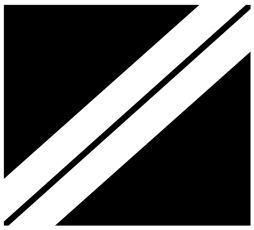

Motor Trades Association of Australia

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

Dear Sir/Madam

Please find attached the submission of the Australian Motor Trades Industrial Council in response to the Discussion Paper – National Employment Standards Exposure Draft.

If you have any queries in relation to this matter, please do not hesitate to contact this Office.

Yours faithfully

Michael Delaney

MICHAEL DELANEY
Executive Director

4 April 2008

Motor Trades Association House, 39 Brisbane Avenue, Barton ACT 2600
PO Box 6273, Kingston, ACT 2604
Telephone: + 61 2 6273 4333. Facsimile: + 61 2 6273 2738.
Email: mtaa@mtaa.com.au A.B.N. 66 008 643 561

Motor Trades Association of Australia

Submission of the Australian Motor Trades Industrial Council in response to the Discussion Paper - National Employment Standards Exposure Draft

April 2008

Service Station Association Ltd.

Motor Trades Association House, 39 Brisbane Avenue, Barton ACT 2600
PO Box 6273, Kingston, ACT 2604
Telephone: + 61 2 6273 4333. Facsimile: + 61 2 6273 2738.
Email: mtaa@mtaa.com.au A.B.N. 66 008 643 561

Introduction

This Australian Motor Trades Industrial Council (AMTIC) submission incorporates the collective views of the motor trade organisations in response to the Discussion Paper – National Employment Standards Exposure Draft. The key issues addressed by the AMTIC are detailed in the Executive Summary.

About the Australian Motor Trades Industrial Council

The AMTIC represents the following organisations that were established in the following years:

- Motor Traders Association of New South Wales (MTA NSW) founded in 1910;
- Motor Trade Association of South Australia Inc (MTA SA) formed in 1926;
- Motor Trade Association of Western Australia Inc (MTA WA) formed in 1934;
- Motor Trade Association of ACT Ltd (MTA ACT) founded in 1974;
- Motor Trade Association of Northern Territory Inc (MTA NT) formed in 1984.
- Service Station Association Ltd (SSA) founded in 1935.

MTA NSW and MTA SA are federally registered Industrial Organisations.

These organisations each provide a dedicated range of services, publications, and advices to its various members to assist in the development and management of businesses in the retail automotive sector. They provide industry training, industrial relations advice, occupational health and safety services and technical advice. In addition, as a collective they are the peak retail automotive industry organisations which represent the industry on a range of issues within their respective State or Territory as well as to Federal Government.

The Industry

The AMTIC organisations represent the retail, service and repair sector and have membership within the vehicle and component manufacturing section of the Australian automotive industry. The retail motor trade industry alone nationally consists of over 100,000 businesses with a combined turnover of over $120 billion and which employ over 316,000 people. The AMTIC is therefore the largest representative of small businesses in Australia.

Background

1. AMTIC recognises that the Government has been elected with a mandate to introduce changes to the current Workplace Relations system. We acknowledge that the Government has consulted with business regarding the platform for these changes. AMTIC supports the Government in its agenda to repeal some of the WorkChoices legislation. AMTIC advocates for an updated, flexible and modern award system that

allows businesses to fairly employ staff with flexibility, whilst recognising the unique nature of our specific industry. Furthermore, AMTIC supports the implementation a workplace relations system that offers both employers and employees flexible work arrangements, and continues to promote productivity.

2. The AMTIC in its submission is cognizant of the Award Modernisation Request of 13 February 2008 in which The Honourable Julia Gillard, Deputy Prime Minister, Minister for Employment and Workplace Relations, Minister for Education, Minister for Social Inclusion in the "Objects" provided that:

   "2. The creation of modern awards is not intended to:

   (d) increase costs of employers;"

3. The AMTIC also note the comments of the Deputy Prime Minister in the Second Reading speech with respect to the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 as reported in Hansard at page 8 on Wednesday 13 February 2008 regarding the new system that:

   "And we believe such a system will be better for productivity and therefore better at fighting inflation."

4. Further at page 12 of Hansard on Wednesday 13 February 2008 the Deputy Prime Minister stated that:

   "Modern awards will:
   - protect 10 important entitlements like penalty rates and overtime;
   - provide industry-specific detail on the 10 National Employment Standards;
   - ensure a fair safety net for Australian employees, including outworkers;
   - ensure minimum award entitlements are relevant to the Australian economy and modern work practices;
   - not be overly prescriptive; and
   - will allow for flexible work arrangements for employers and employees who rely on awards as well as provide an appropriate benchmark for collective agreement making."

5. The AMTIC is encouraged by the comment in the Award Modernisation Request that there is no intention to increase costs of employers. The AMTIC submission is predicated on the Minister's intentions. The National Employment Standards (NES) is the minimum standard to be incorporated into modern awards (MA). Therefore, in the finalisation of the NES it is crucial that the NES be flexible enough to <u>not</u> increase employer costs and reduce productivity. We note also it is proposed that the MA will not be overly prescriptive – these comments by the Deputy Prime Minister are welcomed and provide some comfort to employers.

6. By the Deputy Prime Minister saying in the Second Reading speech that the new system, namely the NES and MA, will be better for productivity and better at fighting inflation, the Government is saying that its measures will not increase employer costs. However, the AMTIC is concerned that many of the provisions of the NES will substantially increase employer costs.

7. AMTIC would make the point that many employers in the retail motor trades are bound by contractual arrangements which do not give them the capacity to recover costs in their own businesses. For example rates paid by insurers for vehicle repairs do not take into account any increased costs incurred in the repairers' business. Commissions paid by fuel suppliers do not increase because the service station operator's employee costs have risen. If the costs of employing are to rise, then the Government needs to consider how small businesses such as those in the retail motor trades are to be given the capacity to recover those increased costs.

Executive Summary

The AMTIC recognises the need for a set of employment standards that are fair to employees but also meet the needs of employers so that any changes do not increase costs and/or reduce productivity. The Federal Government must comply with its stated intention not to increase employer costs, be better for productivity, operate flexibly and without being overly prescriptive.

The main areas of concern with the NES can be summarised as follows:

Interaction Rules:

a) <u>The NES terms should be reflected in the MA</u>
The AMTIC feel there should be greater scope for inclusion of the NES terms within a MA. The MA should be a "one stop shop" where all of the requirements are included. Compliance with the award should be deemed to be compliance with the standard.

b) <u>Non-award employees should not be covered by a catch all award</u>
For non-award employees the AMTIC is opposed to a catch all award as this will reduce flexibility and introduce greater prescription and may reduce favourable benefits to employees. Relevant "default" rules should be included in the legislation rather than the AIRC determining a catch all award - a simple approach within the NES that provides sufficient rules to protect employees, but not overly restrictive so that existing contracts of employment are not compromised. AMTIC would seek an opportunity to be consulted on the default rules. The default rules should be developed concurrently with the development of MA's so that appropriate dovetailing of structures can occur, providing overall coverage and protection for employees.

Maximum Weekly Hours:

c) <u>Maintain existing award hours of work and minimum weekly rates of pay in MA's</u>
Historical award arrangements for hours of work must be maintained and this includes the requirement that wages be expressed as minimum weekly rates of pay. Division 2 – Wages of Part 7 of the *Workplace Relations Act 1996* (WRA) should be repealed with the making of the NES.

d) <u>The concept of 'authorised leave' should be replaced with 'paid leave' or 'authorised paid leave'</u>
Paragraph 47 determines that authorised paid or unpaid leave is taken into account as hours worked. This seems to contradict the 'service" definition for annual leave (paragraph 131) and sick leave (paragraph 175) which excludes unpaid leave. The inclusion of the concept of 'authorised leave' should be removed and replaced with the expression of 'paid leave' or 'authorised paid leave'.

e) Hours worked at own volition should not be a breach of maximum hours
Paragraph 52 provides that hours worked at own volition will not be a breach of the maximum hours of work NES by the employer. The answer to Question 1 should be in the affirmative and it should be made clear that this applies to working in addition at the employees own volition in excess of the maximum hours and reasonable additional hours agreed between the parties.

f) Part time additional hours should be dealt with in the MA in line with the current AIRC award standard
Paragraph 54 deals with part time additional hours and the application of unreasonable additional hours to part time employees. Under the federal retail vehicle industry awards (and most other federal awards that incorporate the part time employees' standard of the AIRC) there are already reasonable requirements to agree the hours to be worked by part time employees and the process to be followed to alter the hours of work. There is no need to include similar requirements in the NES and this is best dealt with in the MA.

g) The NES should not affect arrangements for high income earnings
Paragraph 55 deals with high income employees working long and irregular hours of work. Where remuneration has regard to the pattern of work including hours worked, and the employee has accepted such conditions of work for the remuneration paid, this is sufficient protection. Question 3 should be answered in the negative, namely that the NES should not do anything about high income earnings – the NES is about minimum entitlements and should not intrude into arrangements for high income employees.

Requests for Flexible Working Arrangements

h) 'Reasonable business grounds' should remain undefined – AMTIC seek opportunity to be consulted
Paragraphs 65 and 75, outline the basis upon which an employer can refuse requests for flexible arrangements and this is based on the concept of 'reasonable business grounds'. The AMTIC is prepared to accept that the concept remains undefined but seeks an opportunity to contribute to the development by FWA of the general information and the nature of the assistance to be provided to employers.

Parental Leave and Related Entitlements

i) 10 weeks notice of a request for additional parental leave is necessary
Paragraph 99 deals with requests for additional parental leave and proposes four weeks notice to request an extension of the leave up to another 12 months. Four weeks notice is inadequate. The period should be 10 weeks notice which is the same as the initial notice of the request to take the first period of leave. The 10 weeks notice is necessary to increase the scope for consensus by assisting the employer to make alternative arrangements.

j) The proposal for paid leave where no safe job should be abandoned or an exemption should apply for small business

Paragraph 109 deals with the requirement to provide as safe job and the right to paid leave where no safe job can be provided. This requirement is an inappropriate burden on employers and particularly for small business. Such businesses rarely have sufficient manning and available sedentary activities to create useful other safe roles – paradoxically small business will have to pay for this leave, whilst larger businesses will be able to cope and avoid payment. An exemption for businesses with less than 30 employees is appropriate to reduce the cost impact. If this approach is to be adopted, despite this submission, it should be seen as a community issue to be funded by the Federal Government.

k) The employer should be able to seek medical evidence that it is safe to return to work

Paragraph 118 and Question 9 deals with the right of the employer to seek medical evidence that it is safe for the employee to continue to work. The occupational, health and safety (OHS) requirements make this right an imperative. The employer must be able to seek the medical evidence to ensure that the employer is not injuring the employee at work, and to meet its OHS requirements.

l) The employer should be able to seek medical evidence of the need to be transferred to a safe job

Paragraph 119 deals with the right of the employer to seek medical evidence of the need to be transferred to a safe job. The current requirement under the AIRC *Family Provisions* test case, only recently determined on 8 August 2005, provides an appropriate approach. Even in such circumstances it will be necessary to have medical evidence to determine the legitimacy of the request to provide a safe job if it is available, or to legitimise the commencement of Special Maternity Leave. Therefore, the AMTIC seeks a right to request the necessary medical evidence.

m) 'Reasonable business grounds' should remain undefined – AMTIC seek opportunity to be consulted

Paragraphs 120 and 121 outline the basis upon which an employer can refuse such requests and this is based on the concept of 'reasonable business grounds'. The AMTIC is prepared to accept that the concept remains undefined in the NES but seeks an opportunity to contribute to the development by FWA of the general information and the nature of the assistance to be provided to employers.

Annual Leave

n) Existing accrual method under the WRA should be maintained

Paragraph 127 introduces the concept of progressive accrual which seems to be in line with the current annual leave standard under the WRA. AMTIC is of the view that the existing accrual method under the WRA should be retained to avoid unnecessary cost to employers of making a change.

o) <u>The proposal for the conversion of annual leave to personal/carer's leave should be abandoned</u>
Paragraphs 150 and 151 explain how the proposed NES will allow the conversion of annual leave to personal /carer's leave or community leave by a process of re-crediting of the annual leave. The AMTIC believes that this proposal will lead to enormous abuse by employees. This coupled with the proposed relaxation of evidence rules for the taking of personal and carer's leave will leave employers open to exploitation. It introduces a new entitlement over and above existing leave entitlements for the private sector. An individual sick in their own time should not warrant additional leave for the employee. Sick leave traditionally has been available for employees too sick to attend work to ensure no loss of pay. An employee on annual leave is already being paid and not at work. The reduction in productivity of this proposal and the affect on the economy should be assessed before the adoption of this NES. This proposal should be abandoned.

p) <u>Transfer of accrued entitlements should be optional and determined by agreement</u>
In paragraph 154 it is proposed that the preferred option by employers and employees is that accrued entitlements should transfer to the new employer. The AMTIC's recent experience is that most employers and many employees prefer the entitlements to be paid out on the transmission of business. It should be optional and determined by agreement between the old and new employer, and employees concerned.

q) <u>The AIRC should not have the right to consider a change to the definition of 'rate of pay'</u>
Paragraph 166 proposes that it would be possible for an MA to include in the definition of base rate of pay other components of the employee's remuneration. The rate of pay definition in the NES is appropriate. By excluding relevant allowance, penalty rates, and the like, it mirrors the current 'basic periodic rate of pay' under the existing WRA and this is appropriate. The AMTIC believes that employers want certainty of the application of annual leave payments and, consequently oppose the ability of the AIRC in the formulation of a MA to consider any change to this definition – it simply invites argument and claims. Employers have become used to the current WRA definition and there is no good reason to depart from this approach.

Personal/Carer's Leave and Compassionate Leave

r) <u>Existing accrual method under the WRA should be maintained</u>
Paragraph 172 deals with the concept of progressive accrual in line with the earlier discussion on this matter under Annual Leave (paragraph "n" above) and the AMTIC comments are the same as detailed above.

s) <u>The NES should allow the employer to seek reasonable evidence for any absence</u>
Paragraph 173 details the evidence requirements including the right to "provide evidence that would satisfy a reasonable person of their entitlement to take the relevant leave". On the face of it, this would appear reasonable. However, paragraphs 189 and 190 provide real difficulty for all employers. Paragraph 189

proposes to allow short absences to be excluded from the requirement to provide medical certificates or statutory declarations. This is completely inappropriate and will lead to substantial abuse and reduction in productivity. In essence paragraph 190 provides two exceptions, one where the absence is beyond a short period of time and the other, where there are repeated absences on particular days. In these examples the employer is potentially being faced with non-genuine absenteeism. In such case, why not therefore state in the NES that if the employer considers the absence to be non-genuine he/she may request reasonable evidence?

Short term absences

There remains the problem of short term absences. There is a yawning gap in the requirements of employees regarding short absences that will, in the AMTIC view, inescapably lead to exploitation by employees. This approach should be abandoned in favour of an approach that allows the employer to require reasonable evidence for any absence where he/she has reasonable grounds to consider the absence to be non-genuine.

t) <u>The AIRC should not have the right to consider a change to the definition of 'rate of pay'</u>

In paragraph 198 it is proposed that an MA may provide more beneficial provisions and this might arguably include other components of remuneration. The AMTIC, for abundant caution, confirms its position that the rate of pay definition in the NES is appropriate as it is defined in the draft NES.

Community Service Leave

u) <u>Jury service should not be extended to non award covered employees – if it is to be extended then limit obligation to the first 4 weeks of a trial and payment only up to a maximum of the average weekly earnings</u>

The entitlement to jury service make up pay is an existing provision under the retail vehicle industry awards and now this NES extends the entitlement to award free employees. If the Government goes forward with this NES and extends the entitlement to all employees it should limit the requirement on employers to make up pay for jury service during the first four weeks of a trial. For trials longer than four weeks the Federal Government should make the payments. The payments to employees should be up to a maximum of the average weekly ordinary time earnings.

Long Service Leave

v) <u>Uniformity should be based on the existing federal award standard – more beneficial existing employee entitlements should be grandfathered</u>

In relation to paragraph 242 and questions 34 and 35 regarding getting the balance right on uniformity and minimising complexity, the AMTIC supports uniformity and removing complexity based on existing federal award standards which set a reasonable standard. If employees have existing better benefits in a pre-modernised award or NAPSA, such entitlements should be grandfathered to protect the employee entitlements.

Notice of Termination

w) Notice requirements should also apply to employees

Paragraphs 266 and 267 provide that employees should be entitled to fair notice of termination. The AMTIC supports this approach but, in the light of this fair approach, such notice requirements should also be required of the employee. This is the case under most federal awards and should be required generally. Employers, especially small to medium employers need time to make arrangements to replace key employees – reasonable notice requirements on employees will assist employers to meet that need.

x) Employers should be able to withhold payments to meet employee notice obligations

AMTIC also notes that because Section 576J of the WRA now excludes notice and termination provisions in the MA, there is a need to include reasonable provisions for withholding of payments from any money owing to the employee to meet the payment in lieu of notice obligations of employees.

y) Pay in lieu of notice should be at the employees 'rate of pay'

Paragraphs 274 and 277 provide that the payment in lieu of notice should be at the full rate of pay. The AMTIC opposes this approach because the employee is not working and has not incurred the penalties or worked the overtime. As well they get the benefit of the time off on pay to look for alternative work. Only relevant loadings and monetary allowances based on the skills and abilities of the employee should be included.

z) Notice of termination should not be required to be in writing

Paragraph 279 brings back the requirement to provide notice of termination in writing. This requirement was removed under the WRA as a part of the WorkChoices reforms. This change was welcomed by small to medium sized employers because, without professional employment relations staff, such employers would inadvertently breach the legislation.

aa) 'Apprentice' should be added to the exception list for the requirement to provide notice

Paragraph 280 details the exception to the requirement for the provision of notice of termination. The fourth dot point should be amended to include the words after trainee "and apprentice". The contradiction under the WRA historically, and as proposed in the NES, should be rectified.

Fair Work Information Statement

bb) Should only be a requirement to provide information on where to access the information statement

Paragraph 296 requires an employer to provide the Fair Work Information Statement as soon as practicable after the employee commences employment. The AMTIC was hoping that a more user friendly approach would be adopted by the Government. We suggest that it should be sufficient to advise employees of the details as to how to access the information statement such as the internet address.

Detailed Comments

INTRODUCTION

Interaction Rules

8. The AMTIC find it a bit surprising that there are no questions regarding the interaction of the NES and Modern Award (MA). The AMTIC feel that this is priority issue that should be debated initially to establish the best method of interaction between the NES and a MA. We note that paragraph 21 provides that the NES cannot be modified or excluded by a MA. It is also noted that the AIRC may replicate terms from the NES where "essential for the effective operation of a particular provision". The AMTIC feel there should be greater scope for inclusion of the NES provision within a MA.

9. The nature of the vehicle industry is characterised by small to medium sized businesses that have relied on a federal retail vehicle industry awards to provide the minimum standards. This has served the industry well, and during the period of time when AWA's were more readily available, the take up by members has been modest. This demonstrates that the retail vehicle industry awards have met the needs of the industry for both employers and employees. However, during the WorkChoices period the Australian Fair Pay and Conditions Standard (AFPCS) created a situation where some provisions of the award continued whilst others were determined under the AFPCS. This created enormous confusion and required the AMTIC to undertake extensive industry training. It was hoped with a change of government that we would be able to revert to a situation where the award became the one legally enforceable instrument. However, the current interaction rules mean that our members will have to comply with two instruments – the NES and the MA.

10. The AMTIC is of the view that the MA should be a "one stop shop" where all of the requirements are included. If as it is proposed that the NES, for MA covered employees, will have minimal content, and the machinery provisions are in the award; it makes little sense to the AMTIC to require employers, especially time poor small to medium sized businesses, to have to consult two separately enforceable instruments. Under WorkChoices with only five standards this was problematic – when you now overlay the 10 NES, employers will fail to comply simply because of the complexity alone. The AMTIC take the view that compliance with the award should be deemed to be compliance with the standard.

11. What is the "Better Off Overall Test" referred to paragraph 34? This seems to be a mistake as the *Workplace Relations Amendment (Forward With Fairness) Act 2008* provides that an agreement passes the "no-disadvantage test" if the agreement "does not result, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employees under any reference instrument relating to one or more of the employees." [Section 346D(2)]. Clearly this is a

misrepresentation of the intent of the legislation. The proposed legislative test means that the agreement would be approved in circumstances where the changes will not reduce entitlements. Whereas the "Better Off Overall Test" is an entirely different test meaning that the agreement must provide a better set of benefits than the reference instrument. Please confirm that this is a drafting error so that we have certainty as to the interpretation that will be applied to the transitional legislation.

Possible Issues for Discussion

12. Paragraphs 36, 37 and 38 deal with non award employees and suggests that there is scope for "default" rules in the legislation or a "catch all" award. The AMTIC view is that WorkChoices brought with it minimum standards for all employees for the first time. This was an enormous step and interfered with the existing contracts of employment for award free employees. This was disruptive enough when it involved five minimum standards, now it is proposed to enforce 10 NES and the AMTIC is concerned that this will reduce existing flexibilities of employment. Appropriate caution should be applied. Existing favourable arrangements for award free employees may be sacrificed in a more prescriptive environment; especially a legislative environment that ends up with a "catch all" award made by the AIRC. Employers will be inclined to cease to offer additional benefits for such employees because of the tight legislative/award structure. An example of this is the introduction of the Superannuation Guarantee Legislation (SGL). This meant that it simply became another legislative requirement. The cost of continuing with company based superannuation schemes became untenable to the point where employers left the field, and now nearly all of the schemes with generous defined benefits schemes have been closed and run down by not offering the scheme to new employees.

13. For the reasons in 12 above the AMTIC support relevant "default" rules in the legislation rather than the AIRC determining a catch all award. There should be a simple approach within the NES that provides sufficient rules to protect employees, but not overly restrictive so that existing contracts of employment are not compromised. AMTIC would seek an opportunity to be consulted on the default rules. The default rules should be developed concurrently with the development of MA's so that appropriate dovetailing of structures can occur, providing overall coverage and protection for employees.

Paragraph 38 - Preliminary questions

14. Question 1: The approach should be one of simplicity that offers some scope for flexibility. The NES should provide the method of compliance within the standard. For example, for the 38 hour week and additional hours. The rule should simply be that provided it is agreed as to what the additional hours are for the salary being paid, then such an agreement is deemed to be in compliance with the standard. The approach should be that each of the NES must be addressed by the employer and employee, if they relevantly apply, at the point of engagement. Such arrangements then determine the agreed approach to meet the NES.

15. Question 2: See answer to Question 1.

16. Question 3: Simple rules based on the relevant NES should be contained within the NES and apply to award free employees. Employers of all sizes have difficulty with complex legislative structures. Where there are straightforward rules they are invariably complied with. For example, the AFPCS for annual leave accrual is clear and understandable and is now applied effectively by employers. Such an approach should be applied to all the NES.

17. Question 4: Emerging industries and occupations will be adequately protected under the NES. It is up to organisations of employees or employers to seek relevant award coverage as new industries or occupations develop. History of award regulation shows a dynamic process best left to the interested parties. The AIRC over the years has had oversight of the development of new awards and this process, by and large, has met the needs of the industry parties. The AIRC, and no doubt Fair Work Australia (FWA), will carry on this tradition.

MAXIMUM WEEKLY HOURS

Outline of Entitlement

18. Paragraphs 44 to 46 must not impact on existing award arrangements for the working of ordinary hours of work. Reasonable additional hours should be defined to include existing custom and practice that exists in awards across industries. The federal award standards for hours of work have stood the test of time and meet specific industry needs. The imposition of broad standards such as the NES will potentially increase employer costs if the existing award provisions are not maintained. We note that the imposition of the Australian Fair Pay and Conditions Standard for hours of work (Division 3 of Part 7 of the WRA) with the creation of a minimum wages based on hourly rates (Division 2 of Part 7 of the WRA) is a departure from the existing award standards. This should be redressed legislatively with the repeal of Division 2 of the WRA with the making of the NES, and the maintenance of existing award arrangements for hours of work in the MA.

19. Paragraph 47 determines that authorised paid or unpaid leave is taken into account as hours worked. This seems to contradict the 'service' definition for annual leave (paragraph 131) and sick leave (paragraph 175) which excludes unpaid leave. Authorised leave could be unpaid leave without pay which is included for the purpose of weekly hours of work but not service for annual leave and sick leave. We do not see how this can co-exist in the NES. Unpaid leave is not worked hours so how can it be taken in to account for hours of work, but not be applicable for accrual of annual leave and sick leave. The inclusion of the expression 'authorised' should be removed and replaced with the expression of 'paid leave' or 'authorised paid leave'.

Construction of the hours standard

20. Paragraph 52 provides that hours worked at own volition will not be a breach of the maximum hours of work NES by the employer. The AMTIC propose that the answer to Question 1 should be in the affirmative and it should be made clear that this applies to working in addition at the employees own volition in excess of the maximum hours and reasonable additional hours agreed between the parties. Many employees work

additional hours of their own volition, especially award free employees, and to artificially limit this normal practice departs from the accepted historical position.

Operation of the entitlement in relation to employees who work less than 38 hours a week

21. Paragraph 54 deals with part time additional hours and the application of unreasonable additional hours. AMTIC is opposed to the extension of the concept of reasonable additional hours to part time employees. Under the federal retail vehicle industry awards (and most other federal awards that incorporate the part time employees' standard of the AIRC) there are already reasonable requirements to agree the hours to be worked by part time employees and the process to be followed to alter the hours of work. There is no need to include similar requirements in the NES and this is best dealt with in the MA.

High income employees

22. Paragraph 55 deals with high income employees working long and irregular hours of work. This paragraph points out that the high remuneration reflects the hours worked. The concept under the NES is that an employee may work 38 ordinary hours and reasonable additional hours. Where remuneration has regard to the pattern of work including hours worked, and the employee has accepted such conditions of work for the remuneration paid, this is sufficient protection. High income employees are generally in a position to negotiate from a position of power. They are working the hours because it suits them to do so for the rewards they are receiving. Question 3 should be answered in the negative, namely that the NES should not do anything about high income earnings – the NES is about minimum entitlements and should not intrude into arrangements for high income employees.

REQUESTS FOR FLEXIBLE WORKING ARRANGEMENTS

Reasonable business grounds

23. Paragraphs 65 and 75, outline the basis upon which an employer can refuse requests for flexible working arrangements and this is based on the concept of 'reasonable business grounds'. Paragraph 75 seeks a response to Question 7. The AMTIC is prepared to accept that the concept remains undefined but seeks an opportunity to contribute to the development by FWA of the general information and the nature of the assistance to be provided to employers.

PARENTAL LEAVE AND RELATED ENTITLEMENTS

How can an employee request additional leave?

24. Paragraph 99 deals with requests for additional leave and proposes four weeks notice to request an extension of the leave up to another 12 months. The AMTIC submits that the four weeks notice is inadequate. The period should be 10 weeks notice which is the same as the initial notice of the request to take the first period of leave. The 10 weeks notice is necessary to increase the scope for consensus by assisting the

employer to make alternative arrangements. The AMTIC cannot see any disadvantage to the employee to have to provide such notice.

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

25. Paragraph 102 provides details of the notice requirements. The 10 weeks notice is acceptable and in line with the current AIRC test case provision. We note the change to the test case standard is that there is an exception on the basis that 'or if this is not reasonably practicable, as soon as reasonable practicable'. This allows for too great an opportunity to limit the notice and still be entitled to the leave. The employer needs the 10 weeks notice and the current *Family Provisions* test case standard should be adopted. The AIRC test case provides fair and reasonable notice requirements and appropriate exceptions. The AIRC *Family Provisions* test case was only recently determined on 8 August 2005 and should, where appropriate, be adopted in the NES.

26. Paragraph 103 deals with the evidence requirements. The AMTIC propose that the evidence rules determined by the AIRC in the 8 August 2005 *Family Provisions* test case be adopted in lieu of the proposed evidence rules for the NES. The AIRC test case provides fair and reasonable evidence requirements and appropriate exceptions.

Transfer to a safe job

27. Paragraph 109 deals with the requirement to provide as safe job and the right to paid leave where no safe job can be provided. This requirement is an inappropriate burden on employers and particularly for small business. Such businesses rarely have sufficient manning and available sedentary activities to create useful other safe roles – paradoxically small business will have to pay for this leave, whilst larger businesses will be able to cope and avoid payment. An exemption for businesses with less than 30 employees is appropriate to reduce the cost impact. There should be no obligation on small business to pay the wages of a pregnant employee just because the employer may not have other suitable work for the employee. If this approach is to be adopted, despite this submission, the AMTIC believes this should be seen as a community issue to be funded by the Federal Government if this is approach to be adopted. Under the AIRC *Family Provisions* test case only recently determined on 8 August 2005, the employee would be required to take Special Maternity Leave where they are not fit to perform their normal work and no other safe work is available. This is an appropriate and practical approach and puts a limit on the cost to the employer.

Evidence of being fit for work

28. Paragraph 118 and Question 9 deals with the right of the employer to seek medical evidence that it is safe for the employee to continue to work. The AMTIC view is that the occupational, health and safety (OHS) requirements make this right an imperative. The employer must be able to seek the medical evidence to ensure that the employer is not injuring the employee at work, and to meet its OHS requirements.

Evidence requirement for transfer to safe job

29. Paragraph 119 deals with the right of the employer to seek medical evidence of the need to be transferred to a safe job. The AMTIC view is that the current requirements

under the AIRC *Family Provisions* test case, only recently determined on 8 August 2005, provides an appropriate approach by requiring the employee to take Special Maternity Leave where they are not fit to perform there normal work and no other safe work is available. This is an appropriate and practical approach and puts a limit on the cost to the employer. Even in such circumstances it will be necessary to have medical evidence to determine the legitimacy of the request to provide a safe job if it is available, or to legitimise the commencement of Special Maternity Leave. Therefore, the AMTIC seeks a right to request the necessary medical evidence. In answer to Question 10 the AMTIC cannot see any circumstances where it would be too onerous to require provision of a medical certificate as the employee will always have access during a pregnancy to a treating doctor. Question 11 is not relevant in view of this submission.

Refusal on reasonable business grounds

30. Paragraphs 120 and 121 outline the basis upon which an employer can refuse such requests and this is based on the concept of 'reasonable business grounds'. Paragraph 121 seeks a response to Questions 12 and 13. The AMTIC is prepared to accept that the concept remains undefined in the NES but seeks an opportunity to contribute to the development by FWA of the general information and the nature of the assistance to be provided to employers.

ANNUAL LEAVE

Outline of entitlement

31. Paragraph 127 introduces the concept of progressive accrual which seems to be in line with the current annual leave standard under the WRA. AMTIC is of the view that the existing accrual method under the WRA should be retained to avoid unnecessary cost to employers of making a change. Appropriate computer and software systems have now been adjusted to accommodate the current 'progressive' accumulation and this should be maintained.

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

32. At paragraph 140, progressive accrual is explained as the right of the employee to take leave as it accrues and not at the end of their first 12 months of employment. The concept of the ability to take leave as it accrues is supported and, in particular, the approach currently under the WRA. The current system has now been accommodated by employers and there is no need to change this approach. It accrues as they go and becomes an entitlement upon completion of each for (4) weeks of employment. Some qualifying period for leave is appropriate and this has been the case under most awards historically.

33. At paragraph 141 it is argued that the 'progressive system' avoids the need for complex rules. It would appear that the use of the word 'progressively' in clause 26(2) of the draft provisions could have a variety of reasonable meanings. Because it relates the term to an employee's ordinary hours of work, and because those are

typically described on a weekly basis, the term is potentially referring to weekly accrual. It could also mean accrual on the basis of the employee's pay period, whether it be weekly, fortnightly or monthly; or, indeed, it could mean accrual by the hour or by the day. There is accordingly a potential for a variety of arrangements as being in place. Essentially then, the AMTIC believes that the current arrangement has a set of simple rules and should be maintained. Employers have adopted the new approach and should not have to alter the current accrual methodology.

The progressive accrual of annual leave

34. With respect to Questions 20 and 21 at paragraph 165, the AMTIC is opposed to making any unnecessary changes to the WRA and the issue that arises of concern is the cost to employers and inconvenience of having to make any change to a system that is already perfectly adequate and simple.

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

35. Paragraphs 150 and 151 explains how the proposed NES will allow the conversion of annual leave to personal/carer's leave or community leave by a process of re-crediting of the annual leave. The AMTIC believes that this proposal will lead to enormous abuse by employees. This coupled with the proposed relaxation of evidence rules for the taking of personal and carer's leave will leave employers open to exploitation. It introduces a new entitlement over and above existing leave entitlements for the private sector. An individual sick in their own time should not warrant additional leave for the employee. Sick leave traditionally has been available for employees too sick to attend work to ensure no loss of pay. An employee on annual leave is already being paid and not at work. The reduction in productivity of this proposal and the affect on the economy should be assessed before the adoption of this NES. This proposal should be abandoned.

36. In the private sector the historical industrial precedent is that there has never been a right to convert annual leave to another form of leave. This has provided certainty for employers that once a person proceeds on leave they cannot seek to change the leave to sick leave. This ability is available in the public sector but private sector employers have always opposed such demands, and the AIRC and other State tribunals have never countenanced such claims. This NES should not include such a right.

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

37. In paragraph 154 it is proposed that the preferred option by employers and employees is that accrued entitlements should transfer to the new employer. The AMTIC's recent experience is that most employers and many employees prefer the entitlements to be paid out on the transmission of business. It should be optional and determined by agreement between the old and new employer. In most cases employers have regard to the needs of employees and this should be encouraged by the requirement to consult with affected employees.

Payment whilst absent on annual leave

38. Paragraph 166 proposes that it would be possible for an MA to include in the definition of base rate of pay other components of the employee's remuneration. The rate of pay definition in the NES is appropriate. By excluding relevant allowance, penalty rates, and the like it mirrors the current "basic periodic rate of pay" under the existing WRA and this is appropriate. The AMTIC believes that employers want certainty of the application of annual leave payments and, consequently oppose the ability of the AIRC in the formulation of a MA to consider any change to this definition – it simply invites argument and claims. Employers have become used to the current WRA definition and there is no good reason to depart from this approach.

39. This definition in effect reflects the definition contained within the federal retail vehicle industry awards that apply to our members, and any departure from this in the MA would lead to substantial costs for the vehicle industry employers and most likely employers generally.

40. With respect to Questions 22 and 23 of paragraph 166 the AMTIC does not believe any issues arise with respect to particular types of employees in the vehicle industry and there is no need for additional rules within the NES apart from the maintenance of the current annual leave accrual rules.

PERSONAL/CARERS LEAVE AND COMPASSIONATE LEAVE

Outline of entitlement

41. Paragraph 172 deals with the concept of progressive accrual in line with the earlier discussion on this matter under Annual Leave NES at paragraphs 127, 140, 141 and the Questions 20 and 21 of paragraph 165. The AMTIC has extensively commented on this matte above in the relevant paragraphs. To reiterate our general comments this proposal seems to be in line with the current annual leave standard under the WRA. AMTIC is of the view that the existing accrual method under the WRA should be retained to avoid unnecessary cost to employers of making a change. Appropriate computer and software systems have now been adjusted to accommodate the current 'progressive' accumulation and this should be maintained.

42. Paragraph 173 details the evidence requirements including the right to "provide evidence that would satisfy a reasonable person of their entitlement to take the relevant leave". On the face of it, this would appear reasonable. However, paragraphs 189 and 190 provide real difficulty for all employers.

What kinds of evidence can be requested by an employer?

43. Paragraph 188 correctly points out that medical certificates or statutory certificates are normally required. This is true and employers will require this when it becomes clear that an employee is abusing their rights by taking leave when they are not sick – especially taking of such leave, including carer's leave, attached to rostered days off.

44. Paragraph 189 proposes to allow short absences to be excluded from the requirement to provide medical certificates or statutory declarations. This is completely inappropriate and will lead to substantial abuse and reduction in productivity. The WRA currently allows for medical certificates or a statutory declaration to be required for any absence. The employee has the right to seek a medical certificate from a Registered Health Practitioner (RHP), and this can include apart from medical doctors, a physiotherapists, chiropractors, pharmacists, and the like. Such RHP's are limited to providing a medical certificate within their area of expertise. This approach will eventually reduce the stress on the health system. However, apart from the effect on the health system and the personal cost on employees, this proposal has no regard to the cost on employers from extensive absenteeism as a result, and the significant reduction in productivity to the economy.

45. When the comment is made about individual personal cost of having to provide a medical certificate, the reality is that there are doctors that bulk bill and, if the employee is ill enough not to attend to work, they should be put to the test of providing reasonable evidence of the absence. For most employees that do not abuse their rights, employers invariably do not require a medical certificate but for others it may be necessary to require a medical certificate for any absence, and this provision of the current WRA was well received by employers as a way to manage personal leave and carer's leave. It should be noted that the current WRA extended the entitlement from 5 days in the first year of employment and 8 days in the second and subsequent year of employment with a 12 year accumulation cap under the retail vehicle industry awards, to 10 days per year with unlimited accumulation. This change was costly for employers and generous. On top of that now the Federal Labor Government is now seeking to remove the one measure that provided some protection for employers from abuse by unscrupulous employees. The retail vehicle industry awards approved by the AIRC capped carer's leave at five days a year and this was 10 days under the WRA. Now, it is being made unlimited with no requirement to provide reasonable evidence for short absences.

46. In essence paragraph 190 provides two exceptions, one where the absence is beyond a short period of time and the other where there are repeated absences on particular days. In these examples the employer is potentially being faced with non-genuine absenteeism. In such case why not therefore state in the NES that if the employer considers the absence to be non-genuine he/she may request reasonable evidence?

Short term absences

There remains the problem of short term absences. There is a yawning gap in the requirements of employees regarding short absences that will, in the AMTIC view, inescapably lead to exploitation by employees. This approach should be abandoned in favour of an approach that allows the employer to require reasonable evidence for any absence where he/she has reasonable grounds to consider the absence to be non-genuine.

Evidence and notice requirements

47. At paragraph 202, Questions 25 and 26 have essentially been dealt with in the comments above. The AMTIC clear view is that the NES rules are too lenient and will lead to substantial abuse, losses in production, a significant cost to the economy and will be inflationary. The existing rules under the WRA should be maintained.

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

48. Paragraph 179 and 180 explains the concept of 'base rate of pay'. We note there is no mention of an opportunity to include in an MA within the definition of base rate of pay other components of the employee's remuneration. This was proposed as a possibility at paragraph 166 with respect to annual leave. We note, however, that at paragraph 198 it is proposed that an MA may provide more beneficial provisions and this might arguably include other components of remuneration. The AMTIC, for abundant caution, confirms its position that the rate of pay definition in the NES is appropriate as it is defined in the draft NES. By excluding relevant allowance, penalty rates, etc. it mirrors the current "basic periodic rate of pay" under the existing WRA and this is appropriate. The AMTIC believes that employers want certainty of the application of personal/carer's leave payments and, consequently oppose the ability of the AIRC in the formulation of a MA considering any change to this definition – it simply invites argument and claims. Employers have become used to the current WRA definition and there is no good reason to depart from this approach.

49. This definition in effect reflects the definition contained within the retail vehicle industry awards and any departure from this in the MA would lead to substantial costs for the vehicle industry.

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

50. Paragraph 191 removes the cap on the taking of carer's leave. The retail vehicle industry awards approved by the AIRC capped carer's leave at five days a year and this became 10 days under the WRA. Now, it is proposed to make it unlimited with no requirement to provide reasonable evidence for short absences. The AMTIC believes that this extension of entitlement is completely unreasonable and will simply lead to abuse. The evidence rules under the WRA helps to keep this in check but without such protection it will be open slather. It will be abused and costly to industry – it will be exploited.

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

51. Paragraph 196 proposes that an employee may take personal/carer's leave or community leave during a period of annual leave. We have already commented on the proposal in relation to paragraphs 150 and 151 to allow the conversion of annual leave to personal/carer's leave or community leave by a process of re-crediting of the annual leave. The AMTIC believes that this proposal coupled with the reduced evidence rules will leave employers open to exploitation. It introduces a new entitlement over and above existing leave entitlements for the private sector. An individual sick in their own time should not warrant additional leave for the

employee. Sick leave traditionally has been available for employees too sick to attend work to ensure no loss of pay. An employee on annual leave is already being paid and not at work. The reduction in productivity of this proposal and the affect on the economy should be assessed before the adoption of this NES. This proposal should be abandoned.

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

52. Paragraph 198 allows for more beneficial provisions to provide a fair minimum safety standard. However, paragraph 199 restricts the AIRC from imposing more onerous notice or evidence requirements. This approach is completely objectionable and lacking in any balance. As we have said employers require certainty and simplicity. The current WRA was a shock to employers in that it increased generously the standard to 10 days a year under the WRA from the existing federal award standard already outlined above, but it did provide some controls with the evidence rules. The AMTIC propose that there should not be an opportunity in a MA to argue for a more beneficial standard and the NES must include reasonable evidence rules, preferably the existing WRA rules.

COMMUNITY SERVICE LEAVE

What are the payment obligations in relation to jury service?

53. Paragraphs 223 and 224 provide for the payment of make up pay at the base rate of pay for all employees. This entitlement is an existing provision under the retail vehicle industry awards and now this NES extends the entitlement to award free employees. The AMTIC opposes this change as it is an enormous cost impost to small to medium sized businesses especially if the trial is of an extended duration. The employer not only loses the services of a valuable employee and the level of productivity derived, they will now be forced to pay make up pay. This is a <u>community responsibility</u> and any extension of the entitlement beyond the existing award entitlement should be met by the Federal and State Governments. The payment could be limited to the average weekly ordinary time earnings rather than the actual rate of pay.

Small business and jury service leave

54. Paragraph 232 seeks input in relation to Questions 31 and 32. The AMTIC would suggest that if the Government goes forward with this NES and extends the entitlement to all employees it should limit the requirement on employers to make up pay for jury service during the first four weeks of a trial. For trials longer than four weeks the Federal Government should make the payments. The payments to employees should be up to a maximum of the average weekly ordinary time earnings.

LONG SERVICE LEAVE

Simplifying long service leave entitlements

55. Paragraph 242 and Questions 34 and 35 regarding getting the balance right on uniformity and minimising complexity. The AMTIC support uniformity and removing complexity based on existing federal award standards which set a reasonable standard. If employees have existing better benefits in a pre-modernised award or NAPSA, such entitlements should be grandfathered to protect the employee entitlements.

NOTICE OF TERMINATION AND REDUNDANCY PAY

Notice of termination

56. Paragraphs 266 and 267 provide that employees should be entitled to fair notice of termination. The AMTIC supports this approach but, in the light of this fair approach, such notice requirements should also be required of the employee. This is the case under most federal awards and should be required generally. Employers, especially small to medium employers need time to make arrangements to replace key employees – reasonable notice requirements on employees will assist employers to meet that need.

57. AMTIC also notes that Section 576J of the WRA now excludes notice and termination provisions in the MA. The retail vehicle industry awards allow the employer, in circumstances where an employee fails to give the notice specified, to withhold monies due to the employee to a maximum amount equal to the amount the employee would have received until the end of the required period of notice. The exclusion of such provisions from the MA means that there is a need to include within the NES reasonable provisions for withholding of payments from any money owing to the employee to meet the payment in lieu of notice obligations of employees.

Outline of entitlement-notice of termination

58. Paragraph 271 only places the obligation on the employer to provide notice of termination. This obligation should equally apply to employees for the reason detailed above at point 56 and 57.

59. Paragraph 274 details that the payment in lieu of notice should be at the full rate of pay. The AMTIC opposes this approach because the employee is not working and has not incurred the penalties or worked the overtime. As well they get the benefit of the time off on pay to look for alternative work. Only relevant loadings and monetary allowances based on the skills and abilities of the employee should be included.

How is 'payment in lieu of notice' calculated?

60. Paragraph 277 expands on the explanation as to how to calculate payment in lieu of notice. The AMTIC is opposed to this approach. This is a departure from accepted and historical practice in the private sector. Penalties and overtime are only paid if

the employee actually works the overtime or incurs the penalty for work at unsociable times. They are getting the time off benefit and are free to seek other employment without the need to attend at work.

61. Paragraph 278 supports this approach with the view that the employee should not be financially worse off. This ignores the fact that the employee is getting the benefit of the time off to seek other employment. In the vehicle industry there is a significant shortage of labour and this means that, where an employee is terminated, they can get employment almost immediately. Because of the shortage, reference checking is not routinely conducted.

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

62. Paragraph 279 brings back the requirement to provide notice of termination in writing. This requirement was removed under the WRA as a part of the WorkChoices reforms. This change was welcomed by small to medium sized employers because, without professional employment relations staff, such employers would inadvertently breach the legislation.

63. If the basis of this requirement, as detailed in paragraph 279, is to merely ensure that the appropriate notice has been given, then the issue is really about record keeping. With the provision of pay slips and adequate employer records, establishing this time frame is, in our experience, easily done. The AMTIC does not see any need for this additional administrative burden. The existing record keeping requirements are more than adequate.

Which employees are excluded from the notice of termination NES?

64. Paragraph 280 details the exception to the requirement for the provision of notice of termination. For some reason, maybe an oversight, the excepted employees in the federal jurisdiction, under the existing WRA and the proposed NES does not include apprentices. The fourth dot point should be amended to include the words after trainee "and apprentice". Apprentices are engaged on a training contract in exactly the same way as trainees so should be treated in the same way. The retail vehicle industry awards exclude apprentices from notice requirements, and this is common amongst federal awards. The contradiction under the WRA historically, and as proposed in the NES, should be rectified.

FAIR WORK INFORMATION STATEMENT

65. Paragraph 296 requires an employer to provide the Fair Work Information Statement as soon as practicable after the employee commences employment. The Government in the *Workplace Relations Amendment (Transition to Forward with Fairness) Actl 2008* has removed the requirement of the former Government to provide an information statement. The AMTIC was hoping that a more user friendly approach would be adopted by the Government. We suggest that it should be sufficient to advise employees of the details as to how to access the information statement such as the internet address.