

**AM2014/47**  
**4 Yearly Review of Modern Awards**  
**Common Issue – Annual Leave (Model Term for Annual Leave)**

26 October 2015

**Submission in response to the Draft Determination for the  
*Educational Services (Teachers) Award 2010 [MA000077]***

**1. Purpose of submission**

- 1.1. This submission addresses the draft determination prepared to amend the annual leave clause (cl.21) in the *Educational Services (Teachers) Award 2010* (the Award), which was issued by the Fair Work Commission (the Commission) on Wednesday, 30 September 2015.
- 1.2. This submission is in similar terms to the submission made on 10 July 2015 in response to the draft determination to vary this Award, which was issued by the Commission on Monday, 29 June 2015.

**2. Background information**

- 2.1. This submission is made on behalf of the:
    - Association of Independent Schools of New South Wales
    - Association of Independent Schools of South Australia
    - Association of Independent Schools of Western Australia
    - Independent Schools Queensland
    - Independent Schools Tasmania
    - Independent Schools Victoria (the Associations).
  - 2.2. The Associations represent the interests of their Member Schools. The Member Schools are employers of a significant number of teachers.
  - 2.3. The six Associations represent more than 1,020 employers, enrolling more than 500,000 students.
  - 2.4. The Award is a relevant award for the Member Schools of the Associations, unless a Member School and its teachers have established an enterprise agreement which replaces the application of the Award. In this case, the Award is relevant for the better off overall test applied by the Commission when undertaking the process of approving an enterprise agreement applying to teachers.
  - 2.5. The Associations did not participate in the proceedings conducted by the Commission with respect to the common issue of annual leave.
  - 2.6. The Associations appreciate the opportunity to provide comments to the Commission about the proposed variations to Award's annual leave clause.
  - 2.7. This submission explains the operation of the Award's current annual leave provision for the purpose of submitting that the model term, which deals with excessive leave, cashing out annual leave and granting leave in advance, does not fit with the operation of the annual leave provision in the Award.
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### 3. Relevant Award definitions

3.1. As the arrangements for accruing and taking annual leave in the school/ preschool education industry sector operate differently to the arrangements in other industry sectors, this submission will explain these arrangements before addressing the model term.

3.2. For the purpose of explaining the annual leave provision of the Award in paragraphs 4.1 to 4.11 below, the Award's definitions of the following terms (cl.3 – Definitions) are relevant:

- **school year** means the period of 12 months from the day employees are required to attend the school for the new educational year or the calendar year, as determined by the school, and includes term weeks and non-term weeks;

In practice, each school determines its operational school year, which must be 52.18 weeks in duration, and, typically, might be:

- from 27 January of one year until 26 January of the following year, or
- from 1 February of one year until 31 January of the following year, or
- the calendar year (1 January until 31 December of the same year).

- **term weeks** means the weeks in the school year that students are required to attend school as set out in the school calendar of each school; where a preschool operates according to terms that approximate school terms, term weeks will have the same meaning;

- **non-term weeks** means weeks in the school year other than term weeks and include periods designated as school holidays for students; where a preschool operates according to terms that approximate school terms, non-term week will have the same meaning.

In practice, a school might decide that its school year will comprise 39 term weeks and 13 non-term weeks. The term weeks are divided across four school terms, with each term comprising between 8 and 11 weeks. The number of term weeks in a particular school term will vary from year to year and, sometimes, from school to school. The dates of Easter are influential in determining the duration of Term 1, for example.

### 4. The operation of annual leave in the Award

4.1. As a result of the unique and long-standing working arrangements applying to teachers, the Award deems the non-term weeks in the school year to include the annual leave entitlement specified by the National Employment Standard (NES).

4.2. Clause 21.2 of the Award specifies the arrangement for the taking of annual leave, which is as follows:

*An employee in a school, preschool or kindergarten must take annual leave during non-term weeks. Leave must generally be taken, in the case of an employee whose employment with the employer is continuing into the next school or preschool year, in the four-week period immediately following the final term week*

*of the current school or preschool year, unless otherwise agreed with the employer (emphasis added).*

- 4.3. Clause 19.8 of the Award states that:

*...The employee's absence from school during non-term weeks is deemed to include their entitlement to annual leave (emphasis added).*

- 4.4. Considering these two clauses together:

- a. A teacher must take annual leave during non-term weeks (cl.21.2).
- b. Annual leave is deemed to be taken during the non-term weeks of the school year (cl.19.8).
- c. Where a teacher's employment is continuing into the next school year, which is the norm, annual leave is deemed to be taken in the four-week period immediately following the final term week of the school year, unless otherwise agreed with employer (cl.21.2).
- d. An example of a situation, where a teacher would not take annual leave following the final term week of the school year, is where a teacher voluntarily attends a school trip, camp or excursion, pursuant to cl.19.5(b) of the Award. This means that the teacher will be deemed to have taken annual leave during other non-term weeks of the school year.

- 4.5. Clause 19 – Ordinary hours of work regulates the attendance requirements of teachers during a school year.

- 4.6. Clause 19.3 of the Award states:

*The ordinary hours of work for an employee during term weeks are variable. In return, an employee is not generally required to attend for periods of time when the students are not present, subject to the needs of the employer with regard to professional development, student free days and other activities requiring the employee's attendance (emphasis added).*

- 4.7. Further information is provided by cl.19.4, which states:

*The maximum number of days that the employee will be required to attend during term weeks and non-term weeks will be 205 in each school year (emphasis added).*

- 4.8. Clause 19.5 excludes some circumstances when calculating the 205 attendance days.
- 4.9. A teacher's entitlement to payment during non-term weeks accrues progressively with service undertaken in accordance with the Award. That is, a teacher who works all term weeks, or takes approved paid leave or up to two weeks' unpaid leave during term weeks, is paid for all non-term weeks of the school year.
- 4.10. Clause 22 – Pro rata payment of salary inclusive of annual leave deals with the situation where a teacher works less than a full school year. For example:

- a. A period of up to two weeks' leave without pay during term weeks does not affect a teacher's entitlement to full payment during non-term weeks (cl.22.2(ii)).
- b. Clauses 22.6, 22.7 and 22.8 provide mechanisms for adjusting the payment for non-term weeks, based upon the number of term weeks worked in the school year. That is, a teacher, who works a proportion of the term weeks of a school year, is entitled to payment for the same proportion of non-term weeks (which, given the deeming provision in cl.19.8, includes the same proportion of the four-week annual leave entitlement).

4.11. Therefore, summarising the operation of annual leave under the Award:

- a. A teacher must take annual leave during non-term weeks (cl.21.2).
- b. A teacher is entitled to not attend work for at least 11 non-term weeks in a school year (cl.19.4).
- c. A teacher's non-attendance during non-term weeks is deemed to include four weeks' annual leave (cl.19.8).
- d. Although there is provision for a teacher to attend during non-term weeks, for professional development, student-free days and other activities (cl.19.3), such days are rare and generally limited to special events, such as a short conference for a day or two. Attendance during non-term weeks is neither typical nor regular.

## **5. Annual leave in advance (proposed cl.21.4)**

- 5.1. The scheme for taking annual leave, in the context of non-term weeks in a school year, is outlined by paragraphs 4.1 to 4.11 above.
- 5.2. As the scheme for taking annual leave does not allow for annual leave to be taken at any time other than during non-term weeks, the proposed cl.21.4 is not relevant, and has no application, to this Award.
- 5.3. In general, as students do not attend during non-term weeks, and classes are not scheduled during non-term weeks, and the primary work of a teacher is teaching students in accordance with timetabled classes, it is not possible for a teacher to take annual leave at any time other than during four weeks of the 11 non-term weeks in a school year.
- 5.4. Further, granting annual leave to a teacher during term weeks would result in:
  - a. the employer being required to engage a replacement teacher to cover the teacher's absence on annual leave; and
  - b. the teacher would be required to take an equivalent period of leave without pay during non-term weeks, as it would not be possible to provide the teacher with work during the non-term weeks of the school year.

- 5.5. In the event that the Commission determines to include the proposed cl.21.4 in the Award:
- a. it has the potential to confuse the long-standing understanding of the arrangement for taking annual leave only during non-term weeks in schools, and
  - b. it would encourage a teacher to assume that a request to take annual leave during term weeks is both reasonable and possible, and that it ought to be granted by the employer, given that it is a condition in the Award.
- 5.6. In any event, the proposed cl.21.4 contradicts the Award's scheme for taking annual leave. Under the Award, a request to take annual leave during a term week could not be granted as a teacher must take annual leave only during a non-term week (cl.21.2).
- 5.7. Whilst the Associations do not have any in-principle objections to the concept of an employee taking annual leave in advance of accrual, the proposed cl.21.4, if inserted into the Award, has no utility for a teacher or an employer in this sector and may only serve to cause confusion and disappointment, when a request to take annual leave during a term week is refused.
- 5.8. For the reasons outlined in this submission, the Associations do not support the inclusion of the proposed cl.21.4 in the Award.

## **6. Cashing out annual leave (proposed cl.21.5)**

- 6.1. The scheme for taking annual leave, in the context of non-term weeks in a school year, is outlined by paragraphs 4.1 to 4.11 above.
- 6.2. At the end of a school year of 52.18 weeks, a teacher has been paid for, and has taken, the annual leave entitlement of four weeks. It is deemed to have been taken during non-term weeks (cl.19.8).
- 6.3. Although teachers may undertake work during non-term weeks, such as preparing for next term's classes, etc., such work is generally initiated by the individual teacher. The averaging of the hours of work over 12 months (i.e., over the school year) under cl.19.2 of the Award may result in more than 38 hours being worked in some term weeks but allows the offset of no or minimal work during non-term weeks.
- 6.4. As students do not attend school during non-term weeks, there are no classes to be taught. The main work undertaken by a teacher is not available during non-term weeks.
- 6.5. As an employer does not generally need a teacher to attend work during non-term weeks, there is no capacity for a teacher to take annual leave at any other time.
- 6.6. Accordingly, there is no capacity to accrue more than four weeks' annual leave in any school year. Annual leave is deemed to be taken during the school year in which it accrues.

- 6.7. This means that the proposed cl.21.5 can never be operative, as the necessary condition, which is the accrual of more than eight weeks' of paid annual leave, simply cannot occur in a school.
- 6.8. In the event that the Commission decides to include the proposed cl.21.5 in the Award, its inclusion would allow a teacher to think that it is possible to accrue and cash out annual leave, when it is never possible to do so.
- 6.9. Although the Associations do not have any in-principle objections to the concept of cashing-out annual leave, the proposed cl.21.5 has no work to do in the Award, as it is simply not possible for a teacher to accrue sufficient annual leave for a cashing out provision to have any applicability.
- 6.10. For the reasons outlined in this submission, the Associations do not support the inclusion of the proposed cl.21.5 in the Award.

## **7. Excessive annual leave accruals (proposed cl.21.6)**

- 7.1. Although the Associations do not have any in-principle objections to the concept of directing an employee to take his or annual leave, where an excessive accrual of annual leave exists, subject to meeting a set of requirements, such a provision has no relevance to a teacher employed pursuant to this Award.
- 7.2. The arrangements for the taking of annual leave under this Award, as explained in paragraphs 4.1 to 4.11 above, does not permit the accrual of excessive annual leave.
- 7.3. A teacher is deemed to have taken four weeks' annual leave during the non-term weeks of the school year, in which the annual leave accrues (cl.19.8).
- 7.4. In the event that the Commission decides to include the proposed cl.21.6 dealing with excessive annual leave accruals, a teacher or an employer would make no use of such a clause as it is not possible to accrue annual leave beyond the 12-month period in which it accrues and is deemed to be taken (cl.19.8).

## **8. Evidence supporting the submission**

A witness statement made by Mr Michael Carr, who is the Deputy Executive Director and Director: Governance and School Reviews of the Association of Independent Schools of New South Wales (AISNSW) will be provided separately to support this submission.

## **9. Discussions with relevant union**

- 9.1. The Associations have discussed the terms of the Draft Determination with the Independent Education Union of Australia (IEUA), as the major union with coverage of employees employed by independent school employers.
- 9.2. It is understood that the IEUA does not support the inclusion of the proposed cl.21.4, 21.5 and 21.6 in the Award and will be lodging a submission to this effect with the Commission.

**FAIR WORK COMMISSION**

**FWC MATTER NO: AM2014/47**  
**4 Yearly Review of Modern Awards**

**Common Issue – Annual Leave (Model Term for Annual Leave)**

**26 October 2015**

**Witness Statement to support Submission in response to the Draft  
Determination for the *Educational Services (Schools) Teachers Award 2010*  
[MA000077]**

**Statement of Michael Carr**

On 26 October 2015, I Michael Carr, Deputy Executive Director and Director: Governance and School Reviews at the Association of Independent Schools of NSW [AISNSW], in the State of NSW say:

1. I am currently employed as the Deputy Executive Director at the AISNSW, I have held this role for over five years. Prior to that I was Director: Employment Relations. I have been employed at the AISNSW for over 15 years.
2. Prior to my employment at AISNSW, I was a Principal of three schools in the catholic system in NSW. One was a medium sized co-ed school with students from years K-12. The second school was a large senior high school with students in Years 11 and 12. The third was a medium sized girls school in Years 7-10.
3. I have a deep understanding of the customs and practices in the Independent School Sector across NSW and in all other states through my role as Director: Employment Relations.
4. The *Educational Services (Schools) Teachers Award 2010 (Modern Award)* provides an annual salary for teachers who are employed to work in the school education industry.
5. The School year in all schools is broken into term time and non-term time. Term time is when the students are present at the school and non-term time is when the students are on school holidays. Teachers can be required to attend school during non-term time in accordance with **clause 19. Ordinary Hours of Work** of the Modern Award.



7. **Clause 19.4, Ordinary Hours of Work** of the Modern Award, provides that teachers can be required to attend school for a maximum of 205 days in each school year (this is term days and non-term days).
8. Current practice in the Independent School Sector is for teachers to attend during all of the allocated term time (due to timetabling and supervision concerns), unless specific permission has been granted to take leave without pay, or an employee is taking a period of long service leave. Attendance during non-term time between terms one and two, two and three, and three and four of each school year is typically for the purposes of, but not limited to, engaging in professional development, camps, and planning days. Some schools require teacher attendance following the conclusion of term time in Term four.
9. The overwhelming majority of schools close at the end of term four each school year. Teachers are rarely, if ever required to attend school for any reason until late-January in the following year. The period of four weeks of close-down immediately following term four in each year is deemed to be annual leave for teachers who are continuing into the next school year. This custom is supported in **Clause 21.2, Annual Leave** of the Modern Award, which provides that *'leave must generally be taken, in the case of an employee whose employment with the employer is continuing into the next school year or preschool year, in the four-week period immediately following the final term week of the current school or preschool year, unless otherwise agreed with the employer'*.
10. Permitting a teacher to take annual leave in advance during non-term time earlier in the year will result in an unpaid stand down period immediately following term four each year when schools are closed and there is no work at a school for a teacher.
11. It is understood through the provisions of **Clause 21.2** of the current Modern Award and accepted custom and practice that teachers are deemed to have taken their annual leave during this close down period immediately following term four each year.
12. Teachers are fortunate in that they are not required to attend school during most non-term time periods which provides a break from teaching face to face. This period of time also enables teachers to travel and take holidays even though they are technically being paid normal salary. It is generally accepted that a teacher may go away on holidays in their state or overseas during non-term time periods when they are not required to attend school, as long as they are prepared for the upcoming term. This preparation can be done on their terms at their leisure. Altering the annual leave provision to enable employees to request to take annual leave in advance, can and will significantly impact on teaching outcomes of students, who are reliant on teachers to prepare and plan for the upcoming school term. The industry has a long history of understanding that leave is taken during the summer pupil


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vacation period at the end of term four. The practicality of approving requests to access annual leave in advance is problematic for schools, in terms of sourcing replacements for such short periods of time, and also through managing the disruption to student learning outcomes.

12. A provision for the cashing out of annual leave is redundant in the *Education Services (School Teachers) Award 2010* because there is no capacity for teachers to accrue more than four weeks' annual leave in any school year. Annual leave is deemed to have been taken during non-term time in the year in which it accrues. Cashing out of annual leave will result in a leave deficit later in the year and a consequent period of leave without pay during the school close down period.
13. Teachers do not have the option of accruing excessive annual leave accruals as they expend their accrued leave every year, in accordance with **clause 21.2 Annual Leave of the Modern Award**.
14. In my 40 years of experience in schools and with the AISNSW, I have never had a request from a teacher to take annual leave in advance as teachers already have the benefit of non-term time when they are not required to attend work. I believe this is also because teachers are aware that if they were to request and take annual leave in advance it will result in an unpaid stand down at the end of term four. Most teachers want to ensure that they have enough accrued leave to cover the six to eight week period of summer non-term time, this also being the Christmas period.
15. The Modern Award does not permit teachers to accrue their annual leave from year to year, therefore it has never been necessary to require teachers to take excessive amounts of accrued annual leave.

**SIGNED** at Sydney in the  
STATE OF NEW SOUTH WALES  
by the Deponent:

  
.....  
Michael Carr

  
.....  
Witness:

*EVELYN NICOLLE*  
.....  
Print Name: