

National Employment Standards Exposure Draft

Submission by the Industrial Law
Committee of the Federal Litigation Section
of the Law Council of Australia

Workplace Relations Policy Group
Department of Education, Employment and Workplace
Relations

4 April 2008

Table of Contents

PRELIMINARY	3
GENERAL ISSUES	3
Role of Modern Awards.....	3
Role of Regulations	4
Enforceability of the National Standards	5
“Reasonable Business Grounds”	6
MANAGERIAL AND HIGH INCOME EMPLOYEES.....	7
ANNUAL LEAVE.....	8
COMMUNITY SERVICE LEAVE.....	11
LONG SERVICE LEAVE.....	12
NOTICE OF TERMINATION AND REDUNDANCY PAY	14

PRELIMINARY

1. The Industrial Law Committee welcomes the opportunity to comment on the National Employment Standards (the NES). We note that the NES are expected to operate as minimum standards which, in conjunction with awards, will constitute a fair minimum safety net for employees. The submission deals with general issues as well as selected specific questions in the Discussion Paper.

GENERAL ISSUES

2. We note the invitation to comment on any aspect of the NES, in addition to the specific questions listed in the Exposure Draft¹. We nominate below some issues which may need to be considered.

Role of Modern Awards

3. Meaningful assessment of the National Standards is complicated at this stage by the fact that 'modern awards', which have yet to be made, will provide important infrastructure for operation of the National Standards. The extent to which a modern award may affect the operation of a National Standard, will have a direct bearing on the extent to which a National Standard, as presently drafted, may be said to achieve its purpose. Until more is known about the precise way in which modern awards may alter the operation of the National Standards, it is not possible to reach final conclusions about the effect of the National Standards.
4. For example :
 - a. the National Standard relating to maximum weekly hours cannot be completely assessed, as averaging of hours will be dealt with under modern awards² ;

¹ Exposure Draft p 12

² Proposed s 9(1) National Employment Standards

-
- b. the National Standards relating to parental leave, annual leave, carers' leave and community service leave cannot be completely assessed as the fixing of ordinary hours of work (which is relevant for the definition of base rate of pay), will be dealt with under modern awards³ ;
 - c. the National Standard relating to annual leave may be altered in significant respects by modern awards in relation to a number of matters including cashing out paid annual leave, allowing an employee to be required to take annual leave⁴, establishing the meaning of 'shiftworker'⁵, and the interaction of annual leave with other industrial instruments and contracts of employment⁶. Modern awards may also contain provisions "otherwise dealing" with the taking of paid annual leave⁷.
 - d. the National Standard relating to public holidays may be affected by whether or not penalty rates or other compensation are payable under a modern award for working on a public holiday
5. As the number of 'modern award' variables increases, it will be more difficult for interested parties to discern what the minimum standards are and whether they are being observed.

Role of Regulations

6. The intention seems to be that National Standards cannot be excluded or modified in a way that undermines the safety net and that they will be "guaranteed in legislation"⁸. However, we also note that regulations may prescribe how modern awards can do things "which would otherwise be contrary" to the National Standards⁹. This would seem to open the door for regulations to modify aspects of the National Standards. The result might still

³ Proposed s 4 National Employment Standards

⁴ Proposed s 30 National Employment Standards, Exposure Draft Discussion paper par 162

⁵ Proposed s 26(1)(b) National Employment Standards

⁶ Exposure Draft Discussion paper par 152

⁷ Proposed s 30 National Employment Standards

⁸ Exposure Draft Discussion Paper par 4

⁹ Proposed s 8 National Employment Standards

legitimately be said to be ‘guaranteed in legislation’, albeit that the legislation in this case might also be an agent for modification of protection.

7. Given the potential for modification of the Standards via regulation and the relative ease with which regulations may be made (in comparison with amendment to the Act itself), consideration might be given to whether parties might be left in doubt about the extent to which the National Standards represent a reliable indicator of guaranteed workplace minima.

Enforceability of the National Standards

8. The utility of the National Standards will ultimately depend not only on their content but also their enforceability. We note that it is proposed to deal with the issue of a compliance regime later, when substantive reforms to the legislation are made and Fair Work Australia is established¹⁰.
9. In the meantime, we query the accuracy of describing all the National Standards as “enforceable entitlements”. For example, in the case of flexible work, the National Standard is described as a process for “encouraging discussion” rather than generating an enforceable entitlement. Nor will Fair Work Australia be able to impose the requested flexible working arrangements on an employer¹¹. Similarly, in the case of parental leave, third party involvement or review under the National Standards will not be available for assessment of whether a business has reasonable business grounds, for refusing a request for additional leave¹².
10. In these cases, the National Standard is more akin to a guideline than a guarantee and should perhaps be described as such, lest it lead to confusion among users of the system.
11. If it is intended that the National Standards are to be enforceable, it would be better if the compliance regime for them was introduced at the same time. This is particularly the case given that the AIRC has been requested to make modern awards that can refer to, but not usually include, matters covered by the Standards: see the Request under section 576C(1) – Award Modernisation

¹⁰ Exposure Draft Discussion Paper par 35

¹¹ Exposure Draft Discussion Paper par 73

¹² Exposure Draft Discussion Paper par 101

made by the Minister on 28 March 2008 at paragraph 27. Such modern awards are anticipated to be made in the second half of 2008 and during 2009. Given the terms of the Request, it is likely that modern awards will not contain provisions that deal with matters contained within the National Standards. Accordingly, if the National Standards are not made enforceable from the outset then there is a risk that until the National Standards are made enforceable employees covered by modern awards will lose an existing enforceable right to those matters.

“Reasonable Business Grounds”

12. The phrase “reasonable business grounds” is used in two contexts in the National Standards. First, where an employee requests flexible working arrangements, the employer may refuse the request on “reasonable business grounds”. Secondly, in the context of parental leave, where an employee requests a second period of 12 months unpaid leave, the request may be refused on “reasonable business grounds”¹³. As already noted, such a refusal will not be the subject of third party involvement or review¹⁴.
13. We note further that this phrase is deliberately left undefined, though Fair Work Australia may provide general information and assistance “to employers” as to what may constitute reasonable business grounds¹⁵.
14. We foresee some difficulties in using the same term in two very different contexts. What might be reasonable in the case of a request for flexible working arrangements, over what might be a relatively short period, is likely to be quite different from what might be reasonable in the case of a request for a further 12 months unpaid leave. It may be that Fair Work Australia will need to devise two different sets of criteria or considerations depending on the nature of the matter at hand. From a drafting perspective, we consider it potentially confusing to use one term to describe two competing sets of criteria. It will also be important to distinguish “reasonable business grounds” from “operational reasons”, if the latter expression (which has itself generated considerable debate) is to be retained in the termination of employment context.

¹³ Proposed s 16 (3) National Employment Standards

¹⁴ Par 7 above

¹⁵ Exposure Draft Discussion Paper par 71, 72 (in the case of flexible hours), 120, 121 (in the case of parental leave)

15. It is also unclear why the Exposure Draft envisages that Fair Work Australia would provide guidance only to employers on this issue¹⁶, rather than to other interested participants such as employees and registered organisations. In the case of employees, even if the Fair Work Information Statement contained relevant information, it is only new employees who will receive the Statement¹⁷, with the result that a substantial part of the workforce would be left without information.

MANAGERIAL AND HIGH INCOME EMPLOYEES

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

16. The general approach taken in the draft Standard is to lay down a basic rule and then allow some provisions about how the rule will apply to be contained in modern awards. This will leave out of consideration the possible need for modified provisions in the case of employees, of whom there are many, not covered by modern awards. In particular, these will be employees in traditional managerial or professional pursuits and many other employees, simply because they are able to earn above a relatively modest maximum income level (presently intended to be \$100,000¹⁸).

17. Most of these employees will not be engaged under any form of workplace agreement. They will be engaged under a contract of employment and be required to comply with general legislative provisions. We suggest that consideration be given to permitting some element of modification of how the Standards apply in the case of these employees. Such a facility would not be intended to dilute the Standards but rather to allow practical application of them depending on circumstances. For example, this may be desirable in the case of high income employees who work long but fluctuating hours for which they are well rewarded and which have an essentially voluntary nature. An averaging approach to maximum hours, at least, might usefully be made available.

¹⁶ Exposure Draft Discussion Paper pars 72,121

¹⁷ Exposure Draft Discussion Paper par 300

¹⁸ Explanatory Memorandum to the Workplace Relations Amendment (Forward with Fairness) Act 2008

-
18. An approach which might be considered is for guidelines to be issued by the Minister from time to time, in the way they are in areas such as tax or superannuation, so that an employer and employee will be more confident that a particular means of satisfying the Standard, which makes sense in their circumstances, will meet the statutory requirements. This would require continuing consultation with affected interests.

ANNUAL LEAVE

The concept of ordinary hours of work

Question 17: Are there any issues with this approach to "ordinary hours of work" for particular kinds of working arrangements?

19. The term "ordinary hours of work" is being used in this instance as a reference point for the progressive accrual of annual leave. Its use for this purpose will inevitably cause difficulties. The difficulties come about, however, more from issues associated with varying work patterns and progressive accrual than from any inherent problem in the notion of ordinary hours.
20. "Ordinary hours of work" is a useful and probably necessary concept but it covers a very wide range of circumstances. Some employees work in accordance with standard rostered or other hours which are demonstrably ordinary in the sense that they are fixed and any additional hours will attract an overtime payment. Other employees work broadly predictable hours but with fluctuations which do not directly affect salary. For example, generally speaking, this would be the case with employees in a professional services firm such as a solicitors' or accountancy firm. Still other employees work rostered hours which exceed "ordinary" hours in one sense, but are normal for the employees and contain explicit compensation for a rostered overtime element. Yet others will work in a way which reflects seasons or peaks and troughs in workload so that during one period the hours are light and at another the hours are heavy, but they broadly average out at a reasonable or "ordinary" level. An example of this last group might be seasonal employees or farmhands.
21. When these notions come to be applied to progressive accrual of annual leave there can be complications. Under the Australian Fair Pay and Conditions Standard, this was sought to be resolved by a default setting of 38 hours per

week as the "nominal hours". A similar approach could be taken here (See further our comment below in answer to Question 20 about the progressive accrual of annual leave.)

Question 18: If so how should these issues be addressed?

22. (See the answer to Question 17.)

The progressive accrual of annual leave

Question 20: Are there any issues which may arise from this approach (progressive accrual of annual leave)?

23. Annual leave has been understood, historically, as a benefit which arises upon the expiry of 12 months' service. Federal awards have always approached it this way. Until recently, the same was the case with annual leave legislation in the various states.

24. In more recent years, perhaps driven by computerised payroll systems, there has been a movement towards progressive accrual. Schedule 1A of the Workplace Relations Act 1996 (introduced when the Victorian Parliament referred powers to the Commonwealth), and in the Australian Fair Pay and Conditions Standard, have utilised a progressive accrual notion.

25. In some cases, there is an advantage from an employee's and an employer's perspective in progressive accrual. But the change appears to have occurred without any real deliberation about the policy considerations behind the grant of annual leave. These are to do with recreation and general social wellbeing. Now that there are other categories of leave available to an employee to deal with occasional personal issues which might arise and for which a day or two of leave at a time makes sense – eg, under the heading of personal leave or community service leave – it may be appropriate for there to be greater reflection upon the question of whether the foreshadowed technical approach to the accrual of leave via progressive accrual will best serve the policy which the Parliament has in mind for annual leave.

26. Approaching annual leave as a substantial body of leave to be taken after a lengthy period of work, typically 12 months, consistently with the more traditional approach, may, in some cases, serve those policy purposes better.

-
27. Additionally, an annual accrual regime may in some cases have some practical advantages in matching the way in which many industries work in practice. Many employees work under arrangements where leave is rostered well in advance or, in any event, predictable because of either work considerations (eg, in an oil refinery, in an airline or railway service, or on a farm) or because of association with school holidays or other private matters.
28. Generally speaking, there needs to be an accommodation between the employer and the employee as to the taking of leave, taking into account the legitimate operational requirements of the business and the employee's legitimate desires. Progressive accrual with a right to take leave at any time, subject to the employer having an effective right of veto where it would not suit operational circumstances, is not very well designed to approach these issues in some cases. The traditional approach would have been for the leave to accrue after 12 months, and then be required to be taken within a set period or an extended period where circumstances warrant. At the same time, a facility would have been available for taking leave in advance where an employee requests it and the employer agrees. We suggest that some consideration be given to balancing the factors raised above, when finalising the relevant Standard.
29. It may be that modern awards could, at least in part, deal with the point on an industry by industry basis.
30. We also stress that it is not intended, in this submission, to argue for a standard below the AFPCS or to affect any rights to payment, on termination, of accrued annual leave.

Question 23: What types of additional rules, if any, might be appropriate for inclusion in the proposed annual leave NES to address those issues?

31. Depending on the attitude taken in connection with the policy considerations referred to in answer to Question 20 it may be necessary to consider regulation in the area of:
- an employer having a capacity to direct that leave be taken upon reasonable notice;

-
- a requirement upon both the employer and the employee that leave be taken within a certain period (eg, six or 12 months) of it falling due other than in particular circumstances;
 - a capacity to require that leave be taken in accordance with a roster;
 - rules around leave being taken in advance and pre-payments in that regard being set-off against other termination payments due in the event of an employee leaving the employment before the right to leave taken has fully accrued. (We note that these were matters routinely dealt with in state annual leave legislation and federal awards.)

32. Finally, we note that these matters are not ones which can be adequately dealt with solely through modern awards, although that may present part of an answer. A vast number of employees will be in employment not covered by modern awards, but where the same issues are faced. A legislative approach is desirable.

COMMUNITY SERVICE LEAVE

General issues

Question 33: What other issues should be taken into consideration before finalising the community service leave NES?

33. We wish to support the proposed provision in relation to leave for jury service.

34. We wish generally to make the same comment in relation to voluntary emergency management activity subject to one matter. The matter we raise is that we think a distinction might usefully be made between genuine emergencies which effectively compel an employee to respond – eg, a bushfire or flood in the employee's community or affecting the employee's family – and another type of activity which might have a volunteer element to it – eg, attending in a St John's Ambulance capacity at a local sporting or cultural event. It seems appropriate that an employee have a simple right to the leave in the genuine emergency circumstance. In the more voluntary circumstance, giving the employee a right to attend may cut across other legitimate considerations

and lead to disputes. It seems desirable that some criterion be established for the resolution of some disputes – eg, legitimate business reasons or operational concerns.

LONG SERVICE LEAVE

General issues

Question 36: What other matters should be taken into consideration before proposed long service leave NES is finalised?

Standardisation

35. Long service leave legislation has a long history in federal awards and state legislation. It is highly desirable that the opportunity now be taken for it to be standardised as far as reasonably practicable.
36. Any standardisation of long service leave would need to take into account those industries where there has been a long-standing entitlement to a different (higher) level of long service leave and legitimate expectations or entitlements may have developed. Particular care with transition will be needed.
37. When this is done, it is also desirable that account be taken of the international dimension which attends the employment of many in the workforce nowadays. None of the state legislation deals well with this and there is not much up to date guidance about it in decided cases.
38. The issues are along these lines:
- Should an employee of a company or a related company, who has substantial service, who is recruited and has substantial service outside Australia, but then transfers to Australia and completes substantial service here, be entitled to long service leave by reference to the entire period of service (including the initial service when no accrual requirement would have been in contemplation) or only the Australian service?
 - What should be the rule if the reverse situation applies, where the employment starts in Australia but ends overseas?

-
- What should be the rule if, as would often be the case with overseas executives, the annual leave entitlement exceeds Australian standards but there is no comparable provision for long service leave? Should there be some set-off between the two?

39. The Law Council has no policy position to advance on these issues but it considers that it is highly desirable for the Government to give them thought. When a long service leave Standard is then produced it will have a reasonable prospect of reflecting the full range of modern employment circumstances rather than be mired, as is the current state legislation, in 1950s thought about typical employment patterns.

Drafting

40. The drafting of proposed s 46 of the Standards is confusing. As presently drafted, it would seem that any employee to whom a workplace agreement or a post-reform AWA applies (whether or not it contains a long service leave provision), will be disentitled from access to applicable award derived long service leave entitlements. It may be that the qualifying words “and deals with long service leave (even if it provides that the employee is not entitled to long service leave)” in proposed s 46(1)(b) are intended to apply to both proposed s 46(1)(a) and (b).

41. Further, we note that the long service leave entitlements for employees covered by proposed s 46 are to be the applicable award derived long service leave provisions which applied “immediately before the commencement of the National Standards”. As currently expressed, we query whether this will have the effect of “freezing” entitlements at this point, so that any amendments to those provisions will not apply. This may have an unfair effect over time, especially if improvements occur to those provisions, bearing in mind that state and territory long service leave legislation would be comprehended in the definition.

NOTICE OF TERMINATION AND REDUNDANCY PAY

Question 45: Are there any other matters that should be taken into consideration when finalising the notice of termination and redundancy pay NES?

42. With the introduction of an across the board minimum redundancy pay Standard, it will be desirable for a Standard to deal with the issue of payments on termination which exceed the aggregate of the NES payment in lieu of notice and NES redundancy pay. For example where, in a redundancy, a contract of employment entitles an employee to a termination payment (however described) which is more generous than the aggregate of the NES payment in lieu of notice and NES redundancy payment, consideration should be given to whether further payment under the NES is also warranted. It is desirable that this be clarified.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.