

[2019] FWCA 3209

The attached document replaces the document previously issued with the above code on 9 May 2019.

Industry type missing

Member Assist
On behalf of Commissioner Bissett

Dated 10 May 2019



DECISION

Fair Work Act 2009
s.185—Enterprise agreement

**Kaplan International (Melbourne & Adelaide) Pty Ltd T/A Kaplan
International English**
(AG2019/955)

KAPLAN INTERNATIONAL ENGLISH MELBOURNE TEACHERS ENTERPRISE AGREEMENT 2019

Educational services

COMMISSIONER BISSETT

MELBOURNE, 9 MAY 2019

Application for approval of the Kaplan International English Melbourne Teachers Enterprise Agreement 2019.

[1] An application has been made for approval of an enterprise agreement known as the *Kaplan International English Melbourne Teachers Enterprise Agreement 2019* (the Agreement). The application was made pursuant to s.185 of the *Fair Work Act 2009* (the Act). It has been made by Kaplan International (Melbourne & Adelaide) Pty Ltd T/A Kaplan International English. The Agreement is a single enterprise agreement.

[2] The Employer has provided written undertakings. A copy of the undertakings is attached in Annexure A. I am satisfied that the undertakings will not cause financial detriment to any employee covered by the Agreement and that the undertakings will not result in substantial changes to the Agreement.

[3] Pursuant to subsection 190(3) of the Act, I accept the Undertakings.

[4] Subject to the Undertakings, I am satisfied that each of the requirements of ss.186, 187, 188 and 190 as are relevant to this application for approval have been met.

[5] Pursuant to s.202(4) of the Act, the model flexibility term prescribed by the *Fair Work Regulations 2009* is taken to be a term of the Agreement.

[6] The Independent Education Union of Australia being a bargaining representative for the Agreement, has given notice under s.183 of the Act that it wants the Agreement to cover it. In accordance with s.201(2) I note that the Agreement covers the organisation.

[7] The Agreement is approved and, in accordance with s.54 of the Act, will operate from 16 May 2019. The nominal expiry date of the Agreement is 30 June 2021.

COMMISSIONER

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Annexure A

IN THE FAIR WORK COMMISSION

FWC Matter No.: AG2019/955

Applicant: Kaplan International (Melbourne and Adelaide) Pty Ltd

APPLICATION FOR APPROVAL OF THE *KAPLAN INTERNATIONAL ENGLISH MELBOURNE TEACHERS ENTERPRISE AGREEMENT 2019*
Fair Work Act 2009—s.190

I, Andrew Garnam, Executive Director People & Culture, give the following undertakings with respect to the Kaplan International English Melbourne Teachers Enterprise Agreement 2019("the Agreement"):

1. I have the authority given to me by Kaplan International (Melbourne and Adelaide) Pty Ltd (**Kaplan**) to provide this undertaking in relation to this application before the Fair Work Commission.
2. The Agreement will be read and interpreted subject to the National Employment Standards (**NES**) and, where any term of the Agreement is inconsistent with the NES and provides a lesser entitlement than that provided by the NES, the NES will apply to the extent of that inconsistency.
3. The entitlement to unpaid carer's leave in cl.7.3.6 of the Agreement will also be provided to Part-Time employees.
4. Where a Part-Time Employee is provided with time off in lieu pursuant to cl.3.7 of the Agreement, the agreement to provide, and provision of, the time off in lieu will occur in accordance with the provisions of clauses 24.3(b) to (k) inclusive of the *Educational Services (Post-Secondary Education) Award 2010*.



Andrew Garnam

Executive Director People & Culture

6 May 2019

KAPLAN INTERNATIONAL ENGLISH MELBOURNE TEACHERS ENTERPRISE AGREEMENT 2019

Note - this agreement is to be read together with an undertaking given by the employer. The undertaking is taken to be a term of the agreement. A copy of it can be found at the end of the agreement.

Note - the model flexibility term is taken to be a term of this agreement and can be found at the end of the agreement.

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1. This Enterprise Agreement

- 1.1. This enterprise agreement is called the Kaplan International English Melbourne Teachers Enterprise Agreement 2019 (**Agreement**).
- 1.2. The Agreement covers Kaplan International English (Melbourne & Adelaide) Pty Ltd (ACN 129 017 385) and its Employees who are engaged as English Language Teachers in Melbourne, Victoria. If noted by the Fair Work Commission in its decision approving the Agreement, the Agreement will also cover the Union.
- 1.3. The nominal expiry date of this Agreement is 30 June 2021.
- 1.4. Subject to the Fair Work Act 2009, the Company agrees to commence negotiations for a replacement enterprise agreement with employees and their bargaining representatives, including the Union, at least three months prior to the nominal expiry date of the Agreement.
- 1.5. Modern awards don't apply to Employees covered by this Agreement.

2. Definitions

Some terms in this agreement have defined meanings as follows:

Agreement	This Kaplan International English Melbourne Teachers Enterprise Agreement 2019
Award	The Educational Services (Post-Secondary Education) Award 2010.
Company, Employer or KIE	Kaplan International English (Melbourne & Adelaide) Pty Ltd (ACN 129 017 385)
Employee	An employee of the Company employed as an English Language Teacher in Melbourne, Victoria and covered by this Agreement.
Family and Domestic Violence	Violent, threatening or other abusive behaviour by a Family Member of an Employee that seeks to coerce or control the employee and that causes them harm or to be fearful.
Family Member	A spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the Employee; or a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the Employee or a person related to the Employee according to Aboriginal or Torres Strait Islander kinship rules. A reference in this definition to a spouse or de facto partner includes a former spouse or de facto partner.
Full-Time Employee	An Employee engaged to work 37.5 ordinary hours of work per week.
FW Act	The Fair Work Act 2009 (Cth) or any successor legislation.
FWC	The Fair Work Commission or any successor body.
IEU or Union	The Independent Education Union Victoria Tasmania.

IFA	An individual flexibility agreement made under clause 11.3.
Immediate Family	An Employee's spouse, de facto partner (including a same sex partner), child, parent, grandparent, grandchild or sibling. A child, parent, grandparent, grandchild or sibling of the spouse or de facto partner of the Employee.
NES	The National Employment Standards under the FW Act.
Part-Time Employee	An Employee (other than a Casual Employee) who is engaged to work regularly but has a lesser teaching load and is engaged to work less than the ordinary hours of work specified for Full-Time Employees.
Public Holiday	1 January (New Years' Day) 26 January (Australia Day) Second Monday in March (Labour Day) Good Friday The Saturday before Easter Sunday (Easter Saturday) Easter Sunday Easter Monday 25 April (ANZAC Day) Second Monday in June (Queen's Birthday) Friday Before the AFL Grand Final Melbourne Cup Day 25 December (Christmas Day) 26 December (Boxing Day) Any other day, or part day, declared or prescribed by or under Victorian law to be observed as a public holiday either generally within Victoria or in Melbourne. If, under a Victorian law, a day or part-day is substituted for a day or part-day that is otherwise a Public Holiday, then that day is the Public Holiday (and the other day is not).
Relevant Employees	In clause 11.2 means Employees who may be affected by a change referred to in clause 11.2.1.1 or 11.2.1.2.
Sessional Employee	An Employee employed Full-Time or Part-Time for a specified period of not less than four weeks or more than 40 weeks in any calendar year.

3. Types of Employment

- 3.1. Under this Agreement, the Company can employ Employees as Full-Time Employees, Part-Time Employees, Casual Employees or Sessional Employees.

3.2. On appointment the Company will provide an Employee with a letter of appointment stating their classification, rate of pay and mode of appointment. In the case of a Sessional Employee this will also state the cessation date of the employment.

3.3. **Part-Time Employees**

3.3.1. A Part-Time Employee will be paid the proportion of salary of a Full-Time Employee that their specified hours of work bears to that of a Full-Time Employee with the corresponding qualifications and experience. A Part-Time Employee will be entitled to all conditions of employment on the same pro rata basis.

3.4. The Company and the Part-Time Employee will agree in writing on a regular pattern of work, including the number of hours to be worked each week, the days of the week the Employee will work, the starting and finishing times each day where hours are not averaged and any periods during a year when work by the Employee will not be required.

3.5. Changes to part-time hours may only be made by agreement in writing between the company and the employee.

3.6. Time worked by a Part-Time Employee in excess of the hours mutually agreed in accordance with clause 3.4 or 3.5 will be paid at the Employee's ordinary rate of pay.

3.7. If requested by the Part-Time Employee, and agreed by Kaplan, a Part-Time Employee may be provided with time off in lieu of the payment prescribed by cl.3.6 on a time by time basis. Kaplan is not required to agree to any such request made by a Part-Time Employee and the usual method of compensation for time worked in excess of mutually agreed hours will be as provided by cl.3.6.

3.8. **Job Share**

3.9. A request may be made by an existing Full-Time Employee to share the position that Employee is currently holding.

3.10. The request should be made to the Company identifying the proposed division of the position including time, duties, communication and responsibilities.

3.11. If the request is accepted by the Company:

3.11.1. the parties to the proposal should negotiate a mutually suitable division of the work;

3.11.2. the arrangement will be in writing for an agreed period; and

3.11.3. the residual position may be advertised, unless an additional person has already been identified, and then accepted by the Company.

3.12. Such a request will not be unreasonably refused by the Company, provided that refusal based upon operational requirements of the Company will be deemed to be a reasonable refusal.

3.13. **Casual Employees**

3.13.1. A Casual Employee is an employee who is engaged and paid as such. A casual will be paid for a minimum of two hours per engagement.

3.13.2. The salary scale for Casual Employees will be as set out in Schedule A. These rates include a loading as payment in respect of annual leave, other paid leave and other entitlements not ordinarily payable to casual employees.

3.13.3. A Casual Employee will be paid in respect of each hour of teaching load and will be paid for a minimum of two hours for each engagement. It is acknowledged that the hourly rates for Casual Employees include payment for preparation and correction time.

3.13.4. Casual Employees will on their initial engagement be provided with a letter of appointment stating the casual nature of the employment and their hourly rate.

3.14. Sessional Employees

3.14.1. A Sessional Employee will be paid at the same rate and receive the same conditions as those prescribed for an ongoing Full-Time or Part-Time Employee, as the case may be, with corresponding qualifications, experience and teaching load.

3.14.2. The work of a Sessional Employee will be considered to be continuous for the purposes of the NES unless there is a break of more than two (2) months between sessional contracts or where an Employee advises the Company that they will not be taking up another offer of sessional employment with the Company. While the absence does not break the continuity of service it will not count as service for the purposes of the NES. Where the continuity of service is broken the Employee will be paid their untaken annual leave balance.

3.14.3. A Sessional Employee will be entitled to payment for any public holiday falling within a period of close-down of the Company's operations, provided that the Employee was employed on the last teaching day before the period of close-down and is employed as a Sessional Employee on the first teaching day after the close-down.

3.14.4. The service of a Sessional Employee will be deemed to be continuous notwithstanding that it may have been broken by an interruption by the Company with the intention of avoiding an obligation under this Agreement or relevant legislation.

3.14.5. Subject to the employee's satisfactory conduct and performance, where an equivalent position will exist at the expiry of the employee's period of engagement, the employer will offer a further engagement to the employee.

3.14.6. The College will advise Sessional Employees of whether a further engagement as a Sessional Employee is to be offered to the Sessional Employee no later than two weeks prior to the expiry of the Sessional Employee's engagement. Where possible four weeks' notice will be given. Employees acknowledge that such notice may not always be possible, given the nature of student enrolments.

3.15. Casual/Sessional Employees – Conversion to Ongoing Employment

3.15.1. Where a Casual or Sessional Employee has been employed for a period or sequence of periods in excess of twelve months under this Agreement, that Employee will have the right to request to have their contract of employment converted to a continuing engagement on a Full-Time or Part-Time basis (dependent upon the hours which the Casual or Sessional Employee has worked during the period of engagement), unless the reasons in 3.15.4 apply. These periods include service prior to the commencement of this agreement.

3.15.2. The Casual or Sessional Employee can apply to have their employment converted, in writing, upon becoming eligible for such conversion as set out in clause 3.13.1.

3.15.3. The Company will, within four weeks of receipt of an employee application to convert, agree to or refuse a conversion.

3.15.4. The Company may refuse conversion on the following grounds:

- the number of Casual or Sessional Employees falling to levels below that required to account for genuine variation in student numbers or student enrolments; or
- the employee is not successful in merit selection of the Casual or Sessional Employees eligible for conversion. for a lower number of positions based on this genuine seasonal variation.

3.15.5. Where a Casual or Sessional Employee has converted to ongoing employment in accordance with this clause, the Employee can only revert to casual or sessional employment with the agreement of the Company.

3.15.6. Any dispute in relation to this provision will be dealt with in accordance with the Dispute Resolution Process.

3.15.7. An Employee must not be engaged and re-engaged, dismissed or replaced in order to avoid any obligation under this subclause.

3.15.8. For the purposes of the NES one or more engagements of a Casual Employee with the Company will be deemed to be continuous unless more than two months have elapsed between those engagements. The period between engagements will not count as service.

3.15.9. The service of a Casual Employee will be deemed to be continuous notwithstanding that it may have been broken by an interruption by the Company with the intention of avoiding an obligation under this Agreement or relevant legislation.

4. Hours of Work and Overtime

4.1. Ordinary Hours of Work

4.1.1. The ordinary hours of work for Full-Time Employees will be 37.5 hours per week excluding a daily unpaid meal break.

4.1.2. For Full-Time Employees these hours will ordinarily be performed with the Employee in attendance at the Company's Melbourne campus as follows:

4.1.2.1. a maximum of 25 hours per week of face to face teaching;

4.1.2.2. a maximum of 12.5 hours per week of administration, assessment, consultation, preparation and correction time with the amount of preparation and correction time to be equivalent to 50% of the hours spent in face to face teaching; and

4.1.2.3. where the total hours worked by Employees in the duties set out in clauses 4.1.2.1 or 4.1.2.2 are less than 37.5 hours per week, other duties as directed by the Company which may include participation in scheduled activities such as clubs, KITE and study centre supervision.

4.1.3. For the avoidance of doubt, the total number of hours worked by a Full-Time Employee in the duties contained in clauses 4.1.2.1, 4.1.2.2 and 4.1.2.3 will not exceed 37.5 hours in any week.

- 4.1.4. With the prior approval of the Director of Studies some preparation, assessment and administration may be done offsite. Prior approval may be given for one instance or more than one instance (including general approval for an Employee to undertake duties offsite).
- 4.1.5. In circumstances where a teacher is taking an Exam Class, the maximum number of hours allocated towards the duties in clause 4.1.2.1 (i.e. face to face teaching) will be 21 hours per week.
- 4.1.6. Ordinary hours of work are defined as those hours worked continuously, except for meal breaks, on any of the days from Monday to Friday (inclusive) between 8.00 am and 5.00 pm.
- 4.1.7. Employees who are employed by the Company prior to the date of approval of this Agreement by the FWC may be requested to work until 9.30 pm by agreement with the individual Employee and the Company, provided that the Employee's ordinary hours within the period do not exceed 37.5 hours per week or, in the case of a Part-Time Employee, the Employee's agreed ordinary hours.
- 4.1.8. Employees who commence employment with the Company after the date of approval of this Agreement by the FWC may be required to work until 9.30 pm as a condition of their employment, provided that the Employee's ordinary hours within the period do not exceed 37.5 hours per week or, in the case of a Part-Time Employee, the Employee's agreed ordinary hours.

4.2. Meal Breaks

- 4.2.1. An Employee will be allowed two 15 minute rest breaks on each day as follows:
- one 15 minute rest break between the time of commencing work and the usual meal break; and
 - a second 15 minute break between the usual meal break and the time of ceasing work.
- 4.2.2. An Employee working overtime will be allowed a meal break of 20 minutes without deduction of pay after each four hours of overtime worked.
- 4.2.3. Employees will be entitled to an unpaid meal break of not less than 30 minutes after five hours of work.

5. Pay, Allowances and Superannuation

5.1. Rates of Pay

- 5.1.1. The scales in Schedule A to this Agreement set out the rates of pay for each of the programs.
- 5.1.2. The rates of pay in Schedule A will increase as follows:
- 6% from the first pay period on or after 1 July 2019
 - 6% from the first pay period on or after 1 July 2020

5.2. Bonus Payment

- 5.2.1. A bonus payment will be paid to all Employees covered by this Agreement and employed at the date of payment as specified in clause 5.2.2 below.

- 5.2.2. This payment will be made in the first pay period on or after a vote of employees that approves this agreement.
- 5.2.3. The bonus payment for Full-Time Employees (including both ongoing and Sessional Employees) will be \$2,750. This amount will be subject to taxation but is exclusive of superannuation.
- 5.2.4. Casual Employees will receive the bonus payment if they have been engaged by the Company to perform work as a casual within the five week period immediately prior to the date of payment, as specified in clause 5.2.2, and there is a reasonable expectation by the Company that the Employee will be engaged to perform work as a casual in future.
- 5.2.5. Payment to Casual Employees will be calculated on a pro-rata basis based upon the Casual Employee's hours of work in the 2018 calendar year, provided that 21 hours of face-to-face teaching by a Casual Employee per week will be regarded as equivalent to a Full-Time Employee.

5.3. **Payment**

- 5.3.1. Employees will be paid their salary fortnightly, unless something different is agreed in writing between the Company and the Employees.
- 5.3.2. Payment will be by Electronic Funds Transfer (EFT) to each Employee's bank account. Employees are required to notify the Company of their bank account details, or any changes to these details, in writing.

5.4. **Superannuation**

- 5.4.1. Superannuation legislation sets out the superannuation contributions the Company must make to a superannuation fund for the benefit of each Employee to avoid the Company being required to pay the superannuation guarantee charge.
- 5.4.2. Superannuation contributions will be paid on a monthly basis, or if the Company is unable to pay monthly due to circumstances beyond its control, in accordance with the payment requirements set out by the Australian Taxation Office (ATO).
- 5.4.3. Superannuation contributions will be paid to an Employee's nominated fund, or the nominated default superannuation fund (CareSuper), which offers a MySuper product.
- 5.4.4. The Company offers pre-tax salary sacrificing of Employee superannuation contributions. Where this is offered the Company will provide Employees with a document which sets out: the agreed amount of any non-salary items, the net impact on take home salary, the liability for tax obligations and administration costs required to be paid by the Company under ATO guidelines.

6. **Termination of Employment and Redundancy**

6.1. **Termination of Employment**

- 6.1.1. Except as provided in cl.6.1.2 and cl.6.1.5, the Company or an Employee can terminate the Employee's employment by providing four weeks' written notice (inclusive of the notice required under the NES) or in the case of the Company payment of four weeks' in lieu. If the Employee is entitled to a greater period of notice under the NES, the Company will provide (or pay in lieu) the Employee's entitlement under the NES.

- 6.1.2. If an Employee is in their first six months of employment, the Company or the Employee can terminate the Employee's employment by providing one week's notice (inclusive of the notice required under the NES) or in the case of the Company payment of one week in lieu.
- 6.1.3. Subject to the NES, an Employee doesn't give the required period of notice, the Company can withhold from any amounts due to the Employee on termination an amount not more than the amount the Employee would have been paid for the period of notice, less any period of notice actually given by the Employee.
- 6.1.4. If the Company has given an Employee notice of termination of employment, the Employee will be allowed to take one paid day off during the notice period to seek other employment. This time needs to be taken at a time agreed with the Company.
- 6.1.5. Notice of termination does not need to be provided if an Employee is dismissed by the Company for serious misconduct or other grounds which justify instant dismissal, in the case of Casual Employees or if a teacher is engaged for specific periods or tasks (such as a Sessional Employee).

6.2. Redundancy

- 6.2.1. Redundancy occurs if the Company makes a definite decision that it no longer wants an Employee's job to be done by anyone and this decision will result in the Employee's employment being terminated, except where this is due to the ordinary and customary turnover of labour.
- 6.2.2. In potential redundancy situations clause 11.2 of this Agreement regarding consultation will apply. In accordance with that clause, the company will meet with potentially affected employees and their representatives (if any) to discuss the redundancy of position(s).
- 6.2.3. The Company will provide in writing the reasons for proposed redundancies, excluding any confidential and commercially sensitive reasons, and will discuss with employees and their representatives (if any) measures to mitigate the impact of the proposals. Such measures may include consideration and discussion of:
- redeployment or retraining of Employees, conversion of Employees to Part-Time employment, Employees taking leave or other any other measures suggested by Employees to avoid termination of employment due to redundancy.
 - a process of calling for volunteers for termination of employment due to redundancy.
- 6.2.4. In addition to the period of notice prescribed in cl.6.1.1, if a Full-Time or Part-Time Employee's employment is terminated due to redundancy, they will be paid redundancy pay with respect to their continuous service with the Company in accordance with the table below. Casual Employees are not entitled to redundancy pay.

Period of Continuous Service with the Company on Termination	Severance Pay
At least 1 year but less than 2 years	4 weeks' pay
At least 2 years but less than 3 years	6 weeks' pay
At least 3 years but less than 4 years	7 weeks' pay
At least 4 years but less than 5 years	8 weeks' pay
At least 5 years but less than 6 years	10 weeks' pay
At least 6 years but less than 7 years	11 weeks' pay

At least 7 years but less than 8 years	13 weeks' pay
At least 8 years but less than 9 years	14 weeks' pay
At least 9 years	16 weeks' pay

- 6.2.5. The provisions of cl.6.2.4 are inclusive of any redundancy or severance pay provided by the FW Act.
- 6.2.6. If the Company is going to transfer an Employee to lower paid duties due to redundancy, then the Employee will receive the same period of notice as they would if their employment had been terminated. Alternatively, the Company can choose to pay the Employee in lieu of such notice an amount equal to the difference between their former rate of pay and their new rate of pay for the period of notice.
- 6.2.7. If the Company gives an Employee notice of termination for redundancy the Employee can terminate their employment during the notice period. If they do, they will receive the benefits and payments they would have received under this clause if they'd remained employed until the end of the notice period, but not payment instead of notice.
- 6.2.8. If the Company gives an Employee notice of termination for redundancy, the Company will provide the Employee up to one day's paid time off during each week of notice to seek alternative employment. If the Employee is allowed more than one day's paid time off during the notice period, the Employee must provide proof of attendance at an interview if the Company asks them to. A statutory declaration is sufficient proof. If the Employee doesn't provide proof when requested, then they won't be paid for the time off. This clause applies instead of cl.6.1.4.

7. Leave and Public Holidays

7.1. Public Holidays

- 7.1.1. No deduction will be made from the wages of Full-Time, Part-Time or Sessional Employees for the days on which public holidays are observed.

7.2. Annual Leave

- 7.2.1. Employees, other than Casual Employees, are entitled to annual leave in accordance with the NES. The following subclauses summarise the entitlements under the NES.
- 7.2.2. The entitlement to annual leave is four (4) weeks (150 hours for Full-Time Employees) for each year of continuous service with the Company, which accrues progressively during a year of service in accordance with the Employee's ordinary hours of work.
- 7.2.3. When an Employee takes annual leave, the Company will pay them their base rate of pay for their ordinary hours of work in the period of annual leave plus an annual leave loading of 17.5%.
- 7.2.4. If an Employee's employment with the Company ends and the Employee has a period of accrued but untaken annual leave, the Company will pay the Employee the amount that would have been payable to the Employee if they had taken the leave, unless the Employee is a Sessional Employee and has elected to have their annual leave entitlement preserved in accordance with clause 3.14.2.

- 7.2.5. If there is a public holiday during a period of annual leave taken by an Employee, the Employee will not be taken by the Company to be on annual leave on that day.
- 7.2.6. Annual leave can be taken at a time agreed between the Employee and their manager and the Employee must request the taking of annual leave in advance.
- 7.2.7. The Company may specify a close-down period each year. During this period, the Company may require Employees to take annual leave. The Company will give Employees notice of the requirement to take annual leave as soon as practicable after determining the close-down period.

7.3. **Personal Leave**

- 7.3.1. Employees, other than casual Employees, are entitled to paid personal leave in accordance with the NES. The following subclauses summarise the entitlements under the NES.
- 7.3.2. In summary, the entitlement to paid personal leave is ten (10) days for each year of continuous service with the Company, which accrues progressively during a year of service in accordance with the Employee's ordinary hours of work.
- 7.3.3. Employees can take paid personal leave if:
 - 7.3.3.1. they are unfit for work due to a personal illness or injury that affects them; or
 - 7.3.3.2. they are required to provide care or support for a member of their immediate family or household who needs that care or support due to their own personal illness or injury; or an unexpected emergency that affects them.
- 7.3.4. When an Employee takes paid personal leave, the Company will pay them their base rate of pay for their ordinary hours of work during the period of personal leave.
- 7.3.5. Casual Employees can take up to two (2) days of unpaid carer's leave for each occasion where they need to provide care or support for a member of their immediate family or household who needs that care or support due to their own personal illness or injury, or an unexpected emergency that affects them.
- 7.3.6. Full-Time Employees who have exhausted their paid personal leave entitlement in accordance with clause 7.2.2, can take up to two (2) days of unpaid carer's leave for each occasion where they need to provide care or support for a member of their immediate family or household who needs that care or support due to their own personal illness or injury, or an unexpected emergency that affects them.
- 7.3.7. The Company may allow Full-Time Sessional Employees to go into paid personal leave debit where the Employee needs to take leave for a reason specified in clause 7.3.3.1 or 7.3.3.2, but has not yet accrued sufficient paid personal leave on a particular engagement.
- 7.3.8. Employees need to give the Company notice of their need to take personal leave as soon as practicable and must advise the Company of the expected period of the leave.
- 7.3.9. The Company may require an Employee to give the Company evidence that would satisfy a reasonable person that the leave is taken for a reason specified in clause 7.3.3.1 or 7.3.3.2 as applicable if the Employee has been absent for two days or more.

7.4. **Compassionate Leave**

7.4.1. Employees, other than casual Employees, are entitled to paid compassionate leave in accordance with the NES. Casual Employees are entitled to unpaid compassionate leave in accordance with the NES. The following subclauses summarise the entitlements under the NES.

7.4.2. Employees can take up to two (2) days compassionate leave when:

7.4.2.1. a member of their immediate family or household contracts or develops an illness or sustains an injury that poses a serious threat to their life or;

7.4.2.2. a member of their immediate family or household dies.

7.4.3. Employees need to give the Company notice of their need to take compassionate leave as soon as practicable and must advise the Company of the expected period of the leave.

7.4.4. The Company may require an Employee to give the Company evidence that would satisfy a reasonable person that the leave is taken for a reason specified in clause 7.4.2.1 or 7.4.2.2.

7.5. **Community Services Leave**

7.5.1. Employees are entitled to community services leave in accordance with the NES.

7.5.2. In summary, the NES provides that an Employee participating in an eligible community services activity may be absent from work during a period consisting of:

7.5.2.1. time when the Employee engages in the activity;

7.5.2.2. reasonable travelling time associated with the activity; and

7.5.2.3. reasonable rest time immediately following the activity.

provided that, unless the activity is jury service, the Employee's absence must be reasonable in the circumstances.

7.5.3. An eligible community service activity includes jury service and voluntary emergency management activity.

Jury Service

7.5.4. Employees, other than casual Employees, who attend jury service will be paid by the Company for up to twenty (20) days per jury service summons.

7.5.5. The amount paid will be the difference between the amount paid to the Employee (or that they are entitled to) as jury service pay, and the amount the Employee would have received from the Company for working ordinary hours during the period of absence.

7.5.6. The Company may require an Employee to provide evidence of the amount of jury service pay they received or were entitled to.

Voluntary Emergency Management Activity

7.5.7. Employees are entitled to unpaid leave to participate in an activity dealing with an emergency or natural disaster on a voluntary basis, such as activities with a rural fire brigade or State Emergency Service (SES).

7.6. **Parental Leave**

7.6.1. Employees are entitled to unpaid parental leave in accordance with the NES.

7.6.2. Employees returning from parental leave may request Part-Time employment or other measures that will assist them to manage their work and family responsibilities. The Company will consider and respond to such requests in accordance with the Company's flexible work policy. The Company may refuse a request only on reasonable business grounds

7.7. **Domestic and Family Violence**

7.7.1. The Company recognises that Employees may face domestic or family violence, being violent, threatening or other abusive behaviour by a family member that causes them harm or to be fearful.

7.7.2. Employees are entitled to 5 days' unpaid leave to deal with family and domestic violence, as follows:

7.7.2.1. the leave is available in full at the start of each 12 month period of the Employee's employment; and

7.7.2.2. the leave does not accumulate from year to year; and

7.7.2.3. the leave is available in full to Part-Time and Casual Employees.

7.7.3. An Employee may take unpaid leave to deal with family and domestic violence if the Employee:

7.7.3.1. is experiencing family and domestic violence; and

7.7.3.2. needs to do something to deal with the impact of the family and domestic violence and it is impractical for the employee to do that thing outside their ordinary hours of work.

7.7.4. The time an Employee is on unpaid leave to deal with family and domestic violence does not count as service but does not break the Employee's continuity of service.

7.7.5. An Employee must give the Company notice of the taking of leave under this clause as soon as practicable (which may be a time after the leave has started) and must advise the Company of the period, or expected period, of the leave.

7.7.6. An Employee who has given the Company notice of the taking of leave under this clause must, if required by the Company, give the Company evidence that would satisfy a reasonable person that the leave is taken for the purpose specified in clause 7.7.3.

7.7.7. The Company will take steps to ensure information concerning any notice an Employee has given, or evidence an Employee has provided under this clause is treated confidentially, as far as it is reasonably practicable to do so.

7.7.8. Nothing in this clause prevents the Company from disclosing information provided by an Employee if the disclosure is required by an Australian law or is necessary to protect the life, health or safety of the Employee or another person.

7.7.9. An Employee is not entitled to take leave under this clause unless the Employee complies with this clause.

7.7.10. Additional support may be available to Employees facing domestic or family violence is set out in the Company's Domestic and Family Violence policy (which is not incorporated into this Agreement) at the discretion of the Company.

7.7.11. The entitlements provided will be no less than those provided by the Award.

7.8. Long Service Leave

7.8.1. Employees will be entitled to long service leave in accordance with relevant legislation, being the Long Service Leave Act 2018 (Vic).

7.8.2. In summary, this legislation provides that:

7.8.2.1. The entitlement to long service leave is the total number of weeks of continuous service in employment divided by 60. For an Employee with 10 years' service, this is 8.67 weeks of long service leave.

7.8.3. Employees are entitled to access their long service leave on a pro-rata basis after 7 years' continuous service.

7.8.3.1. Subject to agreement as to the time of taking the leave Employees may take long service leave in periods of not less than 1 day.

7.8.3.2. Employees can request to take their long service leave on half pay, in which case they will receive long service leave for double the period of leave.

7.8.3.3. The time of taking long service leave will be by agreement provided that the Company will grant leave as requested by the Employee with reasonable notice to the Company unless there are reasonable business grounds for not doing so.

7.9. Study Leave

7.9.1. The Company will provide up to 4 days paid leave per annum to an Employee undertaking an approved course of study for the purpose of the Employee undertaking that course of study or preparing for or sitting exams.

7.9.2. The designated IEU workplace representative for the Company's Melbourne campus may utilise 1 day of study leave per annum to attend trade union training, subject to that representative making an application with reasonable notice to arrange relief teaching.

7.9.3. The IEU workplace representative may access 1 further day of study leave per annum to attend trade union training, subject to that representative making an application with reasonable notice to arrange relief teaching and the cost associated with any such relief teaching being reimbursed to the Company by the IEU.

8. Classifications and Salary Progression

8.1. Teachers will be paid according to the salary scale set out in Schedule A.

8.2. Based on an assessment of his/her qualifications an Employee will be classified in accordance with the following;

8.2.1. Category A

Degree and Diploma of Education or equivalent; and either:

- diploma in TESOL (e.g. Dip RSA, Grad Dip TESOL); or
- post-graduation diploma in applied linguistics, languages other than English (LOTE), multicultural education.

8.2.2. Category B

Degree and Diploma of Education or equivalent plus recognised TESOL certificate: or
Degree and Diploma including LOTE/TESOL method.

8.2.3. Category C

Any Degree/Diploma (three year minimum) plus recognised TESOL certificate or a
Degree/Diploma including LOTE/TESOL method.

8.2.4. Category D

Other qualifications not provided for above and/or expected to acquire minimum TESOL
qualifications.

8.3. The relevant pay levels for the above categories will be:

Category A – commences Level 4, maximum Level 12

Category B - commences Level 3, maximum Level 12

Category C - commences Level 2, maximum Level 12

Category D - commences Level 1, maximum Level 9

Provided that a Category D employee who achieves Level 9 may be promoted beyond that
Level where the employee can demonstrate that they are able to carry on the full duties of a
Category A, B, or C Teacher.

If an employer does not accept (fully or in part) the qualifications or experience of a teacher,
the employer will advise the teacher in writing what qualifications or experience are not
accepted or the extent to which they are not accepted.

Subject to the continuing satisfactory conduct, diligence and performance of a teacher and the
acquisition and utilisation of skills and knowledge through experience, progression from one
salary level to the next will occur on the completion of a year of full-time experience or
equivalent part-time experience.

Where the employer considers that the conduct, diligence or performance of a teacher is not
satisfactory or the teacher has not acquired and utilised increased skills and knowledge which
could reasonably be expected to be acquired and utilised and for that reason considers that
progress to the next salary level is not warranted, a formal review will be undertaken by the
employer prior to the date when the increment is due.

When a teacher achieves the further experience or qualifications which entitle the teacher to
an increase in salary the increase will be calculated on and from the first pay period after the
results of the course are announced or the experience is gained.

Experience

**8.4. Employees will be credited with teaching experience and allocated a classification Level by
counting each year's experience as a years' experience at Kaplan, in accordance with the
following:**

- full-time TESOL teaching to adults or secondary students in schools or equivalent in Australia to classes of not less than five students;
- other full-time teaching, including TESOL teaching overseas, teaching in other languages, credited at the rate of one year of experience for each two years of such teaching, to a maximum of three years;
- part-time experience will be recognised on a pro rata basis; and
- where the teacher has worked for less than a full year, they will be accredited with experience in the proportion that the weeks worked over the 12 month period bears to the number of weeks normally required of a full-time teacher at the same institution.

8.5. Experience as a casual teacher teaching TESOL to adults or secondary students will be credited on the basis of the number of hours taught compared to the number of days or hours normally required of a full-time teacher at the same institution. Provided that for every 110 days during which a casual teacher is engaged they will be deemed to have not less than six months' service.

8.6. On appointment, an Employee will be placed on a salary level commensurate with the minimum salary for his/her qualifications and experience by reference to 8.3.1 and 8.3.2 above.

8.7. Employees with a Masters level degree (or higher) in TESOL or a similar field, or with a DELTA qualification will be advanced in the classification structure by 1 level from the date they notify the Company of their attainment of such qualification and provide satisfactory evidence of such to the Company.

8.8. The Company may, at its discretion, consider the relevance of other Teaching experience or in educational institutions either in Australia or overseas, and of overseas qualifications, when determining the appropriate salary level for a new Teacher.

9. Other Provisions

9.1. Positions of Special Responsibility

Head Teacher

9.1.1. A Head Teacher is an Employee who acts as a deputy to the Director of Studies who has responsibility for the supervision and the administration of course programmes for at least 150 students at one location. A Head Teacher will be paid the following additional allowance from the first pay period commencing on or after the commencement date of this Agreement. Increases to the allowance will be from the first full pay period commencing on or after the date outlined in the table below:

	Current	1 July 2019	1 July 2020
Allowance (Fortnightly)	\$199.04	\$210.98	\$223.64

Senior Teacher

9.1.2. A Senior Teacher is an Employee who has responsibility for the supervision, co-ordination and administration of a course or programme as defined by the director or the principal. A Senior Teacher will be paid the following additional allowance from the first pay period commencing

on or after the commencement date of this Agreement. Increases to the allowance will be from the first full pay period commencing on or after the date outlined in the table below:

	Current	1 July 2019	1 July 2020
Allowance (Fortnightly)	\$102.01	\$108.13	\$114.62

9.2. Professional Development

- 9.2.1. The Company will arrange 15 hours of professional development per annum.
- 9.2.2. PD days will be scheduled within the normal working hours for permanent Full-Time, Part-Time and Sessional Employees and these Employees will be paid accordingly. Accordingly, permanent Full-Time Part-Time and Sessional Employees must attend these PD days.
- 9.2.3. Attendance at PD days by Casual Employees is optional as they are not entitled to payment for their attendance.

10. Allowances

10.1. First aid allowance

An employee who has been trained to render first aid and who is a current holder of appropriate first aid qualifications (such as a certificate from St John Ambulance or a similar body) will be paid an amount of \$25.14 per fortnight (pro rata for Part-Time Employees) if they are appointed in writing by the Company to perform first aid duty.

11. Disputes Settling Procedure, Consultation and Flexibility Term

11.1. Disputes Settling Procedure

- 11.1.1. Subject to the provisions of the Fair Work Act 2009 the following procedure will apply to the resolution of dispute about matters arising under this Agreement or the NES.
- 11.1.2. Employee(s) or the Company may be represented at any stage of this process.
- 11.1.3. The parties to a dispute must genuinely attempt to resolve the dispute at the workplace level. This may involve the affected Employee first discussing the matter in dispute with their supervisor, then with more senior management.
- 11.1.4. If the dispute cannot be resolved at the workplace level, either party may refer the dispute to the FWC.
- 11.1.5. The FWC will first attempt to resolve the dispute as it considers appropriate including by mediation, conciliation, expressing an opinion or making a recommendation.
- 11.1.6. If the FWC is unable to resolve the dispute at the first stage, the FWC may then arbitrate the dispute and make a determination that is binding on the parties.
- 11.1.7. The FWC can use the powers available to it under the FW Act when arbitrating the Dispute.

- 11.1.8. A decision of the FWC when arbitrating the Dispute is a decision for the purposes of Div 3 of Part 5.1 of the FW Act and so can be appealed.
- 11.1.9. An Employee that is party to a dispute must, while the dispute is being resolved:
- 11.1.9.1. continue to work in accordance with their contract of employment, unless the Employee has a reasonable concern about an imminent risk to their health or safety; and
 - 11.1.9.2. comply with any reasonable direction given by the Company to perform other available work, either at the same workplace or at another workplace.
- 11.1.10. In directing an Employee to perform other available work, the Company must have regard to:
- 11.1.10.1. the provisions (if any) of the law of the Commonwealth or of a State or Territory dealing with occupational health and safety that apply to that Employee or that other work; and
 - 11.1.10.2. whether that work is appropriate for the Employee to perform

11.2. Consultation

11.2.1. This clause will apply if the Company:

- 11.2.1.1. Makes a definite decision to introduce a major change to production, program, organisation, structure or technology in relation to its enterprise that is likely to have a significant effect on the Employees, not including a major change provided for in this Agreement; or
 - 11.2.1.2. Proposes to introduce a change to the regular roster or ordinary hours of work of Employees.
- 11.2.2. For a major change referred to in clause 11.2.1.1, the Company will notify in writing the Relevant Employees of the decision to introduce the major change and clauses 11.2.3 to 11.2.8 apply.
- 11.2.3. The Relevant Employees can appoint a representative for the purposes of the procedures in this clause. This may be the Union.
- 11.2.4. If Relevant Employee(s) appoint a representative and tell the Company the identity of the representative then the Company will recognise the representative.
- 11.2.5. As soon as practicable after making its decision the Company will discuss with the Relevant Employees the introduction of the change, the effect it is likely to have on the Company and measures the Company is taking to avert or mitigate the adverse effect of the change on the Employees.
- 11.2.6. For the purposes of the discussion in clause 11.2.5, the Company will provide the Relevant Employees with all relevant information about the change including the nature of the change proposed, information about the expected effects of the change on the Employees and any other matters likely to affect the Employees. This information will be provided in writing. The Company doesn't have to disclose confidential or commercially sensitive information.

- 11.2.7. The Company will give prompt and genuine consideration to any matters raised about the major change by the Relevant Employees or their representatives (if any).
- 11.2.8. For this clause, change is likely to have a significant effect on Employees if it results in the termination of employment of Employees, major change to the composition, operation or size of the Company's workforce or skills required of the Employees, elimination or decrease in job opportunities (including for promotion or tenure), alternation of hours of work, need for Employees to retrain or relocate to another workplace or restructuring of jobs.
- 11.2.9. For a change referred to in clause 11.2.1.2, the Company must notify the Relevant Employees of the proposed change and clauses 11.2.3, 11.2.4, 11.2.10 and 11.2.11 apply.
- 11.2.10. As soon as practicable after proposing to introduce the change, the Company will discuss it with the Relevant Employees and provide all relevant information about the change, including the nature of the change, and information about what the Company reasonably believes will be the effect of the change on the Employees and other matters that the Company reasonably believes are likely to affect the Employees and invite the Employees to give their views about the change (including any impact in relation to their family or caring responsibilities). The Company doesn't have to disclose confidential or commercially sensitive information.
- 11.2.11. The Company must give prompt and genuine consideration to matters raised about the change by the Relevant Employees.

11.2.12. **Staff Consultation Meetings**

General Consultation Meetings

- 11.2.13. The Company will continue to schedule staff consultation meetings on a monthly basis with the Principal and/or Director of Studies attending as representatives of the Company. From time to time, more senior managers of the Company may also attend.
- 11.2.14. During these meetings, Employees may raise matters of concern to Employees or provide ideas and advice to improve the Company's performance, teaching and student outcomes, both at the Melbourne Campus and generally.
- 11.2.15. The Company will also utilise these meetings to provide information to Employees about the Company and Melbourne Campus's operations, and any changes to those.
- 11.2.16. Matters raised by Employees at the staff consultation meetings will be considered by the College and change implemented to address those matters when considered by the College to be required and able to be accommodated in light of the College's operational requirements.

IEU Meetings

- 11.2.17. In addition to staff meetings senior Company representatives will meet IEU elected Employee representatives to consult regarding employment matters of concern to Employees covered by this Agreement.
- 11.2.18. Company representatives will also provide briefings on matters that may affect Employees and their work. These meetings will occur not less than every six months unless there are no agenda items provided by either party.

11.2.19. The company will provide an opportunity for the Kaplan Teacher IEU representative to speak to new teachers as part of their induction at times outside teaching times.

11.3. Flexibility

11.3.1. The Company and an Employee can agree to make an IFA to vary the terms of this Agreement in relation to:

11.3.1.1. arrangements about when work is performed;

11.3.1.2. allowances; and

11.3.1.3. superannuation salary sacrificing.

11.3.2. The arrangement must meet the genuine needs of the Company and the Employee in relation to one or more of the matters in cl.11.3.1.1.

11.3.3. The Company will ensure that the terms of the IFA are about permitted matters under s. 172 of the FW Act, are not unlawful under s.194 of the FW Act and result in the Employee being better off overall than they would have been if there was no IFA.

11.3.4. The Company will advise the employee of their right to be represented in any discussions regarding an IFA.

11.3.5. The Company will ensure that the IFA is in writing, includes the date on which it commences and the name of the Company and the Employee and is signed by the Company and the Employee (or if the Employee is under 18 years old, their parent or guardian).


11.3.6. The Company will ensure that the IFA includes details of the terms of this Agreement that will be varied by the IFA, how the IFA will vary them and how the Employee will be better off overall in relation to their terms and conditions of employment as a result of the IFA.

11.3.7. The Company will give the Employee a copy of the IFA within 14 days after its agreed.

11.3.8. The Company or the Employee can terminate the IFA at any time if they agree to do so or by giving no less than 28 days' notice in writing to the other party to the IFA.

12. Signatures

the Company

Signature: 

Full Name and Address of Person Signing: ROBERT WILLIAM KEGAN, 45 CLARENCE STREET, SYDNEY NSW 2000

Authority to Sign: MANAGING DIRECTOR


Independent Education Union Victoria Tasmania

Signature: 

Full Name and Address of Person Signing: DAVID BREGAR, 120 Clarendon St Southbank Victoria 3006

Authority to Sign: IEU Assistant Secretary (Bargaining Rep)

Independent Education Union Victoria Tasmania – Kaplan Sub Branch Representative

Signature: 

Full Name and Address of Person Signing: *Sadia Schneider 119a Donald st, Brunswick.*

Authority to Sign: *IEU sub branch representative.*

Schedule A – Salaries

Teachers - Full-time and Part-Time (Pro-rata)

	Current rate prior to this Agreement (Per Annum)	First pay period on or after 1 July 2019 (6% Increase)	First pay period on or after 1 July 2020 (6% Increase)
Level 1	\$49,117.19	\$52,064.22	\$55,188.07
Level 2	\$49,772.12	\$52,758.45	\$55,923.96
Level 3	\$50,756.16	\$53,801.53	\$57,029.62
Level 4	\$51,750.09	\$54,855.10	\$58,146.41
Level 5	\$53,843.27	\$57,073.87	\$60,498.30
Level 6	\$55,238.64	\$58,552.96	\$62,066.14
Level 7	\$56,509.11	\$59,899.66	\$63,493.64
Level 8	\$57,904.58	\$61,378.85	\$65,061.58
Level 9	\$59,306.60	\$62,865.00	\$66,636.90
Level 10	\$61,116.70	\$64,783.70	\$68,670.72
Level 11	\$62,801.81	\$66,569.92	\$70,564.12
Level 12	\$64,289.37	\$68,146.73	\$72,235.53

Teachers – Casual

	Current rate prior to this Agreement (Per Hour)	First pay period on or after 1 July 2019 (6% Increase)	First pay period on or after 1 July 2020 (6% Increase)
Level 1	\$47.05	\$49.87	\$52.86
Level 2	\$47.67	\$50.53	\$53.57
Level 3	\$48.62	\$51.53	\$54.63
Level 4	\$49.57	\$52.54	\$55.70
Level 5	\$51.57	\$54.67	\$57.95
Level 6	\$52.91	\$56.09	\$59.45
Level 7	\$54.13	\$57.38	\$60.82
Level 8	\$55.46	\$58.79	\$62.32
Level 9	\$56.81	\$60.22	\$63.83
Level 10	\$58.54	\$62.05	\$65.78
Level 11	\$60.15	\$63.76	\$67.59
Level 12	\$61.58	\$65.27	\$69.19

IN THE FAIR WORK COMMISSION

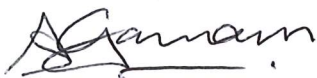
FWC Matter No.: AG2019/955

Applicant: Kaplan International (Melbourne and Adelaide) Pty Ltd

**APPLICATION FOR APPROVAL OF THE KAPLAN INTERNATIONAL ENGLISH MELBOURNE TEACHERS
ENTERPRISE AGREEMENT 2019**
Fair Work Act 2009—s.190

I, Andrew Garnam, Executive Director People & Culture, give the following undertakings with respect to the Kaplan International English Melbourne Teachers Enterprise Agreement 2019("the Agreement"):

1. I have the authority given to me by Kaplan International (Melbourne and Adelaide) Pty Ltd (**Kaplan**) to provide this undertaking in relation to this application before the Fair Work Commission.
2. The Agreement will be read and interpreted subject to the National Employment Standards (**NES**) and, where any term of the Agreement is inconsistent with the NES and provides a lesser entitlement than that provided by the NES, the NES will apply to the extent of that inconsistency.
3. The entitlement to unpaid carer's leave in cl.7.3.6 of the Agreement will also be provided to Part-Time employees.
4. Where a Part-Time Employee is provided with time off in lieu pursuant to cl.3.7 of the Agreement, the agreement to provide, and provision of, the time off in lieu will occur in accordance with the provisions of clauses 24.3(b) to (k) inclusive of the *Educational Services (Post-Secondary Education) Award 2010*.



Andrew Garnam

Executive Director People & Culture

6 May 2019

Schedule 2.2—Model flexibility term

(regulation 2.08)

Model flexibility term

- (1) An employer and employee covered by this enterprise agreement may agree to make an individual flexibility arrangement to vary the effect of terms of the agreement if:
 - (a) the agreement deals with 1 or more of the following matters:
 - (i) arrangements about when work is performed;
 - (ii) overtime rates;
 - (iii) penalty rates;
 - (iv) allowances;
 - (v) leave loading; and
 - (b) the arrangement meets the genuine needs of the employer and employee in relation to 1 or more of the matters mentioned in paragraph (a); and
 - (c) the arrangement is genuinely agreed to by the employer and employee.
- (2) The employer must ensure that the terms of the individual flexibility arrangement:
 - (a) are about permitted matters under section 172 of the *Fair Work Act 2009*; and
 - (b) are not unlawful terms under section 194 of the *Fair Work Act 2009*; and
 - (c) result in the employee being better off overall than the employee would be if no arrangement was made.
- (3) The employer must ensure that the individual flexibility arrangement:
 - (a) is in writing; and
 - (b) includes the name of the employer and employee; and
 - (c) is signed by the employer and employee and if the employee is under 18 years of age, signed by a parent or guardian of the employee; and
 - (d) includes details of:

- (i) the terms of the enterprise agreement that will be varied by the arrangement; and
 - (ii) how the arrangement will vary the effect of the terms; and
 - (iii) how the employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and
- (e) states the day on which the arrangement commences.
- (4) The employer must give the employee a copy of the individual flexibility arrangement within 14 days after it is agreed to.
- (5) The employer or employee may terminate the individual flexibility arrangement:
 - (a) by giving no more than 28 days written notice to the other party to the arrangement; or
 - (b) if the employer and employee agree in writing—at any time.