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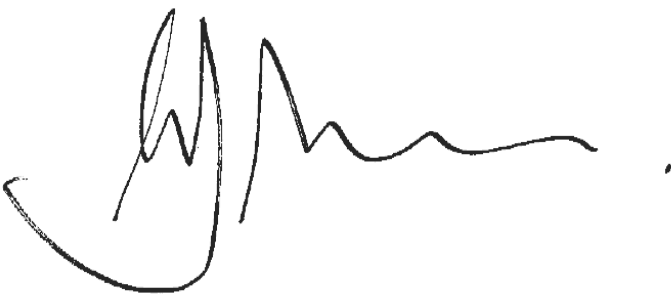
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NES Exposure Draft Submission
GC 31
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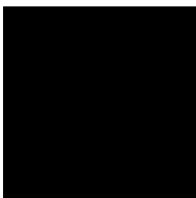
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Please find attached my submission in response to the NES Exposure Draft.

Yours sincerely



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PRELIMINARY QUESTIONS

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?

This question could otherwise be asked: *What statutory protections do managerial employees and high income employees need in the labour market?*

A growing problem when answering this question would be in understanding who or at what level is a managerial employee? Invariably there is no standardisation of the occupational role or title and in that case, the scope (and market value) of the job could be quite broad ranging. In the case of who is a “high income employee”, such a consideration needs no more than a statutory determination of a nominal threshold salary level.

Regardless of these two obstacles, that are perhaps best addressed by the setting of a minimum salary level threshold, there are still some core proposed National Employment Standards that should be mandated as statutory entitlements, regardless of the status or income earnings of an employee. These should be annual leave, personal leave (particularly employee sick leave), compassionate leave, notice and termination and redundancy pay.

There must be a core entitlement (minimum period of annual leave) that every person submitting to an employee contract should be entitled to receive.

The minimum period of annual leave, should be set at 2 weeks for this class of employee. In this regard, one of the problems over the last decade or so, has been the way in which employers have allowed employees to utilise their annual leave in almost any fashion. Some accrued leave entitlement (whatever it be called) should be assigned as “annual leave” and should be specifically earmarked as a condition of employment to allow employees, some time to take a break from work as part of an “annual” holiday and to do so in the context of their own workplace health and safety.

In the case of sick leave, is there a need for a legislative platform to provide guaranteed entitlements to all employees? At issue becomes not whether an employee is to be paid for the leave of absence, but for how long an employer will be satisfied that the absence is a bona fide one.

This dichotomy needs to be well understood. There is a distinct difference as to whether an employee can reasonably be absent from work, as a result of being ill, as opposed to whether or not, an employee should be entitled to be paid leave for that absence. At issue at contract becomes who should bear the responsibility (cost) for the absence. There is likely to be a better argument that those in a higher income bracket will have a greater capacity to absorb the cost of the absence, than perhaps those on a lesser salary. In many respects, a similar argument can be mounted in the case of other types of leave also, such as compassionate leave. In each case there is no reason why higher income earners could not receive the benefit of some statutory protection by way of a reduced minimum entitlement.

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One area that could benefit from a greater degree of government regulatory intervention would be in the enshrinement of certain base standards pertaining to notice, termination and redundancy pay.

Too often, particularly in the case of executive management contracts, there are disputes that arise as a result of this lack of clarity. While it is unlikely or less than desirable that too much prescription of approach should exist in these matters, the benefit to a large group of the Australian workforce, would often be a fairer and more relevant minimum industrial standard, that provides a more appropriate and cost effective outcome, then would otherwise be achievable under the common law remedy.

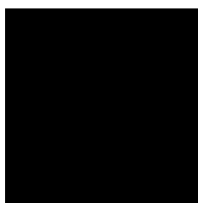
2. What is the best way of providing those flexibilities for those employees, having regard to the principle that the proposed NES are intended to be minimum standards for all employees?

The only way that this can be achieved is by the introduction of statutory thresholds. That is, to earmark a notional rate of income, that signals a point where employees earning above that income level, can expect far less direct government intervention in relation to the setting of such standards. This reduced degree of intervention must bring with it, a reduced calculated statutory entitlement.

Such an approach is no different from many other means tested statutory entitlements such as social security allowances or tax benefits that are income tested. It is nonetheless suggested that the threshold level be set well in excess of the existing threshold utilised for access to the unfair termination laws under the *Workplace Relations Act 1996*. An amount of \$150,000 per annum, for example, would be a far more realistic amount, in order to provide some graduated protection to all employees regardless of income.

3. Are additional rules required for the proposed NES to operate effectively for employees such as managerial employees and high income employees?

Where contracting parties fall outside of the statutory thresholds, an employment contract should state whether or not the terms of the NES are to apply. In the absence of any such expression, then it is to be assumed that the parties have negotiated outside of these obligations. More importantly, with the statutory expression well defined and capable of being read in tandem with the contract arrangement, provides a far clearer entitlement in the event that the employment relationship comes to an end. At the present time, there is far too much uncertainty in this regard.



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4. What is the best way of ensuring adequate protection and flexibility under the NES for employees in emerging industries and occupations that may not be covered by a modern award?

In the case of award based employees, there is a good argument to enable emerging industries and occupations to waive their rights to be bound by some of these standards.

The Australian Industrial Relations Commission is well equipped to develop protocols to enable this type of debate to take place. A standard applying to Flexible Working Arrangements in the real estate industry (for example), may need some testing. Perhaps some of the NES could be trialled and a report back be given in those industries and occupational areas where their application may have some mixed reception.

MAXIMUM HOURS

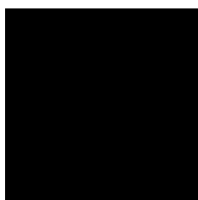
1. Should the maximum hours NES expressly provide that an employer will not be in breach of the NES where an employee works additional hours of their own volition?

The traditional concern for employees working maximum hours, lay in the fact that their preparedness to do so, would not suit every employee's desires or circumstance. A danger in the workplace can be, where employees (for example with no caring responsibilities) have a greater capacity to work additional hours, than employees who may have caring and family responsibilities. Depending on the demographics of a workplace, the prevailing capacity to work is therefore largely determined by the majority.

What needs to be made clear, is that (subject to workplace health and safety considerations) no breach of the Maximum Hours NES will take place, in the case where an employee is willing to do such work and there is no expectation from the employer or other employees, that such additional hours is the normative behaviour.

2. Should the proposed maximum hours NES address the issue of unreasonable additional hours by reference to the hours normally worked by an employee? What issues might arise from adopting such an approach?

The danger here is that any prescription of what should constitute hours normally worked, creates of itself a lack of flexibility in arrangements. The statutory entitlement needs to ensure that the principles of agreement and right of election of individuals are paramount. Issues such as urgency of work, operational needs, capacity to create some flexibility (eg time off in lieu), staffing shortages, all should be factored into the assessment of what is "reasonable".



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3. Given that the NES are intended to provide minimum entitlements for all employees, how should the proposed maximum hours NES deal with the long and irregular hours worked by high income employees?

Excessive hours of work should be regarded as a workplace health and safety concern and not necessarily an issue for NES regulation. Perhaps the limits of what should be regarded as regular weekly hours of work should be prescribed . For example, unless in emergent circumstances, a managerial employee should not be required to work beyond 12 hours per day, without adequate rest break or the provision of a meal.

4. Should additional rules be included in the NES to deal with the application of the proposed maximum hours NES to pieceworkers?

Obviously notions of regular work hours and flexible work arrangements (as two examples only) will have completely different application in these settings. A consideration of whether there is a need to exclude certain categories of workers should be undertaken, but perhaps this type of analysis may be better undertaken under the auspice of the Australian Industrial Relations Commission.

5. Are there any other matters that need to be taken into consideration when finalising the proposed maximum hours NES?

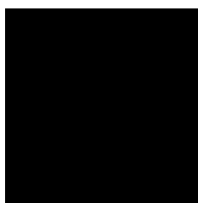
A pre-eminent consideration should be that of the occupational health and safety consequences of a worker being exposed to excessive work hours. It must be remembered that self choice in these matters is not necessarily the prevailing determinative factor and that the risk of accident or illness arising to either the employee or others exposed to that workplace, is the critical concern.

REQUESTS FOR FLEXIBLE WORKING ARRANGEMENTS

6. Should the proposed flexible working arrangements NES include additional provisions to define the term 'employee with responsibility for the care of a child? If so, what additional rules should be included?

The primary caring responsibility should be defined. While it is unlikely that it will be possible to develop an approach to flexibility that will suit all situations, some clarity as to how a primary carer could be defined for this purpose, may still be useful.

For example, an employee who has the primary task of ensuring that a child's basic needs are met during the course of the working day, needs to have such responsibilities identified as being relevant to any contextual backdrop by which proposals for flexible working arrangements



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should be considered. A similar case could be argued where an employee has primary responsibility for the care of a parent or other close family member.

7. Should the proposed flexible working arrangements NES expressly define what constitutes reasonable business grounds? If so, how can this best be achieved? What additional rules, if any, should be included in the NES?

While there may be some capacity to utilise such an approach for award based employees, in the case of managerial and high income employees, such an approach would be unnecessary and far too abstract.

In the case of award based employees, any special considerations or guidance would be best provided by the Australian Industrial Relations Commission.

8. Are there any other matters that need to be taken into consideration when finalising the flexible working arrangements NES?

While clearly the nature of the employment contract is likely to change over time (for both award and non-award based employees), it must be remembered that the importance of the initial contracting process cannot be overlooked.

The inherent requirements of work and the capacity to engage in flexible work arrangements is a far better discussion point prior to and at the commencement of contract, rather than some time after the contract has been entered into.

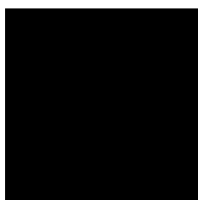
It is extremely unfair to a small employer, where such expectations are not advanced sooner, rather than later. While some of the issues that may be flagged could potentially expose the employer to the risk of exercising discriminatory work practices (in rejecting such proposals or employees), nonetheless some transparency in expectation is not an unrealistic requirement for an employer.

PARENTAL LEAVE AND RELATED ENTITLEMENTS

9. Should the proposed parental leave NES allow an employer to request evidence that an employee is fit for work where the employee wishes to continue working close to the expected date of birth of their child or where the employee wishes to return to work within a short time after the birth?

In many high risk activities (for example) an employer has every right to make such enquiry prior to birth, based on relevant state based workplace health and safety law.

While there may be less of an argument (or requirement) that an employer should request evidence of an employee's capacity to return to work after child birth, in some circumstances that may still be a reasonable request.



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Some mention should be made of the implications of existing workplace health and safety laws that may impact on these entitlements.

There is no need for any clarification of these obligations under the federal industrial relations law.

10. In what circumstances might the rules relating to notice and evidence (to be transferred to a safe job) be inadequate or too onerous for employers and employees?

There is certainly a good argument to suggest that an employer should know well in advance of any possible health concerns that an employee may have, that in turn may impact on the employee's fitness to work in a particular workplace or work role. An employer should also have undertaken an analysis of the risks at work, to ensure that precautionary measures are put in place to avoid any possibility of injury or illness.

Employers are not mind readers. In small workplaces where the reorganisation of work arrangements may not always be that easy to achieve, there remains a positive obligation on an employee that they act in good faith at all times and alert the employer well in advance, to some of the likely consequences that may arise regarding their work choices and preferences. Effective workplace health and safety management plays a critical part in relation to the implementation of this standard.

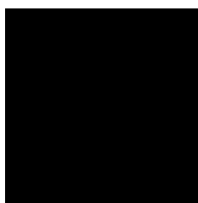
11. What if any additional rules could be included in the proposed parental leave NES in order to address the issues arising in those circumstances?

Most of these issues are addressed in the context of either workplace health and safety law or anti-discrimination law. This may be something that the Australian Industrial Relations Commission is far better equipped to adjudicate on, in terms of what may be reasonable and appropriate for the guidance to the parties. There is also likely to be an ongoing educative role that could be pursued by the new Fair Work Australia authority, that would serve to better inform employers and employees as to the practical impacts of these requirements,

12. In what situations should examples of reasonable business grounds to be included in the proposed parental leave NES?

Obviously there is always going to be a heavy reliance on the definitional requirements, at that point where some confusion or dispute as to notice or evidence takes place. It would seem to make sense that the examples of "reasonable business grounds" be given in the context of how this may apply at the outset of the employment contract and that the parties should always keep these issues in mind, in the event that an employee is pregnant at work at some stage.

In effect, what is being asked of an employer, is that they provide a flexibility within the workplace that will always allow for the movement of pregnant staff. Clearly such a strategy



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may also have limitations, particularly for example in a situation where there are simply more pregnant staff than safe jobs.

13. What type of examples could be included in the NES in order to address any issues arising from these situations?

The size of an employer and way in which job specialisation occurs at the workplace, would be two considerations that would be highly relevant.

14. Are there any other matters that need to be taken into consideration when finalising the proposed parental leave NES?

In some cases there will be training costs associated with the reorganising of work arrangements and the deploying and transferring of employees into alternative work roles. These issues may need to be canvassed further in relation to issues of reasonableness.

ANNUAL LEAVE

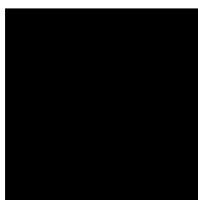
15. Is it appropriate for the definition of shift workers to be contained in modern awards or should the proposed annual leave NES define 'shift worker'?

The changing consumer and service requirements in Australian society over the past 20 years has had an enormous impact on the way in which work is defined and regular notions of daily work activity described.

Because of the large variety of work arrangements, spread of hours, flexible starting and finishing times, sporadic daily engagements etc, it is hard to see how a legislative definition could be a practical way of regulating these areas.

On the other hand, the award system has the capacity to tailor make and describe many of these arrangements, providing far greater clarity and in a much more useful way to the award parties.

Some workers who may not be well represented or covered by the award system, may not achieve the same security in entitlement, but again this issue should be considered in the context of award nor legislative coverage.



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16. If so, how can this be achieved while accommodating industry specific needs?

Again, these are the issues that the industrial relations tribunals in this country have more than adequately supervised. In the case of award based employees, it is recommended that a similar charter be provided to the Australian Industrial Relations Commission, so that the Commission may investigate and determine the most appropriate arrangements based on the specific industry and occupational group needs.

17. Are there any issues with this approach to ‘ordinary hours of work’ for particular kinds of working arrangements?

One issue that would appear relevant would be in the way in which an hourly rate could be determined in these circumstances. Traditionally, there has been an approach that some form of standardised percentage top up, should apply to compensate for a particular type of shift arrangement.

18. If so, how should those issues be addressed?

These issues should be included in a Special Review undertaken by the Australian Industrial Relations Commission.

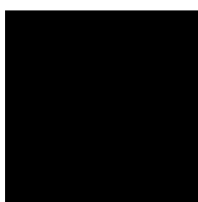
19. What considerations need to be given to the interaction of the NES with other kinds of leave or absences provided by a contract of employment or industrial instrument?

Another issue that needs to be considered, is whether annual leave needs to be considered as a regular leave break, or as a more general type of leave that can be utilised and taken in conjunction with other types of leave arrangements.

While there may be good examples of where annual leave should be taken for non recreational purposes (such as in the case of family emergency or where personal/carers leave is exhausted), such flexibilities perhaps do need some greater clarification to avoid unnecessary angst and dispute where an employee is absent from work and thereafter seeks payment in accordance with one or more leave entitlements.

20. Are there any issues that may arise from this approach?

For award employees, this may be an issue better addressed under those mechanisms.



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21. If so, how should those issues be addressed?

These are matters that normally would be amendable to Special Review cases under the auspice of the Australian Industrial Relations Commission.

22. What specific issues might arise for particular types of employees from the base rate of pay definition in the proposed annual leave NES?

While not all leave types may be paid in the same way, this is likely to be an issue that needs to be considered in the context of the unique awards.

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

It may be the case that some protection should be given to award employees in relation to the recrediting of leave entitlements, in cases such as where an employee is unwell and unable to commence annual leave at a particular time, or where an employee wishes to avail of bereavement leave (for example) in that same period and be recredited for the annual leave entitlement that would be otherwise taken during that same period.

24. Are there any other matters that need to be taken into consideration when finalising the proposed annual leave NES?

Nil comment

PERSONAL/CARER'S LEAVE AND COMPASSIONATE LEAVE

25. In what circumstances might the rules relating to notice and evidence be inadequate or too onerous for employers and employees

The advent of a greater reliance on email communications and telephone texting (for example), has created novel situations where notice has been communicated to employers and employees unsuccessfully.

The methods of how communications are to take place are paramount to the effective relationship between an employer and employee.

Some of these ground rules need to also be established at contract. An employer should advise an employee as to the expectation in relation to notice, protocol and where required, evidence. An employee needs to also articulate any unique circumstances that may make compliance with traditional practices, difficult. (eg An employee who lives alone and does not have access to a home telephone).



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26. What, if any, additional rules could be included in the NES in order to address the issues arising in those circumstances?

An employer should be able to ask an employee for additional evidence that the employee was in fact ill, particularly where she or he has any doubt as to the bona fides of a worker's absence due to illness,

While it is recognised that there may be many occasions where an employee may not need to attend a medical practitioner, but still be unwell and absent from work, at issue is whether an employee has a right of entitlement without question to eight or ten days paid leave per year, or whether some evidentiary onus needs to be placed on the employee as proof of illness or absence. At issue is whether personal leave, for example, is a right or an entitlement in the case of bona fide illness.

In this regard, an employment relationship that is founded on mistrust is unlikely to be a sustainable one.

27. Do any issues arise from this approach to the taking of paid and unpaid carer's leave?

Again this issue appears as much about workplace education than anything else. An employee at commencement needs to be better instructed as to the impact that unintended absences has on an employer. In the case of a small employer, often such a situation is even more impacting.

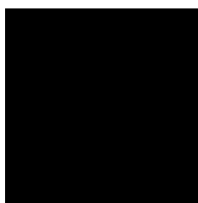
28. What other matters should be taken into consideration when finalising the proposed personal/carer's and compassionate leave NES?

Other issues that may need to be considered include simple mechanisms for dealing with grievances arising from disputes in relation to entitlements and requests for production of evidence etc.

COMMUNITY SERVICE LEAVE

29. What issues might arise in association with the taking of community service leave by shift workers, particularly afternoon and night shift workers?

There is obviously going to be a potential for greater disruptive impact associated with community service leave, where workers are withdrawing from work arrangements that are not based on ordinary daily hours. In some cases there are going to be financial losses incurred by workers who otherwise may have been due shift allowance payments based on working the normal shift work arrangement, where no community service leave was required.



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30. Should the proposed community service leave NES contain express provisions dealing with these types of employees?

Perhaps this is one area where greater clarity within the legislation will be needed.

31. Having regard to the Government's view that paid jury service leave should be a minimum entitlement for all employees, should additional rules be included in the proposed community service leave NES to address a small business' obligation to pay jury service leave?

A clarification of any entitlement or obligation can only be a good thing.

32. If so, what additional rules should be included?

Nil comment

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

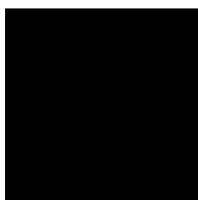
Nil comment

LONG SERVICE LEAVE

34. What issues arise from the preservation of long service leave entitlements including machinery rules from industrial instruments and the intention that workplace agreements will not be able to override state and territory long service leave law?

There are still differences in the state long service leave legislation at the present time and these will ensure that for an employer who is involved in several state activities, that some process for standardisation (where desired) needs to be available.

A case in point would be under the Queensland *Industrial Relations Act 1999*, where an employee may be in dispute with an employer regarding access to long service leave entitlements under that Act after 7 years, because of "pressing necessity". For an employer with activities extending beyond one state, these types of considerations may be more appropriately dealt with under a whole of employer industrial instrument.



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35. What additional rules, if any, should be included in the proposed long service leave NES to deal with these issues.

Nil comment

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

Nil comment

PUBLIC HOLIDAYS

37. Do the range of factors provide an appropriate, simple guide to determining reasonableness, or is there a need for additional express factors to be included to ensure that particular matters may be considered?

The range of factors are appropriate, however some consideration also may need to be given to the public holiday in question. For example, some days such as Australia Day, the Queens Birthday and a Bank Public Holiday or State Show Day may be days that do not hold too much relevance for many workers. Working on these days may present less concern to workers, then days such as Christmas Day and Good Friday that are more typically associated with religious and vocational periods. Although it is well recognised that even these days, are less likely to hold an attraction (other than to have the benefit of the paid day's leave) for many people from other faith traditions.

38. What specific issues could arise in connection with the 'ordinary hours of work concept' for particular kinds of working arrangements.

This type of consideration may also need to have regard to the income threshold that may be in place and whether the day as a working day, will affect in any material way, the take home salary entitlements of a worker.

39. What specific issues might arise for particular types of employees from the 'base rate of pay' rule in the proposed public holiday NES?

For many workers, there is little real disadvantage to them for working on several of these public holidays. Certainly in the case of higher income earners, there will be an expectation invariably that some of these days will be traded off, depending on work requirements and that concepts more akin to 'time for time', will be regarded as the more appropriate trade off.

For low-income workers, particularly those with family responsibilities, there may be other costs to be considered where these workers may be required to work and as a result be forced to make

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other paid carer arrangements. In those cases, it is highly unlikely that formulas calculated on the 'base rate of pay' will be seen as attractive or fair.

40. Should additional rules be included in the proposed public holiday NES to address those issues?

For many national employers, there is presently a lack of consistency in the way in which several of these public holidays are held. (eg Queens Birthday, Labour Day, Show or Bank Holidays)

Where broad agreement exists, some standardisation of arrangements should be available through awards and agreements.

41. Are there any other matters that need to be taken into consideration when finalising the public holiday NES.

Some of these issues need a far more rigorous analysis undertaken under the auspice of the Australian Industrial Relations Commission.

NOTICE OF TERMINATION AND REDUNDANCY PAY

42. Does the redundancy pay NES need to address the issue of different types of redundancy schemes?

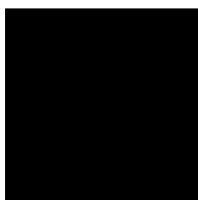
The Redundancy Pay NES should recognise that there are different bases upon which the relevant entitlements of an employee are derived.

43. If so, how should the redundancy pay NES address this issue and what additional rules, if any need to be included in the NES?

The NES should establish the minimum national standard, however in saying that, such a standard should be relevant and may provide some more insightful rationale for how and in what circumstances a larger quantum of entitlement should be made available to an employee.

Relevant issues that may be derived from the common law would include:-

- Nature of work role;
- Degree of expertise and experience required to perform role;
- Reason for termination;
- Duration of employment with employer;
- Level of seniority ; and
- Industry custom and practice.



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44. What types of express provisions, if any, should be included in the proposed redundancy pay NES for the purpose of identifying the employees who are to be included in determining the application of the small business exemption?

Exemptions in the case of award based employees should only be entitled by way of special application in a manner similar to the Economic Incapacity arguments available to employers traditionally under National Wage Case Decisions.

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

An employer should be able to make application to the Australian Industrial Relations Commission in some circumstances where an employee has been paid an amount under this NES and who within a minimum period of time is able to secure a comparably determined job with another employer.

This type of situation has occurred frequently in Australia, particularly in the 1980s and 1990s where voluntary employment redundancies were common place.

Employees should in some circumstances be prevented from double dipping, particularly in cases where an employer may not have the full capacity to make the payments.

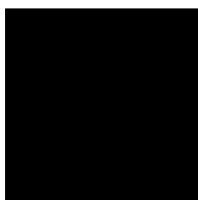
FAIR WORK INFORMATION STATEMENT

46. Should changes be made to the proposed information in the workplace NES to allow an employer to provide the Information Statement prior to the employee commencing employment (eg at the time an employee considers a letter of offer)

This would be by far the most important time for an employee to consider the context and benefits of their proposed entitlements at work. The information statement should serve as a possible checklist for both parties, so that many of the issues and possibilities that arise out of the employment relationship, can be identified and canvassed.

47. Are there any other matters that need to be taken into consideration when finalising the information in the workplace NES.

It would be highly beneficial if a structured set of checklist type questions was available to the employee at this time. For example, what is the expectation to work additional hours each week. Is there weekend work?, What should happen if my children require me to attend to some



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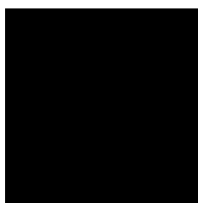
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medical appointments without much notice; What are the circumstances that annual leave can be used ? Will I be required to work on the Queens Birthday?.

By doing this, there is a far greater chance that an employer will reveal some of their true colours in relation to their expectations and preferred operating style. An employee too may be required to provide another layer of insight into their motivations, preference and general work ethic. While clearly these issues need to be couched and addressed in the context of the broader obligations to ensure processes are bias and discrimination free, such an approach can only assist in the way in which parties enter into their employment contracts.

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