National employment standards comment

Peter Egan 8E/1 Francis Rd, Artarmon 2064 ph +61 4 1450 9700 peteregan2001@hotmail.com

1. Language

There are a number of instances of language that is not that normally used for legislation. This creates difficulty in understanding the intent of some clauses of the NES. A second exposure draft would be useful once comment have been considered. Negative expressions should not be used where a positive expression is available.

The commentary at the front of the NES says things that appear to disagree with the draft NES. A number of my comments immediately below are addressed to items in the commentary rather than the text of the draft NES. I assume it is the intent of the commentary writers to modify the draft NES to reflect the commentary.

2. Application

It is a major error that the NES will not be compulsory for employees who are managers, company directors or covered by a 'modern award'. All elements of the NES should apply to all employees. The NES should be deemed to be an unmodifiable part of every employment agreement where work substantially takes place under the jurisdiction of Australia. Thus they should apply to a worker employed in Australian while the worker is travelling out of Australia, but they should not apply to workers employed under another jurisdiction, but visiting Australia for work.

No reference was made to applicability of the NES to employees of the Commonwealth, the States, members of parliament, ministers and other employees for whom separate acts of our various parliament has been made. What is the intent for these employees?

It is appropriate that 'modern' awards provide for particular means of NES implementation and to make additions to NES, but no award should modify the NES. The NES should be deemed to apply to all existing awards and employment agreements immediately the NES become law.

The NES laws should not provide for the NES to be changed by regulation, nor should they permit special treatment for any group. The NES will be central to the economy. There effectiveness is in being the same for all employees. If they need modification, Parliament meets often enough to consider changes in a timely manner.

Exceptions to NES application are not desirable in Australia due to:

(a) A major social trend of the last hundred years has been doing away with class divisions and exceptions to NES application will encourage social division.

(b) Considering less than a quarter of all employees are members of a union, it is likely the appropriate award is not easily determined for a majority of workers. There are several reasons for this:

(i) Award application has still not been determined for many traditional occupations as the process can be expensive. For example, until recently I worked for a high profile organisation with a tradition of a portion of the workforce being members of a union. Both the company and the union shied away from taking the matter of award coverage to court due to cost, possible long-term cost increases to the company and the tradition of individual employment disputes being favourably settled for the employee when the union was involved.

(ii) The nature of work is changing. Awards are based around unique skill sets and work environments. Workers increasingly require a more general skill set with a focus on entrepreneurial activity on behalf of the organisation. The proportion of a worker's skill set that is particular to an occupation has narrowed. However, the variety of particular skill sets has increased dramatically. It has become impractical to define awards for each new or even existing occupation.

(iii) Organisations have discovered a never-ending stream of productivity gains by increasing entrepreneurial and therefore managerial roles. It affects all sectors of the community. A key piece of evidence for this is the mushrooming of subcontracting businesses and the huge increase in the variety of businesses providing specialised services since the mid 20th Century. The trend is even evident in the not-for-profit sector and government.

Thus the decline of union membership since the mid 20th century has had little to do with government action or inaction. The trend is supported by our education system that continues to better equip its students for the more entrepreneurial workplace of the future.

Its better if there is a stand-alone set of NES that apply to all employees including managers, chief executives and company directors. Non-executive directors are in effect part-time employees. The only difference between directors and other employees is that the shareholders can set directors fees at zero dollars. Directors, as per MPs and Ministers are entitled to NES benefits such as annual leave, parental leave, etc. The NES should not be seen as over riding any responsibilities of company directors and professionals like doctors and lawyers, armed forces, police and safety officers.

Therefore, it is essential that the NES are stand-alone and apply to all employees irrespective of the type of employment. Modern awards should be regarded as icing on a cake.

The more black and white the application of NES and the broader their application to all types of employment, the more productivity enhancing the NES will be. The NES would become the level playing field of the workplace.

Job specific awards are increasingly less relevant. Unions need to shift focus to services tailored to individuals rather than groups of workers.

Employer organisations should shift focus as well. Most workplace difficulties arise from poor management practices. Most managers have to learn people management on the job. The fact that workplace matters were a significant election issue says too many people have experienced poor management in the workplace. Work Choices and Labor's laws and legislative proposals do nothing to address workplace management education.

Distinguishing between employment and service contracts

The NES need to distinguish between employment and service contracts. At present there is much grey area as to whether a contract is a contract of employment or a contract for provision of services. It is possible for a matter in dispute to be won in both industrial and commercial courts on the same set of facts. It is common practice for matters to be commenced in both courts to drive up an opponent's costs and risks and thereby receive a higher settlement of commercial matters.

There should be simple clear-cut tests of an employment relationship. This test could be responsibility for workers compensation insurance. Both employment and service contracts could be required to state who has this responsibility. The legislation could provide a default of the contract being an employment contract where responsibility for workers compensation is not stated.

Requests

The NES use requests to deal with many situations. Requests are not an appropriate thing to be the subject of workplace law as they are used in a huge variety of circumstances is all aspects of life with greater and lesser degrees of intent. Legislating that work processes commence with requests (such as for leave) reinforces an 'us and them' mentality in a workplace. In practice, formal applications/requests are more a last resort way of doing things in the Australian tradition.

Workplace matters should be dealt with on the basis that employer and employee collaborate to get work done. Thus, for all workplace matters (leave for example), the requirement should be for the employee and employer to first discuss the matter and reach a mutually acceptable outcome that is then documented. Only if a mutually acceptable outcome does not result in an appropriate time frame should a more formal process be instigated. The more formal process should then be that both employee and employer formally advise each other of the action they intend taking so they know where the other stands and can seek advice from other people (managers, colleagues, unions, friends, employer organisations, as appropriate). Hopefully, this leads to resolution. If at the end of this process an employee takes an action (e.g., going on leave) that the employer disagrees with, and the employer takes disciplinary measures (dock pay, terminate employment, etc), the employer will need to be able to demonstrate that its measures were reasonable to the circumstances. (Fair Work Australia would no doubt issue guidelines for typical workplace disputes).

In a number of instances, the NES give a timetable to the request process for particular matters (e.g., three weeks notice for certain types of leave). For the process suggested above, a set period, such as a week, should be allowed for agreement to be reached by discussion, or a further period mutually agreed between the parties. If the employee does not get a satisfactory outcome within the week, or the further period, the employee should formally advise (e.g., email/give a written note) their intended action (e.g., taking leave) to the employer. The employer than has two weeks to formally respond. Hopefully, agreement will be reached during this period.

If the employer does not respond to the employee's advice or even refuses to discuss the matter in the first place, the employee should be assumed to be proceeding in accordance with the advice they gave and any action by the employer will need to pass a much tougher test of reasonableness.

Unpaid parental leave

The NES appear to have been drafted with the traditional nuclear family in mind. The issues of gay and lesbian parents will be dealt with in other legislation at another time. On the present approach additional legislation will need to written to cover the following instances where a child under two years is involved:

(a) children where more than one man and one woman have contributed to the child's DNA,

(b) foster parents,

(c) children who are being cared for long term by aunts, uncles, grandparents, close friends of the parents. Some of these responsibilities arrive suddenly due to death or injury,

(d) newly separated/deforced/de facto parents who suddenly find themselves with a long-term part-time parental role,

(e) a birth mother who is not a biological parent,

(f) the circumstances and many Aboriginal and Torres Strait Islander communities,

Parents by adoption are a small proportion of non-biological parents. For some reason, the NES give much attention to them to the exclusion of the above categories.

Any family law expert will tell you the focus should be on the interests of the child.

The legislation should provide for a child under two years to be assumed have two long-term primary care givers at any particular moment in time. The legislation should allow for a third person to be a long-term part-time primary care giver – as is the situation with many separated/divorced people. This approach covers every parental role imaginable and won't require additional legislation to go into the miasmas of DNA contributors, birth mothers who are not DNA contributors, foster parents, parents by adoption, separated/divorced/de facto parent, and any of the former with a regular part-time parental role.

As per the draft NES, only one of the two long-term primary care givers should be permitted to take parental leave at any one time and then only for a single period of leave. DNA contributing and non-DNA contributing birth mothers should both be permitted to begin parental leave six weeks before the expected date of birth. A birth mother giving up a child or a birth mother whose child dies while she is on parental leave should be considered to be continuing in that role until six weeks after the event. Thus upto a six week overlap of parental leave may occur where a birth mother has given a child to others to raise. As per the NES, a second non-birth mother primary care giver should be able to take overlapping parental leave during the first three weeks after the birth of the child, or until the child leaves hospital.

Three weeks of joint parental leave should be permitted to the two long-term primary care givers of a child under eighteen years who dies. This is bereavement related to parental duties and is much more significant than attending the funeral of other relatives.

Where the employer directs it be provided, the employee shall provide evidence of the parental role reasonable to the circumstances. (Fair Work Australia can produce a guide on evidence reasonable to the various circumstances.)

Long Service Leave

Long service leave is increasingly unattainable as job mobility increases due to both a rapidly changing environment for government and non-government organisations and people changing employers to enhance their work opportunities and life experience. LSL is increasingly a gift from employee to employer as the opportunities to qualify for LSL decline even though the employer has made provision for it.

LSL should not be apart of the NES but an option that can be added to an employment agreement – award-based or not.

Paid maternity leave

While nice in theory, it will in the main be a gift from women aged upto about 45 years to their employer. On average, a women will qualify to collect paid maternity 1.8 times in their lives, yet employers will allow for it in their costs for all female employees under 45 or so. Generally, it will rarely be paid out and so will be a winfall gain for most employers most years. It will also provide an incentive to pay men higher wages as the cost will not be applicable to them. It will certainly be a gift bargaining chip to males in wage negotiations.

The wider community has a greater interest in paid maternity leave than individual enterprises. Thus the best way to pay maternity leave is for the representative of the wider community to pay it – i.e., governments should pay maternity leave if they believe women should receive it.

It is notable that the approach to parental leave is even handed for both males and females except for the practical issues associated with the birth of the child. It is also notable that paid parental leave has not been suggested. It too would be both a gift to employers most years and an informal bargaining chip for males who have less need of it.

Part-time, piece work, commission work,

The NES do not adequately address part-time, piece work and commission work as it was intended to leave it modern awards. Modern awards will miss too many people and thus conditions specific to these work arrangements need to be covered in the NES.

Company/partnership director duties

The NES should also apply to work as a company director. Director's duties and the NES are compatible.

Clause 1 Definitions

Delete **'continuous service'** and replace with 'continuous employment'.

'Service' is a term more applicable to government, community service and not-for-profit organisations. Too often service is seen as serving the boss and not employment.

'Service' is primarily used in the NES in the context of distinguishing periods of time since commencement of employment that do not count towards paid benefits like annual leave. **'Excepted periods'** are all unpaid periods except for workers compensation which is not paid by the employer but an insurer. The NES would be clearer if 'time since commencement of employment less periods of unpaid leave and workers compensation' was not shortened by the use of 'excepted periods'.

The origin of 'service' goes back to the master-servant relationships of former centuries. Not something to be continued in the 21st Century. 'Service' also has relevance in our relationship with her Majesty Queen Elizabeth II, a relationship many Australians would prefer did not exist.

'De facto spouse' is defined. It will not be necessary if the above approach to parental leave is adopted.

'Employee couple' is only relevant to parental leave and should be deleted in favour of the above approach.

'Immediate family' – I'm not sure where this term is used, but it is a concern that it needed definition.

'Penalty rates' – This term should be replaced with 'Incentive rates'. Nothing about work should be described as a penalty unless its for a criminal offence. Extra pay due to the length of work hours of the time of day or day on which they are worked should not be regard a penalty to employee or employer.

Clause 9 (6) – The NES should include default **averaging of hours** rules for use by the majority of the workforce who won't be working under modern awards.

Clause 11 (2) is a de facto definition of '**casual employee'**. It should be in definitions.

Clause 21 'transfer to a safe job' during pregnancy does not consider high paid people with unique skills such as professional sportswomen. Requiring pay for a high paid sportsperson (the first $1 Million netball contract has been signed) could break a club and deny other players the opportunity to play due to salary caps.

Clause 26 (1) (b) additional leave for **shift workers**. The hundreds of thousands of shift workers who won't be subject to a modern award should also be entitled to five weeks annual leave.

Clause 39 and 40. As drafted **paid compassionate leave** can amount to months in a year and should not be paid except as part of personal carers leave.

Clause 42 (2) permits the Minister to make a regulation that any service remotely related to a **community service** is a community service. Community service is a very wide term. It includes politics, union activities, education, superannuation, government, etc. The Parliament should actively consider new activities proposed for community service to ensure the integrity of community service leave which many employers pay as normal hours.

Clause 47 C) permits a regulation to override a state or territory public holiday. The phrase permitting should be deleted.

Clause 48 Working on public holidays Many retail employees are regularly rostered on for weekends and public holidays. The leave request process should follow that suggested under the heading 'Requests' above.

Clause 49 If **working on a public holiday** is a normal working arrangement, an unexplained absence should be treated as annual leave if due, rather than a public holiday.

Clause 50 See above comment on **continuous service**.

Clause 51 (1) Language is tortured. Use '**former**' in preference to 'old'. 'Old' has age implications that are confusing here. I think this clause is trying to say the employee's period of continuous employment, less periods of unpaid leave, transfer with the transmitted business.

Clause 52 See comment on continuous employment. The table itself should be revamped as many people wont be eligible LSL and redundancy should be independent of LSL. The **redundancy** requirement should be 4 weeks for at least one complete year and then an additional 1.5 weeks for each additional complete year of service up to a maximum of 16 weeks.

Clause 54 (b) (ii) delete 'immediately before termination'. An employer with 15 employees could give notice to 5 employees on the one day with one finishing a week before the others. If the clause remained as it is, the 4 departing a week later would not be eligible for the payment.

Clause 55 (i) This is too convoluted. If a business transfers ownership, an employee's period of employment less unpaid periods transfers also.

Clause 55 (ii) (a) Change 'old' to 'former'. (ii) (b) is too convoluted. The employee's entitlements shall transfer.

Clause 56 (i) (b) delete – specify elsewhere that a **period of probation** cannot exceed one year.

Clause 56 (i) (f) delete – should apply to trainees. **Seasonal employees** are not referred to elsewhere. A seasonal employee could be defined as a casual employee.

Clause 56 (i) (g) delete – there should be no exceptions

Clause 56 (3) delete – any exceptions should be in legislation

Clause 56 (4) delete – a poor reason to discriminate, and an unnecessary opportunity for ministerial patronage.

Clause 57 (2) (b) add 'the other forms of permitted workplace agreements' A majority of employees won't be covered by modern awards and they should informed of alternative forms of agreements.

Clause 57 (3) Change '**other matters'** to 'additional matters' as it better reflects the intent. This clause also needs to be changed so that it will not permit a regulator to change the intent of Clause 57 (2).

Add a **clause 59** to the effect that the employer must give to the employee a **copy of the relevant modern award, agreement or contract** applicable to the employment. It will be acceptable to have documents common to many employees on website/data base if the relevant employees have access to the documents.

Commentary section of NES

Point 7 – There needs to be a regulated minimum wage outside of awards as awards won't apply to all employees.

Point 17 – Says application of the NES will be determined outside the NES. This contradicts Point 3 of the commentary. The NES need to apply whole to all employees without amendment as suggested in my early comments.

Point 19 – The NES need to contain their application rules.

Point 21 – Point 17 contradicts this.

Point 28 – A default averaging of hours formula needs to be included in the NES for the many people who will not be covered by a modern award.

Point 30 – Additional leave entitlements for whole industries is excessive. Additional leave entitlements should apply to specified occupations in an industry.

Point 31 – Default cashing out of leave entitlements need to be included in the NES. There will be many people working week on/week off or two weeks on/two weeks off and not an award in sight. Many will find 6 or 10 weeks leave a huge waste of their time considering they only work only 20 to 26 weeks year. People working this type of hours should be entitled in the NES to cash out 2 weeks annual leave. Seasonal and part-time workers should also be able to cash out two weeks leave.

Point 32 – totally contradicts many of the earlier points – perhaps this is just poor choice of language.

Point 35 – The compliance regime will need to be in place before the NES become law.

Point 36 – This is a 1950s view of work roles. See my early comments. The 3 categories mentioned in Point 36 are just the tip of the iceberg. The nature of work is changing so fast that an award system will struggle to be applied to more than 50 % of workers. Chasing award coverage of all employees, excluding the 3 categories mentioned, will still be like chasing an ever receding horizon. The emphasis should be on providing awards for employees keen to have them. The remaining employees in the community should be permitted to rely on the NES.

Point 38 – These defaults need to be in the NES.

The NES will not prevent company directors, government ministers, members of parliament, doctors, lawyers, safety officers, etc, from fully complying with their professional responsibilities.

Point 48 – This needs to consider professional and safety responsibilities in determining reasonableness.