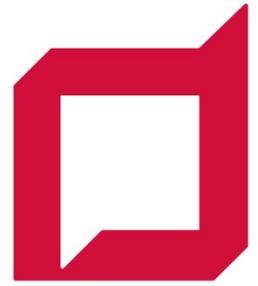


Submission
to Minister for Employment,
Senator the Hon Michaelia Cash



**Independent
Schools** Victoria

Summary of concerns with the national workplace relations system

Information about Independent Schools Victoria

The Independent Schools Victoria (ISV) Vision is:

‘A strong independent education sector demonstrating best practice, providing excellent outcomes for students and choice for families.’

To realise this vision, ISV:

- supports quality education
- advocates for excellence in education
- champions Member Schools
- protects the rights of parents to choose where and how their children are educated.

ISV assists our diverse Member Schools to continue providing the best possible education outcomes for the citizens of tomorrow.

Background to this Submission

ISV has 218 Member Schools. These Member Schools employ approximately 12,705 teachers and 6,061 general staff employees. ISV provides employment relations services to the governing body and management (usually principals, business managers, human resource managers and designated senior staff members) of Member Schools. Accordingly, ensuring a fair and equitable workplace relations system is important to us, and those we represent.

Introduction

ISV has identified a number of significant issues affecting Member Schools which we seek to raise. These concerns include issues relating to the Notice of Employee Representational Rights and the technical way in which the Fair Work Commission (FWC) deals with these matters. We note that recent legislation introduced to the Parliament considers this point, as well as our concerns regarding the efficacy and efficiency of the Four Yearly Review of Modern Awards.

Also of concern is the operation of the National Employment Standard (NES) entitlement to long service leave, specifically the extent of the interaction between the preserved pre-reform long service leave terms and the *Long Service Leave Act 1992* (Vic) (LSL Act). Another important issue for our Member Schools and their employees is the accrual of leave entitlements during a compensation period.

Concerns

Notice of Employee Representational Rights

1. ISV commends the Government's initiative to introduce the *Fair Work Amendment (Notice of Employee Representational Rights) Regulations 2017*. This was in response to issues many employers, across all industries, have faced when seeking approval of enterprise agreements.
2. There are still concerns as to the overly technical and at times zealous way that the FWC has approached applications for the approval of enterprise agreements.
3. Examples of this include the refusal to approve enterprise agreements based on the Notice of Employee Representational Rights (Notice) being issued on company stationery. For example, it is commonplace for schools to put communications to staff on school letterhead. Based on the current case law surrounding this issue, the use of company stationery/letterhead would invalidate the Notice. We submit, however, that in instances where the text of the Notice has not been changed, the use of school stationery would not materially hinder an employee's understanding of the Notice.
4. We note that on 1 March 2017 the Government introduced the Fair Work Amendment (Repeal of 4 Yearly Review and Other Measures) Bill 2017 which seeks to introduce provisions which would enable the FWC to overlook procedural or technical errors when approving an enterprise agreement. ISV supports the substance of this Bill.

Four yearly review of Modern Awards

5. ISV has been an active participant in Stages 3 and 4 of the Four yearly review of modern awards (Four yearly review process) and has made submissions with respect to the *Educational Services (Teachers) Award 2010* and the *Educational Services (Schools) General Staff Award 2010*. We have found the process thus far to be time and resource intensive.
6. The initial conference with respect to these stages was held on 18 November 2014. To date, little progress has been made and neither award has been finalised.
7. Further, with respect to the common issue of annual leave, the FWC has been slow to individually tailor the *Educational Services (Teachers) Award 2010* to reflect the specific conditions of the education sector. The concern is that the annual leave provision is not relevant to this award, as the structure of the school year is such that teachers in schools take all annual leave within the non-term weeks of that school year. Consequently, a teacher cannot accrue excessive annual leave and cannot take annual leave in advance.
8. We submit the current Four yearly review process does not meet the objects of the *Fair Work Act 2009* (Cth) (the FW Act) to create a simple, easy to understand, sustainable award system.
9. We note that on 1 March 2017 the Government introduced the Fair Work Amendment (Repeal of Four Yearly Review and Other Measures) Bill 2017. ISV supports the substance of this Bill.

Long Service Leave

10. Section 113 of the NES preserves applicable award-derived long service leave terms. For Victorian teachers in the independent education sector, the relevant award-derived long service leave term is cl.27 of the *Victorian Independent Schools – Teachers – Award 1998* [AP802001] (the preserved term).
11. The preserved term provides entitlements unique to teachers but does not cover the field. The preserved term makes no reference to the LSL Act. We believe there are differing interpretations as to whether or not the preserved term interacts with the LSL Act. It seems unlikely that the Federal Government, when drafting s.113, would have intended that the LSL Act not apply in instances where the preserved term did not cover the field.
12. To provide a practical example, cl.27.2 of the preserved term states that the entitlement to long service leave arises from “continuous employment”. Those words are not defined in the preserved term and would therefore assume their ordinary meaning of being employed without a break in employment, should the LSL Act not apply. The LSL Act contains a definition of continuous employment which sets the parameters as to what should or should not be included in continuous employment (e.g. unpaid parental leave is not included for the purpose of accruing long service leave). Without relying on the provisions of the LSL Act, and instead applying the ordinary meaning of the term continuous employment, Member Schools would need to include unpaid parental leave when calculating a teacher’s long service leave entitlement. It is questionable whether s.22 of the FW Act offers any assistance, given the FW Act provides a definition of service and continuous service, while the LSL Act refers to continuous employment.
13. Another example is the long service leave entitlement of a casual teacher. The LSL Act provides specific rules as to the meaning of continuous employment for casual and seasonal employees. It recognises that casual employees are likely to have breaks in employment, but details specific provisions as to what periods should be counted for the purposes of accruing long service leave. As the preserved term does not envisage a break in employment, if the preserved term was not read in conjunction with the LSL Act, it is arguable that a casual teacher would not have an entitlement to long service leave.
14. The preserved term is not as comprehensive as the LSL Act with regard to the specification of entitlements and obligations. For example, under the preserved term:
 - An employee does not have the right to take long service leave (13 weeks) in one period (s.67(1) of the LSL Act).
 - There is no limitation on the number of separate periods over which long service leave may be taken (s.67 of the LSL Act).
 - Payment in lieu of taking long service leave is not forbidden (s.74 of the LSL Act).
 - Long service leave is not exclusive of public holidays or annual leave occurring during the period when long service leave is taken (s.70 of the LSL Act).
15. ISV submits that the examples listed above would not have been the intended consequences of preserving award-derived long service leave terms, without allowing them to interact with the LSL Act.
16. For long service leave purposes, there are at least five categories of employees with different award-derived long service leave terms across the sector, some of which

expressly refer to the LSL Act. There is a lack of consistency, and potential inequity, where there are different categories of employees within the one workplace with arguably different long service leave entitlements.

17. Further, it is operationally difficult for employers to administer and ensure compliance with different arrangements applying to different categories of employees.
18. A related issue is the long service leave entitlement of employees engaged by employers that commenced operation on or after 31 December 2009. A threshold issue is whether or not s.113 of the FW Act applies to these employees, given they could not have been employed at the 'test time'. Whilst some legal opinion indicates that s.113 will not be enlivened and therefore the terms of the LSL Act alone will apply, others believe s.113 is a deeming provision and it is irrelevant whether the actual business was in operation as at 31 December 2009. If the secondary view prevails, we note that it is difficult for employers who commenced operation on or after 1 January 2010 to be aware of relevant award-derived long service leave terms.
19. It was understood that the NES preserved the award-derived long service leave terms as an interim measure prior to the introduction of a national long service leave standard. ISV submits that both schools, and their employees, have great difficulty in locating and interpreting this maze of industrial instruments, and that a new federal long service leave standard would provide clarity and certainty for all.
20. Alternatively, and perhaps for the short term, the preservation of award-derived long service leave terms should be examined to ascertain whether the effect of the legislation is as was intended by the Parliament. Such a review, together with any necessary amendments, could assist with providing clarity and certainty of entitlements for employers and employees.

Accrual on Accident Compensation

21. Section 130 of the FW Act sets out rules regarding the restrictions on taking or accruing leave while receiving workers compensation. There is an exemption under s.130(2) of the FW Act which allows an employee to take and accrue leave during a compensation period if it is permitted by a compensation law.
22. The operation of s.130 was examined in *Anglican Care v NSW Nurses and Midwives' Association* [[2015] FCAFC 81]. In this case, the Full Federal Court confirmed that employees receiving workers compensation are also entitled to accrue annual leave provided that "permission is given by the compensation law for dual receipt." The Full Federal Court found that in the absence of any provisions in a compensation law preventing accrual, an employee would be entitled to accrue annual leave.
23. The *Workplace Injury Rehabilitation Compensation Act 2013* (Vic) does not consider the accrual of such leave, therefore on the reasoning of the Full Federal Court, an employee in Victoria would be entitled to accrue annual leave while receiving workers compensation payments.
24. The Fair Work Amendment Bill 2014 introduced on 27 February 2014 attempted to rectify this issue by repealing the exemption under s.130(2). The proposed amendment was not passed in to legislation and we submit this is still a live issue that needs addressing.

Conclusion

25. The issues raised in this submission are important to our Member Schools and their employees. ISV would welcome the opportunity to discuss these issues further.