



Department of Education, Employment and
Workplace Relations

National Employment Standards (NES) Exposure Draft/ Inquiry

April 2008

A FEI

Australian Federation of
Employers & Industries

Australian Federation of Employers and Industries

The Australian Federation of Employers and Industries (AFEI) is one of the oldest and most respected independent business advisory organisations in Australia.

With over 3,500 members and over 60 affiliated industry associations, our main role is to advise, represent and assist employers in meeting their obligations relating to workplace relations. Our membership extends across employers of all sizes and a wide diversity of industries.

AFEI provides advice and information on employment law and workplace regulation, human resources management, occupational health and safety and workers compensation. We have been the lead employer party in running almost every major test case in New South Wales.

AFEI is a key participant in developing employer policy at national and state (NSW) levels and is actively involved in all major workplace relations issues affecting Australian businesses.

TABLE OF CONTENTS

A.	INTRODUCTION	4
B.	NES AND AWARDS	4
C.	AWARD FREE EMPLOYMENT	5
D.	MINIMUM WAGES	8
E.	EXPOSURE DRAFT STANDARDS.....	9
1.	MAXIMUM WEEKLY HOURS	9
2.	REQUESTS FOR FLEX WORK ARRANGEMENTS.....	14
3.	PARENTAL LEAVE.....	18
4.	ANNUAL LEAVE	23
5.	PERSONAL/CARER'S LEAVE AND COMPASSIONATE LEAVE	33
6.	COMMUNITY SERVICE LEAVE	38
7.	LONG SERVICE LEAVE	41
8.	PUBLIC HOLIDAYS	41
9.	NOTICE OF TERMINATION AND REDUNDANCY ...	43
10.	INFORMATION STATEMENT	45

NATIONAL EMPLOYMENT STANDARDS

A. INTRODUCTION

How the National Employment Standards Should Be Progressed

1. The outcome of this exposure process should be a revised set of draft National Employment Standards (NES) and a further opportunity for community comment. The efficiency, productivity and competitiveness of business will be significantly affected by the NES, the award modernisation process and other interlocking features of the Government's Forward with Fairness policy. All these issues go to the health of the Australian economy, the sustainability of investment and the capacity to create and retain jobs.

B. NES AND AWARDS

2. The interaction of NES with "modern awards" is uncertain and could be significantly problematic. These two components of minimum entitlement setting are, so far, unknown territory. Will existing award and statutory entitlements merely be split up between these two new areas of regulation -- NES and modern awards -- or will there be significant new, restrictive and costly additions to employment conditions? For the moment, employers are being asked to accept, as a matter of faith, that the new regulatory system will be fair, flexible and productive, yet these factors could be adversely affected by the final details of NES, the extent to which modern awards build on top of NES, the role and functioning of Fair Work Australia and other provisions of the substantive legislation.
3. Rather than providing an open ended invitation for modern awards to build on NES, at the very least, some NES should be restricted to the statutory standards e.g. jury service, community service, redundancy, notice of termination, parental leave, requests for flexible working arrangements.

C. AWARD FREE EMPLOYMENT

4. As submitted above, there should be a further draft NES and exposure process as part of which we would have another opportunity to comment on provisions applying the NES to persons who are presently award free.

Discussion Paper Preliminary Questions 1 - 3 p5

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

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

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

5. It would be unwise to seek to impose public sector style bureaucratic rules on private-sector management. It is not practical to insulate managers against the very demands they confront daily and which they have to overcome if the businesses and organisations they work for are to be efficient, productive and competitive. Consequently, there should be the greatest flexibility in the way managers are engaged and in their working conditions.
6. Attempting to codify the circumstances in which managers will be exempted from parts of the NES is a recipe for implanting rigidities, inefficiencies and failure throughout the structure and functioning of management. Trying to deal with these issues by way of "additional rules" is not a sound approach. It would take us down the French path, where, for example, implementation of the 35 hour week created not just an unsustainable increased cost, but also a massive bureaucratic and efficiency bottleneck which had an inevitable negative impact on the competitiveness of French industry and on employment. In the case of working hours, for example, it would expose all the limitations of government level central planning.

7. Effective management is already very difficult to achieve. If NES create additional impediments to the efficient deployment of management and, hence, the efficient functioning of business, Australian industry will inevitably slide increasingly into reverse.
8. It is not easy to circumvent the difficulties referred to above simply by having a remuneration threshold of, say, \$100,000. There are many managers who would be below any nominated "high income earner" category. It may be sustainable to have a number of remuneration thresholds for managers working at a particular level of management or in juxtaposition with particular occupations. Employers should be able to engage employees at or above these thresholds under a contract of employment covering almost all of their conditions of employment. However, there is a compelling case for excluding management at all levels from the NES and modern awards.
9. To increase the flexibility involved in employing staff, it would also be useful to have a separate exemption for any award employee on remuneration beyond a certain threshold level, but that level should be one that is relative to the particular award classification.
10. For those award free employees who are neither managers nor high income earners, a contract of employment should be permitted to deal with all or most of their employment conditions.
11. "Catch all" awards are not an acceptable means of dealing with employees in management positions, or who are high income earners or award free.

Preliminary Question 4 p5- Employees in emerging industries and occupations

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

12. While markets may be imperfect, it is often the case that emerging industries and occupations reflect hitherto unseen possibilities where significant investment risks must be taken in order to provide some new service or product to an uncertain clientele. If it transpires that there is actually a new

market to be served, business and employment will grow to meet the demand. Employers will seek to recruit employees with the necessary skills or to train them, as necessary. If the skills are low, so will the remuneration be low. And the reverse will inevitably be true also, with the market working out the labour demand/supply equation.

13. The more this uncertain, risky and creative environment is regulated by bureaucratic rules that effectively prevent the fast footwork needed to assess what the market is and how it might be serviced, the more unlikely it is that a relevant industry and related occupations will emerge at all. As "old industries" disappear offshore and "new industries" seek to emerge in Australia or overseas, it is imperative that we provide the highest level of flexibility to encourage that emergence here. Thereafter, the economics of each new industry will tell us clearly enough what kind of regulation will be tolerable or necessary.
14. We are not advocating the creation of new industries which can only sustain jobs at the most marginal levels of remuneration and working conditions. Such industries would scarcely attract employees in this country. However, "emerging" industries can take a considerable time to actually emerge and become a stable platform for investment and jobs. During this period, government should contain the urge to regulate.
15. The small size of the Australian economy makes it even more difficult to establish new industries and nurture new occupations, or even to provide traditional jobs in a new industry setting. The marginal size of our economy and its wide distribution across a continent the size of the contiguous United States, leads to an unattractive market density, creating yet further impediments to risk-taking and the emergence of new industries and jobs -- all the more reason why great care must be taken to encourage new ideas, instead of burdening them with unsustainable costs and inflexibilities.
16. Award free employees should remain genuinely award free, without any disguised pressure to force them into the award environment. Hence, employers should have the flexibility to deal with issues such as the following in their contracts of employment with award free employees to the exclusion of NES and modern award provisions.

- Cashing out of leave entitlements
 - Employer directions to the employee to take leave
 - The taking of leave for annual close downs and other shutdowns
 - Hours of work, including averaging of hours
17. "Catch all" awards are not appropriate means of dealing with emerging industries and occupations.

D. MINIMUM WAGES

18. An adult minimum wage should be added to the proposed NES framework for employees not subject to award minimum wages, along with commensurate subsidiary minimum wages for junior employees, trainees, persons with a disability, etc.
19. However there would need to be measures in place -- to prevent the minimum wage from putting upward pressure on award classification wage rates. This minimum wage should be decoupled from, and at a lower level than, ordinary award classification wage rates -- sufficiently low to encourage employers in a non-overheated economy to recruit employees of low educational attainment and low skill levels. We need a minimum wage made up of an employer-paid component and a secondary wage component. The employer-paid component would reflect the actual economic contribution of the employee to the business or organisation and the secondary wage component would be a transitional welfare/DEEWR funded payment while, and until, the employee undertakes/completes a skills acquisition program qualifying him/her for an entry-level award classification wage rate.
20. Piecework rates should remain subject to regulation through particular awards, and no generic treatment of piecework in the NES should be attempted.

E. EXPOSURE DRAFT STANDARDS

1. MAXIMUM WEEKLY HOURS

21. The title of the hours NES should be changed to "Reasonable Additional Hours of Work". The reference to Maximum Working Hours is misleading.
22. The hours standard should only apply to award employees. There should be no "catch all" award for those who are currently award free.

Reasonable Additional Hours

23. Broadly, there is no reason for this level of regulation. In fact, the proposed provisions (including the wide scope of Exposure Draft clause 9(4)) invite argument and disputation but do little to provide criteria that can resolve a disagreement. The dividing line between "reasonable" and "unreasonable", is made impossible to fix in any particular situation because of the contradictory mix of criteria required to be considered. Here, as in many other places in the NES, this will actually invite disputation, which, over time, would almost certainly result in reduced flexibility, productivity and competitiveness. In a full employment economy this could also be hyper-inflationary.

The hours standard should not apply to workers paid on the basis of their output (e.g. piece workers, commission agents).

24. It is not appropriate to have workers, who are paid on the basis of output, subjected to a maximum hours regime. We recognise, of course, the ongoing desire of many unions to restrict flexibility and reduce productivity because arrangements of this kind make it difficult for them to recruit members and negotiate different outcomes from the ones the employees themselves, by and large, seem to favour.
25. The hours actually worked under these arrangements are subject to significant variability. For example, a real estate salesperson might spend significant time with just a few customers. Inspections and conversations take place at times to suit the availability of the buyer

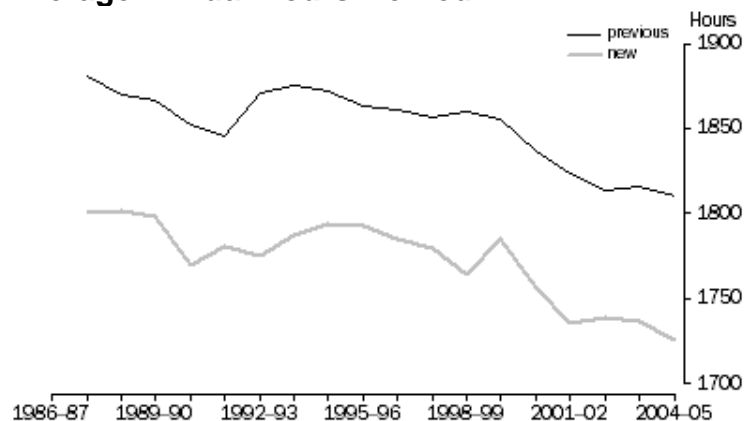
and seller. It is not possible for the industry to command any kind of business-day regularity in the interaction the salesperson has with clients. At times, activity will be hectic, sometimes leading to several successful sales and the resultant commissions within a short time. At other times there will be no business at all. In industries like this there is only one measure of success - sales achieved - and only particular types of people flourish in that environment. Consequently, all notions of fixed hours of work are impossible to sustain.

The asserted long working hours culture is not supported by evidence.

- 26. The statistical data indicates that around 69% of workforce is working 40 hours or less.¹ Longer hours are worked by managers, professionals, associate professionals, standard trades (at their request), senior clerical. The argument about long hours is an on-going strategy by unions to try to justify a 35 hour week. The Government is being drawn into this debate. OHS regulators are elevating policy intervention in this field on the ground of the alleged injurious effects of long hours of work.
- 27. Average hours worked per week have been declining for the past three decades, a trend which has not changed in the past decade (Tables 1 and 2).

Table 1

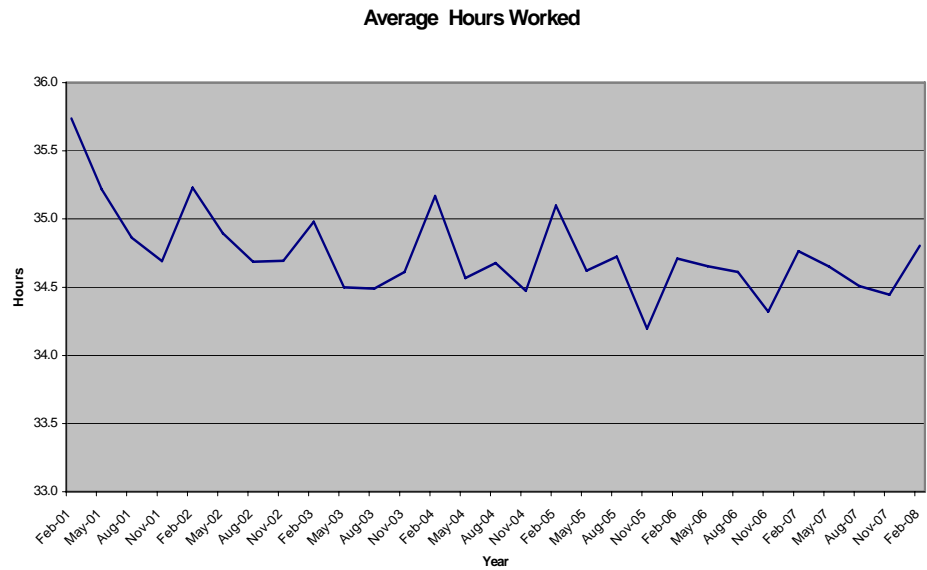
Average Annual Hours worked



Source: Australian Bureau of Statistics 5204.0.55.003 - Information Paper: Implementing New Estimates of Hours Worked into the Australian National Accounts, 2006

¹ ABS Australian Labour Market Statistics 6105.0 April 2008 Table 2.7

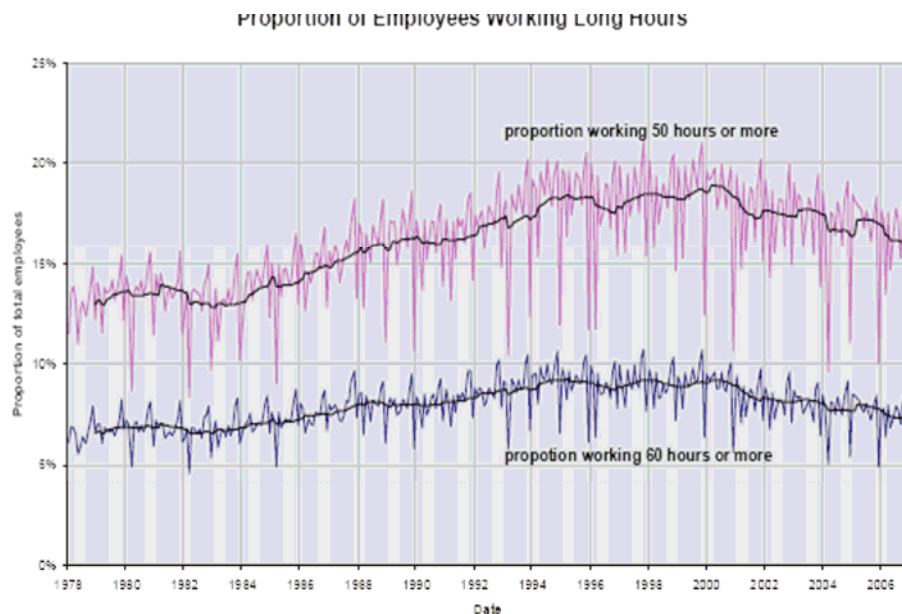
Table 2



Source: Australian Bureau of Statistics 15 6291.0.55.003 Labour Force, Australia, Detailed, Quarterly Table 12. Employed persons and Actual hours worked by Occupation and Sex

28. The proportion of employees who are working long hours (50 or more) increased until about 1995, remained steady until 2000 and has been declining since then (Table 3). A similar trend occurs for the number of people working very long hours (60 or more).

Table 3



Source: Australian Bureau of Statistics 15 6291.0.55.003 Labour Force, Australia, Detailed, Quarterly Table 12. Employed persons and Actual hours worked by Occupation and Sex

29. The proportion of the workforce working more than 50 hours a week is currently around 17%. Of these, about 60 percent are managers, professionals or associate professionals.²

Question 1, p 8 - Additional Hours Of Employees Own Volition

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 ?

30. The hours NES should expressly provide that an employer will not be in breach of the NES where an employee works additional hours of their own volition. However, it would be impractical to have to apply a volition test every time the possibility of working overtime arises. This would mean no more than the employer being on safe ground if the employee always agreed. Conversely, the employer will be back at square one every time an employee did not agree.
31. The employer needs to be able to establish volition on a general basis rather than occasion by occasion e.g. at the commencement of employment or in the contract of employment, for the general or expected actual hours of work, including additional hours, or for a particular period or season and for particular types of circumstances e.g. emergencies, failure of another employee to turn up, unexpected orders, etc.
32. The uncertainty faced by an employer if none of the foregoing alternatives is available is very significant. An employer could never be sure of being able to make a commitment to a customer which required delivery of goods or services in anything but ordinary hours.

² 15 6291.0.55.003 Labour Force, Australia, Detailed, Quarterly Table 12. Employed persons and Actual hours worked by Occupation and Sex.

Award Hours Averaging

33. The NES should explicitly provide for averaging over 52 weeks. Many employers use averaging because of seasonal factors and cycles of activity. Many industries can only functioning on this basis and it is inappropriate to move to a more restrictive and inflexible regime. If we had a maximum 52 weeks cycle in the NES, what else would be needed in awards?
34. If the modernisation of awards amalgamates awards that have different provisions, there is an added danger averaging provisions will not be taken up in modern awards. Hours averaging is too significant an issue to be left to chance.

Question 2, p9 - Reasonable Hours for Part-Timers

2. Should the proposed maximum hours NES address the issue of unreasonable additional hours by reference to the hours normally worked by an employee?

What issues might arise from adopting such an approach?

35. The point of comparison for part-timers should be 38 hours plus reasonable additional hours.
36. Imposing a restriction of the kind speculated upon in the Discussion Paper, is another goal of trade unions, the outcome of which would further restrict flexibility. Employers must be in a position to respond to fluctuating demand. The ability to increase the hours of part-timers is one mechanism for doing that. Initiatives which could prevent that from happening, would either force an additional hours load upon other employees or prevent the employer from responding to the market.

Question 3, p9 - Non Award Employment – Hours

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?

37. See earlier comments regarding award free employees. High income earners are remunerated for the work they do. That generally means they are required to devote their time and attention to their job to the extent necessary to get it down. The demands of the job can be taxing. That is not always the case, but when it is, the high income earner cannot merely brush aside his/hers duties. And it is not appropriate for legislation to try to insulate them from the demands of their positions.

Question 4, p9 - Piecework

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

38. See earlier comments about pieceworkers. Pieceworkers should be excluded from the (maximum) reasonable hours NES.

2. REQUESTS FOR FLEX WORK ARRANGEMENTS

39. In mandating the "right to request" as a standard, there is a clear risk of elevating expectations of employer agreement rather than setting out a process for encouraging discussion on this matter.

40. In AFEI's consultation with employers in many industries across NSW, there was significant concern about how employers could manage these requests/expectations and the likelihood that reasonable business grounds might be construed against them in discrimination jurisdictions.

41. There are already many things that employers do to accommodate their employees. Frequently, these come as a cost to the business, reflected in losses in efficiency, productivity, corporate knowledge, etc. Instead of institutionalising a legal right to ask and opening up the prospect of discrimination litigation, there should be a detailed study of the requests that are currently made and the way employers deal with them. In this way, a better understanding will develop of the gaps between desire and delivery on the employee side and reticence to delivery on the employer side.
42. The kind of changes which may be requested could be better discussed after the research exercise referred to above. In the meantime, however, the legal right to ask and the expectation that employers will consider possibilities should be tightly restricted to working hours and the form of employment (ie part time instead of full time, etc), and should preclude any arrangement which would increase labour or administration costs for the employer.
43. AFEI is strongly opposed to the government mandating through detailed prescription what the term flexibility encompasses.

No Third Party Involvement

44. The Discussion Paper states that Fair Work Australia “will not be empowered to impose the requested working arrangements on an employer”, the issue arises as to third party involvement in the application and interpretation of the NES. Whilst apparently not subject to third party involvement from Fair Network Australia (FWA) under the NES, other third parties, such as Human Rights and Equal Opportunity Commission (HREOC) or the Anti-Discrimination Board (ADB) may become involved on grounds of discrimination, or Occupational Health and Safety (OHS) regulators may pursue employers where an OHS risk to the employee’s health and welfare is said to be caused by not acceding to the change sought. FWA, it should be noted, is to provide

advice to employers but it will not be clear until FWA has been in operation for some time, just what character its advice will take on.

45. There needs to be a guarantee from the Government that there will be no third party intervention by any court, tribunal, regulator, union or other body.

An Employee Business Case

46. Employees should have to put a business case in writing, and indicate the expected duration of the desired change in work arrangements.

Investigation Period

47. The Flexible Work Arrangements NES does not specify an appropriate period for an employer to investigate an employee request or proposal. However, other legal requirements, where employees are making requests that would impact upon their continuation in their current positions, periods of six and seven weeks notice or other timeframes are nominated eg: NSW Parental Leave Test case standard -- requests for additional period of leave to be in writing and made as soon as possible but not less than seven weeks prior to the date the employee is due to return; UK Right to Request law allows employers six weeks to respond to employee request -- 28 days before the employer must meet with the employee and an additional 14 days to notify the employee of the employer decision.
48. In our view six or seven weeks is not enough to properly manage an employee request, considering the impact of the request on staffing and operations. Even where an employer is able to respond positively, there is the implementation phase, with all the inbuilt delays, which entail advertising the position, culling applications, interviewing applicants, preparing contracts, making an appointment, executing contracts, providing relevant induction/training and seeking to bring a new employee on board as quickly and productively as possible. This would, at the

minimum, be a two month process; longer in a tight labour market.) This is a substantial commitment, likely to take around three months, whereas a shorter timeframe could lead employers exposed to unrealistic deadlines and forced to give more weight to refusal than sympathetic investigation.

Question 6, p.12 - Who is An Employee With Responsibility?

6. Should the proposed Flexible Working Arrangements NES include additional provisions to define the term 'employee with responsibility for the care of a child'? If so, what additional rules should be included?

49. This term should be clarified. Proof should be required to be provided if requested by the employer. The term "parent like relationship" is too vague and should be explicitly defined as meaning the parent who currently has the legal and actual responsibility to look after the child, being a natural parent, adoptive parent, step parent, foster parent or guardian.

Question 7, p.13 - Reasonable Business Grounds? (RBG)

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

50. The Flexible Working Arrangements NES should not define "Reasonable Business Grounds" (RBG) nor make any rulings on this matter. If the Government is genuine about intending this to be a process of discussion and accommodation between employers and their employees, it should resist putting in place any, and especially a universally applicable, government view of what is reasonable for the business. Given the conflicts of interest inherent in the numerous roles Fair Work

Australia (FWA) will have, it is not acceptable either that this body will have a key role in defining the scope of RBG. The research approach we have suggested earlier will assist in understanding the circumstances in which employers can and cannot accommodate employees' requests, including those where such accommodation is difficult for employers.

Question 8, p.13 - Any Other Matters?

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

- 51. Arrangements made between employers and employees should be able to override NES and modern award provisions.

3. PARENTAL LEAVE

Medical evidence that the employee can work safely

- 52. Occupational Health and Safety legislation requires employers in NSW to ensure,(ie guarantee) the safety of employees at work, and in other states to ensure safety as far as practicable. Consequently, the Parental Leave NES should require employees to provide medical evidence which has regard to the nature of the work and an assessment of the employee's capacity to work safely where there are work safety concerns for the employee, either whilst pregnant or on returning to work a short time after the birth, or where an employee requests a transfer to a safe job

Transfer to a safe job

53. While employers may seek to assist pregnant women in these circumstances through access to various forms of paid leave, it is a unrealistic assumption that small and medium business will have another job to which an employee can be productively transferred or will be able to sustain the cost of paid leave when there is no safe job, not to mention the lost productivity/output when trying to secure a replacement temporary employee to fill in for the "risk period".
54. The provision of paid leave for "no safe job" leave should be removed. This is an onerous and costly requirement, and unmanageable for small businesses in particular.
55. This is an exercise in cost shifting by government. Such employees should have immediate access to social security benefits. This would be consistent with the tenor of the International Labour Organisation (ILO) Convention on Maternity Protection (See the 1952 (ILO C103) revision, which provided that employers should not bear the cost of maternity leave; that this is a cost which should be carried by the community:

Article 4 4. The cash and medical benefits shall be provided either by means of compulsory social insurance or by means of public funds; in either case they shall be provided as a matter of right to all women who comply with the prescribed conditions.

Article 8 8. In no case shall the employer be individually liable for the cost of such benefits due to women employed by him.

Documentation / Evidence

56. All references to medical evidence "which would satisfy a reasonable person" should be deleted and replaced with the requirement to produce a medical certificate from a registered medical practitioner.

Concurrent leave

57. No doubt employers would like to accommodate new fathers if they can, however, when labour shortages are acute (and even in a less buoyant economy, where it can be impossible to get a substitute employee for three weeks, let alone eight weeks) how are businesses, particularly small businesses, going to function? The concurrent leave proposed is not subject to agreement and is not subject to a right of refusal as is currently the case. The Parental Leave NES therefore restricts an employer's ability to reasonably refuse the concurrent leave which, in addition, has been increased from one week to three.
58. In a small business, a single employee can account for 20% to 50% of turnover. In a medium-sized business, an employee can occupy a pivotal position in the workforce, or in relation to a particular job or project. These requests are the result of circumstances over which the employer has no control -- the pregnancy of the staff member or their partner. It is better to keep the period of concurrent leave shorter rather than longer. Employees and employers can make other arrangements if they choose, without increasing statutory entitlements or introducing a statutory right to ask.

Request To Extend Period Of Leave

Notice

59. The period of notice of four weeks for requesting an extension of parental leave for up to a further 12 months is too short. Employers have to contend with the staffing issues surrounding the temporary absence of employees – advertising, recruitment, training, notice periods for temporary replacements, rescheduling of staff, etc. A short notice period compounds these problems and is likely to create additional pressures on others in the workplace.

60. As noted previously, other award and legislative requirements cite notice periods of at least six and seven weeks. However, even these periods are too tight for businesses to function adequately. Based on our discussions with employers of different sizes and from different industries, a notice period of at least eight weeks is the minimum regarded as reasonable in the circumstances. Note that the difference between this period and the period cited earlier for Flexible Work Arrangements, is reflective of the probable differences in the deliberative aspect of the consideration given to the employees request. Future experience will tell whether this difference is borne out in practice.

Definition of Reasonable Business Grounds

61. The NES should not provide a definition of what constitutes reasonable business grounds. Nor should FWA, given its many conflicting roles, be providing "assistance" to employers regarding the meaning of RBG.
62. The concerns raised earlier about third party involvement at paragraph 41 is also relevant in deciding what constitutes reasonable business grounds, and the terminology "unreasonable refusal" used elsewhere (see paragraph 73).

Interaction With Other Forms of Leave

Variation to Leave

63. There is no reason to seek a provision here. If an employee makes a request, employers are then free to decide how to deal with it in accordance with the relevant legislation.

Meaning of Service

64. The NES should clearly state that parental leave does not break **continuity of service** but is not to be counted toward the employee's **service**. It should reiterate s.316 of the *Workplace Relations Act* to clarify that there is no accrual of service for purposes of long service leave and paid no safe

job leave. As currently expressed, the Long Service Leave NES preserves state legislation and entitlements, which, in NSW for example, is silent on accrual of service whilst on parental leave, but service does not accrue due to the provisions in the *Workplace Relations Act* and the NSW IR Act.

Notification on Return From Leave

65. Item 17 of the Exposure Draft NES Bill requires the employee to notify the employer of the "intended start and end dates of the leave". This is useful. Except where the maternity leave ends other than in the birth of living child, or the employee intends to take maternity leave of the minimum duration, this notice would always be well in advance of the historical four week requirement. For good measure, however, there should be a confirmatory notice at least eight weeks before the **already notified return date**.
66. The real issue is: what happens if the employee fails to give the original notice or this confirmatory notice? Does the employee lose the right to return to his/her guaranteed position? Is the employer then entitled to deal with that position accordingly?
67. Despite the fact that many employees take maternity leave and employers are then prevented from filling their former positions other than temporarily, it is the four weeks notice (or, as proposed here, eight weeks) that indicates to the employer whether the employee is actually returning or not.
68. Historically, less than half of mothers actually return to their jobs. Hence, the eight weeks notice should be the trigger for clarifying the return / non-return issue and if the latter, the failure to give the notice would terminate the employment and free the employer to permanently fill the position. In order to avoid the inevitable disputes, it may be that the employer could write to the employee around the time of the eight weeks notice date to draw the employee's attention to the eight weeks notice

requirement and seek written and advice from the employee that he/she has received this correspondence and confirming that he/she will/will not be returning to work on the already notified return date. Failure to respond to this letter and failure to give the notice at eight weeks would confirm the termination.

Question 9, p.21 - Evidence Employee Is Fit for Work in Late Third Trimester

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

69. Under OHS law there are some circumstances where there could be an issue of added risk exposure. Of course, employers should have the right to request evidence. However, the practical consequence of seeking that evidence is that the employee's doctor is then potentially exposed to litigation for tort negligence if he/she says it is safe to work, but the pregnant employee suffers health problems. Because of this risk exposure doctors increasingly opt for self-preservation by declaring jobs to be unsafe and specifying ever tighter safe work regimes. The net result -- the employer cannot provide alternative safe work for the "risk period" and employees become entitled to paid leave at the employer's expense.

4. ANNUAL LEAVE

Accrual

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

Question 20. p29

Are there any issues that may arise from this approach?

Question 21. p29

If so, how should those issues be addressed?

71. Whilst the progressive accrual mechanism is mathematically simpler, it is more costly than current standards in that leave would accrue faster and would be available to be taken at an earlier date(s). The current approach, with annual leave accruing after each 4 weeks of continuous service, should be retained.

Taking Annual Leave

72. Whilst many employers allow some flexibility as to when leave can be taken by employees, others face seasonal and financial factors which create some rigidities. For those situations, employers need a right of decision about the timing of leave taking. Notwithstanding absolute or four weekly progressive accrual, the right to take leave as leave should not arise until the end of each 12 months' of continuous service, subject to over ride by agreement between the employer and employee. Additionally, employers should have the right to direct the taking of leave for the purpose of annual or other close downs, including periodic maintenance shutdown work; other stoppages of work for which the employer cannot reasonably be held responsible; and to reduce the financial costs of significant accrued annual leave and other entitlements.

Unreasonable Refusal

73. The qualified employer right of refusal in the Annual Leave NES is the third formulation restricting the capacity of employers to make decisions. We have had

- (i) Refusal only on reasonable business grounds (RBG);
 - (ii) Evidence that would satisfy a reasonable person; and now
 - (iii) Employer must not unreasonably refuse.
74. If authorised and unauthorised absences are not able to be properly managed by employers, including by way of policies about leave taking, then efficiency and productivity will suffer in those workplaces where a more controlled approach is necessary. modern awards should not be able to impose limits on employer flexibility in relation to the Annual Leave NES nor on the ability of employers to manage absences. There must be a guarantee that the interpretation of "must not unreasonably refuse" will permit proper management of absences.
75. The Discussion Paper proposes that Fair Work Australia will provide information and assistance to employers on what constitutes reasonable and unreasonable refusal. Again, FWA's conflicting roles make it an inappropriate body for providing objective advice.

Payment for Annual Leave

Question 22, p29

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

Question 23, p29

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

76. Annual leave should be paid at the base rate of pay, in accordance with the long established standard. There is no reason to depart from this standard.

77. Various practical issues should be dealt with in the Annual Leave NES. These issues are vitally important to thousands of people who administer payrolls. Examples (some of which are dealt with in the Discussion Paper) are set out below. However, content depends on the particular model of accrual adopted (e.g. absolute progressive, four weekly progressive, annual, etc):

- At any particular time when an absolute progressive accrual is calculated for the purpose of taking leave, it should be calculated to the end of ordinary working time of the day (or shift) which is two clear days prior to the end of the preceding pay period.
- Where a termination payment is calculated, it should be calculated to the end of the last hour of ordinary time worked by the employee on the employee's last ordinary working day.
- Where an employee changes hours worked (e.g. from a full-time employee on 38 ordinary hours per week to a part-time employee working 15 ordinary hours per week, or working variable ordinary hours each week) additions are made to the employee's accumulated annual leave accrual based on the periods worked at each different number of ordinary hours (to a maximum of 38 ordinary hours) per week, provided that an employee on an averaging cycle of ordinary hours would accumulate an annual leave accrual as though he/she were working a standard 38 ordinary hours week over the cycle.

Ordinary Hours of Work

Question 17.p28

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

Question 18 p28

If so, how should those issues be addressed?

Cap of 38 (Ordinary) Hours Per Week

78. Paragraph 134 of the Discussion Paper adopts the correct approach. It keeps the system tidy where, for example, employees work on an averaging cycle. There should be a cap to ensure that an employee does not accrue more than 38 hours of leave per week / 152 hours per year, (other than continuous shift workers).

Part-Timer on Variable Hours

79. This depends what the award provides. In some awards you could have a part-timer who may have a standard work week but who works additional ordinary hours when the demand requires. Under an absolute progressive accumulation model, annual leave is accumulated for the ordinary hours actually worked, not just for the standard (lesser number of) ordinary hours.

Extra Week Of Annual Leave For Certain Shift Workers

Question 15.p28

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

Question 16. p28

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

80. The principle is that the benefit of an additional week of annual leave is not an automatic benefit of shift workers generally, but a benefit enjoyed by shiftworkers in particular industries working specific shifts on particular days. The NES should not extend this long standing industrial benefit to shiftworkers at large.
81. The additional week of annual leave for this category of worker should be dealt with in a modern award, reflecting the pre WorkChoices award entitlements in particular industries without any addition or extension. Importantly, modern awards should define who is a shift worker **for the purpose of the additional week of annual leave**, not who is a shift worker, simpliciter.

Right To Take Leave In Periods Agreed Between Employer And Employee

82. This allows the greatest flexibility for both parties to be able to take leave in anything from single days to consecutive weeks, as mutually agreed. We support this approach. However in the event of excessive accumulated leave, the employer should be able to direct the employee to take a proportion of leave accrued (see section below).

Awards and Annual Leave

83. Modern awards should not place restrictions on the ability to take leave as agreed and should allow for the maximum flexibility in leave arrangements agreed between employers and employees.
84. To the greatest extent possible, the flexibility provisions should be contained in the NES.

85. The NES should stipulate that the use of annual leave should be as flexible as possible, not just in how leave may be taken. This should include provisions which allow the cashing out of leave entitlements, taking twice the leave on half pay, etc. Leaving these flexibilities to modern awards and determination by the AIRC will mean that these flexibilities may be subject to adverse change, made less flexible, not exist at all in awards and, because they are confined to modern awards, not be applicable at all to award free employees, for whom there should be the greatest flexibility.

Employer Right to Direct Employees to Take Leave

86. The NES should specify that an employer can direct an employee to take accrued leave, or a portion of accrued leave, with four weeks notice. This is a reciprocal right to the employee's right not to have leave unreasonably refused. An appropriate model is the *NSW Annual Holidays Act*, where leave must be given and taken within six months after the date upon which the leave is accrued due, otherwise the employee loses the entitlement to annual leave in the form of time off, but retains the right to be paid for the leave on termination.
87. Under the current *Workplace Relations Act*, an employer can direct an employee to take excessive accumulated leave (take one quarter of two years worth). However, it would be better to limit the accrual of leave by allowing employers, with reasonable notice, to direct employees to take any leave accrued beyond one year's entitlement.

Annual Close Down

88. Where annual close downs are part of the business operations, employers should have the right to reasonably refuse leave during the year so that the employee has sufficient paid leave to cover the close down period. An employer should not be compelled to pay for the close down period

if the employee has exhausted their leave entitlements.

89. The NES should provide that:

- An employer may temporarily close down their business annually and instruct their workers to take any leave due for that period. The NES may include provisions requiring notice to be given of such a shut down (The NSW *Annual Holidays Act* requires an employer must give one month's notice to all workers affected)
- Any worker with an insufficient leave balance or accumulation to cover the period of the close down must take leave without pay for the balance of the close down. Pro-rata payment may be made for employees with less than 12 months service (ie they haven't yet become entitled to take leave as leave).

90. It is important for this to be contained in the NES so that an employer has the same obligations to all employees in the workplace, not different obligations for different types of staff.

91. WorkChoices created confusion over this issue due to an unclear statement contained in the Explanatory Memorandum which was open to differences in interpretation:

“: 532. An employer may only direct an employee to take annual leave where that employee has an annual leave credit that is at least equal to the proposed shut down period.”

92. What if the shutdown period is two weeks and an employee only has one week accrued? If an employer is required to provide paid leave to an employee during an annual shutdown (and an unearned payment if the employee has insufficient leave), this leads to:

- Disparity between employees who have used all leave and are effectively entitled to additional paid leave (double dipping),

compared with employees who must use their leave

- Disparity between longer serving employees with sufficient leave accrual compared to employees with less service who would be entitled to additional paid leave for no justifiable reason
- Employees taking all accrued leave to receive additional paid leave entitlement
- Employers refusing employees leave so they have enough to cover a shutdown period rather than having double liability, when business is closed and no income coming in (making this a triple liability?)

Interaction of Annual Leave With Other Forms of Leave.

Question 19. p29

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?

Re-crediting Annual Leave

93. This is a major issue for employers. While a minority of employers already make some accommodation in this regard, there are many businesses that struggle just to pay for annual leave each year, not to mention their difficulty in coping with the loss of employees during the leave period.
94. The provision of sick leave benefits in awards was not conceived on the basis that employers should pay for all sick leave downtime. There is a sharing of the loss. When employees exhaust their leave allocation, there is no legal expectation that employers will keep paying. Likewise, although some employees might think it a nice idea, no one really argues the legitimacy of employers paying

for the imperfections of a holiday experience. It has never been proposed that someone sick on a public holiday or rostered day off should be doubly compensated by their employer.

95. The sick leave aspects of personal leave are about a benefit provided "without loss of pay" to the employee. This provision envisages being paid for annual leave and then getting a re-credit for something that may or may not have gone well.
96. An employee whilst on annual leave could take community service leave, personal / carer's or compassionate leave. There is a problem of providing evidence for the change in leave status (eg medical certificates for sick leave) and is open to abuse.
97. How is an employer to determine the legitimacy of a personal / carer's leave re-credit claim? How is the employer to be notified? .
98. If a member of employee's immediate family becomes ill or suffers an injury (e.g. child sustaining ankle injury while on family skiing holiday) what proportion of annual leave would the employee be able to claim as carer's leave? How would this period be substantiated?
99. The consequence is an unfair benefit provided to employee who, while on holidays, is not required to be ready willing and able to work. Primarily, employees are not absent from work due to illness, they are absent from work on annual leave. As much as we would all like our period on annual leave to be perfect, the fact is all the normal blemishes of the real world are just as capable of visiting themselves upon our holidays as they are upon our weekends or the days we are actually at work. If we are to compensate employees for being sick on holidays or tending to a relative to whom they need to give care, what else could employers possibly be asked to do to underwrite a perfect holiday experience.
100. Personal/Carer's times leave and various other employment benefits are provided on a

contingency basis to cover absence from work. They are not provided for the times an employee is not at work.

101. There is also the additional administrative burden of re-crediting leave, and the multiplicity of difficulties in assessing the circumstances of each employee and ensuring equitable treatment of diverse employee experiences whilst on annual leave.

Transmission of Business

102. The preferred approach of most employers is **not** to carry over accumulated and pro rata liabilities from the old employer to the new employer. The standard approach is to pay out these liabilities through some offset to the purchase price. There should not be any legislative obligation to recognise service or carry over entitlements to a new employer.
103. Rather, this should be dealt with during the sale of business or commercial contract governing the transmission. It may be appropriate that either the new employer or previous employer provide notice to employees stating whether prior service is recognised and whether such entitlements are carried over or not.

5. PERSONAL / CARER'S LEAVE AND COMPASSIONATE LEAVE

104. Personal/carer's leave and compassionate leave are designed to help an employee deal with personal illness, caring responsibilities, family emergencies and the death or serious illness of close family members. The carer's leave aspect of this renamed benefit derived from the recasting of sick leave entitlements so as to permit employees to utilise part of sick leave accruals for this purpose. This intention should be emphasised in the NES. This is not an automatic right to additional leave each year but is restricted to specific circumstances (beyond the control of the employee) which the employee should be required to verify.

105. The NES should make it clear that personal/carer's and compassionate leave are available only as leave which may be taken, not cashed out.

Terminology

106. What is the intended meaning of "**unexpected emergency**"? The emphasis should be on an unexpected emergency situation requiring the immediate attention of the employee, it should not apply in situations which are covered by carers or compassionate leave or where the event is foreseeable or may be attended to at another time.

"Immediate family" – definition is workable

"Member of household" – A definition that imposed strict limits on scope of this term is essential.

"Permissible occasion" – this expression is problematic; but may be overcome by capping. While death and the attendant leave can only occur once, a life threatening illness may be ongoing and possibly subject to more and less serious bouts. Confusion has occurred over what is considered a permissible occasion e.g. if a family member contracts a life threatening illness but the threat may not be immediate, or the one illness creates multiple occasions where there is a threat to the person's life, such as certain cancer patients and related illnesses. (see comments below.)

107. The WorkChoices Explanatory Memorandum appeared to contemplate a situation where there is an immediate threat to life. For instance it provided at paragraphs 584 and 585:

"584 An employee (other than a casual employee) would be entitled to take two days paid leave to spend time with a critically ill, injured, or dying person who is a member of the employee's immediate family or household.

585. An employee may take up to two days compassionate leave upon the death of a member of their immediate family or household."

108. For an illness/injury that is life-threatening, compassionate leave should be accessible only once in respect of any one individual. In the case of death, there is obviously, also, only one occasion for accessing compassionate leave.

Evidence Requirements

109. The NES evidence requirements are open ended and should be made more stringent. As currently proposed, they will be open to interpretation and dispute. What is a reasonable person? In this context it is unworkable. In this and its other uses within the NES, it effectively exposes every decision of the employer to second-guessing and argument.
110. In addition, modern awards will not be able to insert more rigorous notice and evidence requirements (Discussion Paper paragraph 199).
111. For any relevant leave, employers should be able to insist on a medical certificate. The government may not think it reasonable to request a certificate for every absence, and it has not included its view expressed in paragraph 190 of the Discussion Paper in the draft NES. Employers may not request evidence on each occasion of absence, but they should have the right to request. Managing absence is a huge problem across industry, and the production of evidence for the absence, even for a single day, is an important element in any absence management system.
112. The unclear standard of evidence -- satisfying a reasonable person -- reinforces the view that these forms of leave are automatic and open ended.
113. Where there is no abuse of the entitlement and untaken leave accrues endlessly, employers face the possibility of significant balance sheet

liabilities whose cost will escalate every time wages rise.

114. Whilst immediate family and spouse are defined, member of a household is not. Unless the particular character of these household members can be explicitly identified and a legitimate link to the immediate family established in the legislation, then " household member" should be deleted.
115. The NES should make it clear that an employer can ask for evidence on each occasion of leave, and where it is possible to provide notice in advance of the intention to take leave, that this be done as soon as the employee becomes aware of the need for leave.

Cap on Personal and Carer's Leave

116. Personal and carer's leave accrues indefinitely at 10 days for each year of service. For the many employees who do not abuse their entitlements, unlimited accrual creates a costly impost on employers and a significant transfer of the cost of caring to the employer. As indicated earlier in this submission, many small employers struggle to find the money just to pay annual leave entitlements (typically at the end of) each year, so a large accrual of personal leave entitlements will plainly be a significant cost to them.
117. Even larger businesses have financial positions which are very finely balanced. For all of them, the management of genuine and non-genuine absences is a major issue. Many cannot afford to carry the escalating provisions in their balance sheets. The Personal/Carer's Leave NES should be redrafted to avoid this unaffordable outcome. There must be a cap on the accumulation of personal/carer's leave. Five years would be an appropriate level for employees with a ten day annual entitlement. For employees with higher annual entitlements, which are almost always based on their exposure to a higher incidence of (usually) minor ailments, like colds and "flu",

there should be a lesser number of years of accumulation.

Unpaid Carer's Leave --Cap on "Each Occasion"

118. Two days unpaid carer's leave are to be available to employees on each separate occasion a member of the employee's immediate family or a member of the employee's household is ill, injured, or has an unexpected emergency. No limit is proposed to the number of occasions -- as each occasion arises, the employee is entitled to two days' absence.
119. Notice has only to be given "as soon as reasonably practicable". This is another expression which increases the likelihood of abuse and disputes. That is the experience of employers trying to manage both genuine and non-genuine absence. The employee may decide that it is not practicable to notify until they return to work, leaving employers to manage the consequences of both the absence and the uncertainty. A. Evidence has only to be provided after notice has been given, and the form of that evidence is open ended.
120. The design of this NES will encourage the view that these contingent entitlements are easy to use, and abuse, and inefficiencies that come with the inevitable outcomes will raise the on-costs of employment in Australia and worsen the already inadequate labour productivity levels which underpin our competitiveness.
121. The legal entitlement to unpaid carer's leave should be capped at two separate occasions per annum, non-cumulative.

Compassionate Leave

122. There is no cap on the number of occasions an employee may take paid compassionate leave. The entitlement arises each time a “permissible occasion” occurs, without limitation, subject to the open ended notice and evidence requirements.
123. There is an entitlement both at the time an illness is contracted, and when the illness develops, with the entitlement to commence compassionate leave for that occasion whilst the illness or injury persists. The leave is not confined to leave for a particular individual but a particular illness/injury. Should the individual contract another illness or injury, compassionate leave would again be available.
124. There should be a limit of two days compassionate leave per year for each immediate family member and there should be an aggregate limit as well. The latter aspect requires some research and debate as to its magnitude.

Can Accrual Change?

125. The same issues arise here, in relation to progressive accrual, as we submitted in relation to annual leave.

6. COMMUNITY SERVICE LEAVE

126. AFEI questions the need for a community service leave standard. These matters are already being managed by employers without detriment to the community and there is no evidence that they should be subject to further regulation. Employers, in addition to release of employees, directly contribute to fund raising and the viability of many community services.

127. If standards are mandated, employers will require additional information and notice requirements from participating employees. In addition, a mandated standard will require additional management between agencies and employers as employers will want to be more certain that the employee is absent in an appropriate emergency volunteer capacity.
128. The two forms of leave, jury service and emergency service should be treated as completely different types of leave.

Emergency Service Leave

129. The need for additional regulation in this area is questioned. It appears to be a means of mandating (initially) additional unpaid leave. The government should provide additional material demonstrating why regulation in this area is needed.
130. If a community service standard is introduced, it should be confined to certain prescribed activities, and only for short periods of time (ie not open ended or extended). If the NES does not limit the period of leave, any period of community service leave should not be considered as periods of service with the employer, but would not break continuity of service.
131. Emergency services leave should be limited to emergencies which are under the aegis of statutory emergency services agencies and to employees who are registered volunteers with such an agency and whose registration has been notified to their employers at the time of engagement by the employer or at any future date when they become registered. Whilst currently limited to those prescribed in s.659, more may be prescribed in the regulation. This is open ended and would not necessarily be a matter for debate. Such activities should not include community action / causes or special interest group activities in relation to which debate has arisen in the past.

132. The NES does not provide for any form of notice to be provided. It should require that advance notice be provided to the employer. The situation where the employer's business is put at risk where an employee unilaterally decides to leave to volunteer without a demonstrated need, and without the employer's knowledge should not be permitted.
133. If there is to be an NES, it should only be operative where the statutory emergency services agencies, referred to above, are required to coordinate with the employers of registered volunteers to ensure that the volunteers called upon for a particular emergency come from those businesses which will suffer the least adverse consequences from the absence of their employee(s).
134. The necessary work by a statutory agency to identify the circumstances in which the released from work of individual volunteers may cause more or less problems, should be carried out at the time an individual volunteer becomes a registered volunteer and, periodically , to update the agency's preparedness to handle a future emergency.

Community Service Leave - Juries

135. We do not share the government's views that employer paid jury service should be a mandatory minimum entitlement. Jury service leave is a disruption for business and can severely impact operations where a senior or key employee is required to attend a trial, especially a lengthy trial.
136. Small businesses are particularly affected, even with short periods of jury service. In addition, the NES expects employers to pay for this community service which can affect them at random, at short notice and over which they have no control. It represents a cost shifting from the public budget to employers who have to subsidise the jury system. It is time governments undertook to pay jurors the income they lose as a result of their

service to the community as jurors. The employee's absence from work is already costly in itself. Employers should not have the additional burden of paying for that absence.

137. The NES should provide only that an employee can take unpaid jury service leave and that proof must be provided to the employer on request. Jury service leave should not be an allowable award matter.

7. LONG SERVICE LEAVE

138. It is premature to have an NES for long service leave. The government is right when it points to the complexity and difficulties facing multi-state employers dealing with a multiplicity of schemes. However the diversity within these schemes presents some impenetrable barriers to national uniformity which will require considerable debate. It will not be acceptable for a national standard to merely adopt the most costly and most generous features of current schemes. Portable long service leave will be unacceptable in any circumstances.

8. PUBLIC HOLIDAYS

139. Page 45 of Discussion Paper states 'The proposed NES entitlement will protect public holidays declared by state and territory governments for working Australians.' Hence the Government's intention is to preserve existing state and territory Public Holiday entitlements, not to create additional public holiday entitlements.
140. Consequently, the Government should ensure that when a particular event (eg Christmas Day), which attracts a public holiday, occurs on a weekend and a substitute day for observing that event and having a public holiday is declared for an ensuing weekday, this declared substitute day actually becomes the public holiday for NES purposes, in lieu of the date on which the relevant event occurred. Under the current state and territory systems employees are not entitled to

both days and the legislation should be drafted to ensure that double dipping does not occur in respect of substitute days.

141. Where an issue arises as to whether an employee will work on a public holiday, any debate about a right of refusal to work should be limited to the day actually declared for observance of the public holiday. In the preceding paragraph that would be the substitute day and not the day on which the event actually fell.

Location of Work

142. This is a welcome addition that clarifies this issue by explicitly stating that the public holiday is based on where the employee is located on that day for work purposes (rather than the employee's residence, which has caused confusion in the past eg APEC regional holiday). This also assists with occupations with no usual place of work (eg truck drivers, commercial travellers)

Meaning of Public Holidays

143. Union picnic days should be excluded from the NES and should not be allowable matters in "modern awards".

Reasonable Request and Reasonable Refusal

144. This two tiered test will be confusing, open to challenge and a source of dispute. It will be unworkable and impracticable to apply, with an inordinate amount of time being required to undertake a dual assessment of the reasonableness of the request and a refusal.
145. The tests include an assessment of whether the employee could reasonably expect that the employer may request work on the public holiday. What would be the test of "reasonable" be here? There is a circularity in this assessment process.

146. The tests do not include consideration of the employee's contract of employment which may include an agreement to work on public holidays as an explicit condition of engagement in the employee's position. At the time of recruitment, employers need to be in a position to engage employees who are actually prepared to carry out the work that needs to be performed. Shifting from that position to one where debate arises on every occasion when, as here, public holidays occur or, in the hours of work NES, where additional hours are required, creates a new wave of inflexibility and uncertainty.
147. Here, a standard is created which places an impediment in the way of employers getting the work done. And then, there is also an attempt (a counter measure) to prevent an employer from legitimately planning to deal with the impediment in the way they engage employees (e.g. by recruiting employees who, at the time of recruitment indicate they are prepared to work on public holidays or are prepared to perform the additional hours, as needed). Both the impediment and the counter measure need to be removed from the NES.

Casuals

148. Casual employees should be excluded from section 49.

9. NOTICE OF TERMINATION AND REDUNDANCY

Notice of Termination

149. The Government should implement a Notice Of Termination Of Employment NES in the terms outlined in the Discussion paper, and remove the existing notice requirement from the termination provisions of the *Workplace Relations Act 1996*. Further, this should not be a matter for award determination.

150. Current employer obligations should be retained. Written notice should not be required. This poses an unnecessary burden on employers as it may be impractical in certain situations. Small and medium businesses, and even smaller business units of large businesses are frequently not set up to handle the kind of paperwork the public sector might think is commonplace.
151. In consultations with our members, they were unanimous that employees should be compelled to provide proper notice and that an employee resigning without notice had a significant negative impact on their operations.
152. In the same way that employers are liable to pay employees in lieu of notice, employees should be liable to pay employers for notice not given. The current position of forfeiture in relation to wages owing is nearly always negated by employees disappearing upon receipt of their last pay. If forfeiture is to be retained as the NES standard, it should attach to any monies owing, including accumulated leave entitlements. Moreover, the obligation to pay wages should not arise until an appropriate length of time after the end of the pay period, which is equal to half the length of the pay period, thereby leaving accrued but unpaid wages to be forfeited if the employee fails to give notice.
153. Where an employee has been paid wages in advance or allowed to take leave in advance, the value of those advances should be recognized as payable to the employer on termination. Apart from any other method that might exist for their recovery, they should be able to be deducted, to the extent possible, from the wages or other entitlements otherwise payable to the employee on termination or resignation.
154. As to the amount of notice an employee should give, it should be equal to that required to be given by the employer. There should be provision to reduce the notice period by mutual agreement, or to unilaterally pay out an amount equivalent to notice or the remaining part of the notice.

Redundancy Pay

Redundancy pay should not be payable in the circumstances of ordinary labour turnover.

155. The nature of work in some industries is such that ordinary redundancy rules are inappropriate. In some sections of the building industry, for example, employees are typically engaged by the job or project and the particular job or project may run for several years. In these cases, it is known at the commencement of the job or project that the employment will end at some time near the end of the job or project, as contractors and their labour forces progressively leave or scale down.
156. In the cleaning contracting industry, contractors tender for particular jobs, for example the cleaning of certain public schools for a period of years. Before the end of that period the job is re-tendered. Where a new contractor wins the tender, it is frequently the case that the employees engaged by the previous contractor may stay on and work for the new contractor. This may happen several times over the life of a number of tender periods. In these circumstances also, redundancy pay is not appropriate.
157. Generally, where there is a change of contractor, or ownership of the business or the taking over of the work of the business, but employees "stay on", while there might be, legally, a severing of a contract of employment, the reality is that the employee retains the job. In such circumstances redundancy pay should not apply.

10. INFORMATION STATEMENT

158. Employers question why it should be their obligation to disseminate this material. It is an inconvenient additional administrative burden which, given the experience of the Workplace Relations Fact Sheet, only serves to confuse many employees.

159. Whilst providing the sheet to employees may appear straightforward, dealing with the confusion and differing employee interpretations, is problematic.
160. Particular regard should be had to the content of any fact sheet to avoid misunderstanding or misleading information.
161. To ensure that any unintended consequences are avoided and the information is not misleading, a Draft Fact Sheet should be provided for consultation.
162. We support flexibility in the dissemination of any information as easily as possible for employers eg flexible mode, by intranet, email, physically handing, mail etc, timing, as soon as practicable either prior to, on or after commencement of employment.