory declaration where it is not practicable to provide a medical certificate, is the minimum evidence that must be provided where an employee is seeking to access either parental leave, unpaid special maternity leave or a transfer to a safe job.

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82. The Act contains provisions relating to the provision of a statutory declaration where either an employee is applying for ordinary maternity leave in line with section 271 or an employee is applying for long paternity leave in line with section 288.
83. Awards applying to independent schools and other industry sectors also provide for the provision of statutory declarations. Typically such clauses are stated as follows: *“When the employee gives notice under (xxxxx) the employee must also provide a statutory declaration stating particulars of any period of paternity leave sought or taken by her spouse and that for the period of maternity leave she will not engage in any conduct inconsistent with her contract of employment”*.
84. The requirement for an employee to provide a statutory declaration where requested by the employer when providing notice to take parental leave should be included in the NES.
85. The purpose of parental leave is to provide employees with leave where they will have primary responsibility for the care of a child. Employees should not engage in secondary employment with an alternate employer which has the potential to create a conflict of interest, unless they have the prior approval of their employer.
86. The requirement that an employee provide a statutory declaration to the effect that the employee will not engage in conduct inconsistent with the employee’s contract of employment gives employers the scope to protect themselves from situations where an employee may otherwise accept alternative employment with a competitor to the detriment of the employer who has granted parental leave.
87. It is the view of the Associations that the NES should define or at least provide guidance as to what constitutes ‘conduct inconsistent with the contract of employment’.
88. Secondary employment during a period of parental leave which is in direct conflict with the interests of the primary employer would constitute conduct inconsistent with the contract of employment. This is a well established principle at common law and it is the Associations’ view that the establishment of a new set of minimum employment standards provides an opportunity to clearly articulate this principle in employment legislation.

### **Question 12**

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

89. A definition, and examples, of reasonable business grounds should not be included in the proposed parental leave NES. Reasonable business grounds will differ for each workplace based on the industry or industry subsector in which the employee is working, the size of the employer and the nature of the role undertaken. To include examples of reasonable business grounds within the NES would be to limit the scope of what constitutes reasonable business grounds.

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### **Question 14**

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

90. The Associations express their concern about the broad applicability of the “no safe job leave” entitlement. The provision, as outlined in the Discussion Paper, provides an employee with paid leave for the specific period (i.e., the risk period).
91. In this sector, it is necessary to replace a teacher who is absent on leave. In other industry sectors, it is not always necessary to do so as the work tasks may be absorbed into the work requirements of other employees, particularly if the absence is for a limited or defined period of time. It is unreasonable for an employer to bear the cost of the salary for the absent employee and the salary of the replacement employee for an unlimited period of time.
92. Therefore, the Associations recommend that any such leave comes out of existing accrued personal leave entitlements. Following exhaustion of the accrued personal leave entitlements, the employee should be placed on leave without pay for the specific period (i.e., the risk period).
93. An employee who requests an extension of unpaid parental leave has an impact upon the school’s educational programme, the employment expectations of the employee temporarily acting in the position and the expectations of parents in the school’s delivery of the educational programme.
94. Therefore, the Associations recommend that the NES provision increases the minimum written notice to be given to employers from four weeks’ notice to at least six weeks’ notice. Clause 16(2) of the NES could be specified as:

*“The request must be in writing, and must be given to the employer as soon as practicable, however no later than 6 weeks before the end of the standard period”.*
95. This would have the benefit of ensuring enough notice is provided to enable the employer to make the necessary adjustments to the workplace. It would have the added benefit to the employee of avoiding a situation where the extension of parental leave is denied due to a lack of notice and an inability to make the appropriate changes to the workplace.
96. The Associations note that there is no provision in the proposed NES regarding the notice period required for an employee to provide to the employer of the employee’s intention to return to work.
97. The current provision in the Act states that an employee who wishes to return to work after maternity leave must give the employer written notice of the proposed return no later than four weeks before the proposed date of return.
98. In a school context, most employees negotiate with their employer to take an agreed period of parental leave of up to 12 months. The current Act allows employees to change their mind by giving the employer four weeks’ notice of an intention to return to work. This provision, if exercised by the employee, has a destabilising effect upon the school community. It impacts upon the expectation of parents, the educational welfare of students and the

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employment expectations of the current employee temporarily acting in the position.

99. The Associations would encourage a provision which increases the minimum written notice from four weeks' notice to at least six weeks' notice given to employers to notify an intention to return to work. For example, the provision could be specified as follows:

*"The notice of intention to return to work must be in writing, and must be given to the employer as soon as practicable, however no later than 6 weeks before the intention to return to work".*

100. Such a provision would have the benefit of ensuring enough notice is provided to enable the employer to make the necessary adjustments to the workplace.

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

#### **Question 25**

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

101. The proposed rules relating to notice and evidence are inadequate and do not clearly articulate the obligations of employers and employees.
102. Subsection 41(2) of the proposed NES obligates the employee to provide notice as soon as reasonably practicable and to advise the employer of the period, or expected period, of the leave. The section does not obligate an employee to state the reason or the purpose of the leave as being either for personal illness or injury, for caring responsibilities or for compassionate circumstances.
103. An employee should be compelled to state the reason for the leave to enable the employer to understand the circumstances of the absence. That is, where leave is accessed for sick or carer's leave purposes, the employee should be required to state whether it is an injury or an illness but not the exact nature of the illness or injury. This requirement will also assist the employer in reconciling the documentary evidence, if required, with the stipulated reason for the absence and the legislated entitlement.
104. Subsection 41(2)(a) states that notice "*must be given to the employer as soon as reasonably practicable (which may be a time after the leave has started)*". The requirement to provide notice "*as soon as reasonably practicable*" could be made more workable.
105. In the first instance, an employee should be required to provide notice prior to the absence, where practicable. This will give the employer the opportunity to organise alternative arrangements to cover the absence. This is particularly important for teacher absences where the school must organise a replacement teacher in order to meet its duty of care obligations to students and to comply with other legislative requirements.

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106. Subsection 41(3) of the proposed legislation requires the employee only to give the employer evidence “*that would satisfy a reasonable person*”. This requirement is workable, provided the employer can have regard to the particular circumstances and the employee’s history of absence.
107. It is not uncommon for independent school employers to experience issues with absenteeism where they suspect that the entitlement is being abused by some employees. Whilst the majority of employees use personal leave for its intended purpose, there are circumstances where employees use personal leave illegitimately. For example, there have been cases where employees take a period of sick leave immediately after being placed on a performance management process or after an implemented change with which they do not agree. At times, an employee will take sick leave prior to the end of a school term or at the beginning of a school term to take advantage of cheaper air fares and accommodation, if travelling.
108. The onus upon the employee to provide reasons for absences, to produce specified documentary evidence when required and to provide notice as soon as is practicable prior to the absence is significantly reduced by the proposed legislation. These inadequate notice and evidence requirements, as highlighted above, have the potential to facilitate occurrences of personal leave abuse and to impact adversely upon a school’s educational programme.

### **Question 26**

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

109. The NES should provide further clarification of evidentiary requirements where an employee gives notice of taking personal leave.
110. While the Associations appreciate the Government’s intention to simplify the current notice and evidence requirements, the Associations believe that the three different types of personal leave (sick, carer’s and compassionate) warrant different evidentiary requirements.
111. A certificate from a registered health practitioner should be the preferred document for absences due to personal illness or injury. If it is not practicable to provide a medical certificate, a statutory declaration may be provided. This requirement lessens the potential for personal leave being taken for illegitimate reasons.
112. The Associations acknowledge the Government’s comment in Paragraph 189 of the Discussion Paper, which states that the provision of a medical certificate for every single absence places unnecessary stress on the health system by diverting resources solely to the provision of medical certificates. A certificate from a *registered health practitioner*, rather than a *registered medical practitioner*, broadens the spectrum of practitioners that an employee can obtain a certificate from, i.e., from chiropractors, naturopaths, acupuncturists and nurses. The certificate should be issued in respect to the area of health that the person practises in. This will alleviate the potential for stress to be placed on the health system. In recognition of the fact that it is not always practicable to provide a certificate, a statutory declaration can be given by the employee.

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113. The Associations agree that it is not reasonable for an employer to request a certificate or a statutory declaration for every occasion of sick leave. Most awards include the circumstances in which evidence is required, for example, for any absence of more than two consecutive days or where the number of days exceeds five in any year. Where awards do not apply, many employers specify evidence rules for personal leave in policy documents. It is therefore an unlikely scenario that employers will require certificates for every single absence but an employer should have the capacity to require such documentation in certain circumstances with surety.
114. The NES should require an employee to provide a certificate from a registered health practitioner or a statutory declaration in order to be entitled to carer's leave. This evidentiary rule recognises that a certificate in the first instance is not practicable for carer's leave and thus allows the flexibility to present either a certificate or a statutory declaration.
115. To be entitled to compassionate leave, the NES should require the employee to provide any evidence that the *employer* reasonably requires of the illness, injury or death. Given that two days of paid compassionate leave can be taken for each permissible occasion and this is not capped, the evidentiary requirement should be tightened to meet the employer's 'reasonable' requirements to mitigate the potential for abuse.
116. The NES should specify the evidence required (i.e., certificate from a registered health practitioner or a statutory declaration) for the varying types of personal leave. In addition, the NES should include provisions that allow modern awards to include evidentiary and notice rules that reflect specific industry or occupational requirements or characteristics.
117. Workplace agreements should also have the capacity to build on the NES to set enterprise-specific rules for circumstances in which an employer may require evidence provided that these requirements are not more onerous than the NES. For example, provisions in a workplace agreement that required a medical certificate from a 'registered medical practitioner' rather than a 'registered health practitioner' would be considered more onerous than the NES.

### **Question 27**

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

118. The Associations support the principle of an enforceable safety net that facilitates employees' caring responsibilities; however the capacity to use all accrued personal leave entitlements as carer's leave creates some issues.
119. Awards for teachers in the independent school sector vary with respect to the amount of personal leave provided, ranging from 10 to 33 days for each year of service. It is not uncommon for long-serving teachers to accrue a substantial amount of personal leave over time. The widening of the circumstances in which this leave can be accessed has the potential to increase business costs to schools, may also lead to absenteeism and adversely impact upon students' education.

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120. Unlimited access to personal leave for carer's purposes also erodes the personal leave entitlement for sick leave purposes. As a statutory safety net, employees have access to 'unpaid' carer's leave where personal leave is exhausted. However, they do not have an automatic entitlement to unpaid sick leave in the same circumstances.
121. The Associations maintain that a cap of 10 days' carer's leave per each 12 month period with access to two days' unpaid carer's leave where personal leave is exhausted is a fair and sufficient safety net for employees.

### **Question 28**

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

122. Paragraphs 41-49 of this Submission articulate the Associations' primary position on clause 28(2) of the proposed legislation allowing an employee to take personal leave during a period of annual leave. As already stated, this provision has significant implications for employers.
123. The Associations believe that if the NES is not amended to remove this provision, specific notice and evidentiary requirements should be attached to personal leave taken during a period of annual leave. For example, where an employee wishes to access sick leave during annual leave, the employee should be required to submit a medical certificate from a registered medical practitioner to the employer during the period of illness or injury, as far as is reasonably practicable. The NES should also be amended so that where an employee applies to take personal leave in lieu of annual leave, the employer has the ability to direct an employee to undertake a medical assessment by a registered medical practitioner nominated by the employer, where practicable.

## **LONG SERVICE LEAVE**

### **Question 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?***

124. The Associations agree that workplace agreements should not be able to derogate long service leave provisions in awards and State and Territory long service leave laws.
125. However, the capacity for a workplace agreement to override long service leave provisions and to require leave to be taken when accrued has provided mutual gains for employees and employers in the independent school sector.
126. Where State/Territory laws prohibit the cashing out of long service leave, a workplace agreement can override this prohibition to advantage both employees and employers alike. Long service leave cash-out provisions are a common feature in workplace agreements.

**Question 35**

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

127. The NES should protect an employee's long service leave entitlement under the relevant industrial instrument. However, it should include specific provisions that allow modern awards and workplace agreements to override long service leave laws in the following areas:
- a) allow for cashing out of long service leave entitlements by mutual agreement between the employee and the employer. In keeping with the principle that employees should have access to some amount of recreation leave after a long period of service, the provisions should contain a minimum amount of accrued leave that cannot be cashed out; and
  - b) allow flexibility in specifying industry-based rules for calculating an employee's long service leave entitlement where the employee's hours have varied over the period of employment.
128. In narrowly defining the areas in which long service leave laws can be overridden, the NES can achieve a balance between maintaining flexibilities at the enterprise level and protecting substantive long service leave entitlements.

<p><b>NOTICE OF TERMINATION AND REDUNDANCY</b></p>
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**Question 45**

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

129. The Associations acknowledge that the proposed notice of termination and redundancy pay NES is silent on the minimum notice that an employee is obliged to provide an employer. Further, Division 3 – *Terms of modern awards* of the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* (Cth.) does not specify notice of termination as a matter that can be included in a modern award. It is thus inferred that contracts of employment will need to specify the minimum notice required of employees.
130. This will have a serious impact on independent schools, where the period of notice has traditionally been longer than in other industry sectors. Although the independent school awards vary, the awards require teachers to provide seven weeks' notice or, as in some awards, a full term's notice of resignation. This reflects the unique circumstances of schools which operate around the concept of a school year of three or four terms. Schools require longer notice periods from teachers in order to maintain continuity of the educational programme during term time.
131. The quality of an educational programme relies upon greater notice of termination obligations for employers and teachers alike. The curriculum may be disrupted and compromised in situations where adequate notice is not provided leaving the school little time to organise replacement teaching staff. As teachers usually move to another education sector employer with similar

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notice requirements, the longer notice period is generally not a disadvantage to either the employer or the teacher.

132. The Associations are concerned that if there is no industrial regulation relating to employee notice of termination, schools will be exposed to situations where employees abruptly leave employment. This can have disastrous effects on educational programmes, especially for small regional/rural schools where it takes more time to find appropriate replacement staff than in a large metropolitan area.
133. While the Associations understand that there is capacity for an employment contract to regulate minimum notice requirements, it is likely that many schools will inadvertently omit such detail from contracts and as a consequence will lose the security of a minimum notice period that has traditionally been provided at the award level.
134. The proposed notice of termination and redundancy pay NES does not include provisions that allow an employer to withhold monies from an employee who fails to provide the required period of notice. This would mean that employers will have limited ability to withhold monies from an employee who fails to observe notice requirements. Notice of termination requirements for employees are less effective without a provision for an employer to seek a remedy where an employee fails to comply.
135. The NES should include an express provision to allow an employer to withhold monies from an employee who fails to give the full amount of notice required. The right to withhold monies should be equal to the ordinary rate of pay for the period of notice not given.
136. Clause 53 of the proposed notice of termination and redundancy pay NES allows the amount of redundancy pay to be varied where the employer 'obtains acceptable employment for the employee' upon application to Fair Work Australia.
137. Employment in the education sector is fluid and time fractions vary frequently depending on fluctuating enrolments and other factors. Where a teacher's part time fraction is significantly varied, the accepted practice in the independent school sector is to offer the employee a choice of accepting the varied role or taking a redundancy payment. An employee forfeits an entitlement to redundancy pay where an employee accepts the offer of employment. The requirement to make an application to Fair Work Australia on every occasion that this occurs will significantly increase costs and time for employers and will unnecessarily increase the workload of the tribunal.
138. The requirement to make an application to Fair Work Australia to vary an amount of redundancy pay should be waived where an employer obtains other acceptable employment for the employee and the employee accepts this offer of employment. In such situations, the entitlement to redundancy pay should be automatically annulled.

**PUBLIC HOLIDAYS**

139. Paragraphs 260 and 261 of the Discussion Paper deal with the matter of employees substituting public holidays for other days of significance. This is important for schools established in the context of a particular faith such as Judaism or Islam. Both faiths, for example, have a number of days of significance to the adherents of the faith. It is customary in these schools to substitute some public holidays for these days of religious significance.
140. It is possible, for example, that the school will employ employees who are not of the same faith as the majority of the school's students. Whilst the standard public holidays for Christmas, Easter and Australia Day are observed, it is not uncommon to have substitution arrangements for some of the other public holidays. The schools always ensure that the total number of public holidays and days of religious significance will be no less than the total number of public holidays that will apply in the relevant State or Territory.
141. Awards, for many years now, have allowed the substitution of public holidays for other days of significance by a majority vote of employees, which is recorded and duly notified to all employees. The NES implies that the substitute day arrangement will only be at the request of the employee.
142. This is not feasible for some workplaces, such as faith-based schools, where the school cannot operate on a religious faith day due to all students and most staff members wishing to be absent from school. There is cause for a faith-based school to determine the substitution arrangement, but still have regard to the religious faith of other employees, who do not share the faith of the majority. In such a situation, it will be problematic if an employee can refuse to substitute a public holiday, although there is no work for that employee on the day due to the school being closed for observance of a day of significance to its students, the community, and the majority of employees.
143. The NES needs to make provision for employer-determination of the substitution of days. If this is not possible, then the determination needs to be by the approval of the majority of the employees.

**Question 37**

***Does 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 are considered?***

144. The range of factors should include consideration of the specific circumstances of the employer and/or the employees when determining whether it is reasonable to require employees to work on public holidays. The NES needs to allow for the substitution of public holidays, for other faith or religious days of importance to the workplace and in the case, of schools, to students and the majority of employees.

**CONCLUSION**

School education is too vital a component of Australia's future to be disrupted in any way. If the NES and modern awards cannot include the flexibilities recommended, independent schools will require radical structural change in order to achieve compliance with the legislation. This has the potential to create significant disruption to the education sector.

This Submission has enumerated concerns with each of the NES and has offered solutions which will obviate the difficulties. The Associations urge the Government to reconsider aspects of the proposed workplace relations system where education is concerned and allow for flexibility which will facilitate the continuation of long standing arrangements which have served both employers and employees in the independent education sector well.

## **Appendix 1**

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