



# National Employment Standards

## Discussion Paper

### Submission by WorkSight

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4 April 2008

## Introduction

WorkSight is an industrial relations consultancy committed to providing independent and practical advice to its clients. WorkSight has a wide range of clients and is a specialist adviser in the education, training & employment services sectors. WorkSight believes that its work with a range of employers makes it well placed to make submissions regarding the NES exposure draft.

This submission sets out responses to the questions as numbered in the exposure draft. Some additional comments are made in relation to particular paragraphs in which case the paragraph number is identified. Comments have not been made in relation to all questions.

## Interaction of NES with Awards (Paragraphs 32-33)

The NES should be included in modern awards for ease of reference, so that employers and employees have one source document for their conditions of employment, otherwise employees and employers have to refer to both the legislation and their award to ascertain their conditions of employment which may lead to confusion and risks of non-compliance.

*Preliminary question 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?*

An NES award could be established for award free employees so that their minimum conditions are set out in an accessible and readable format rather than in legislation.

## Maximum Weekly Hours

*Preliminary question 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?*

WorkSight’s primary concern with this is that employers may put pressure on an employee to work additional hours through their “own volition” with the result that an employee would be required to work additional hours for no pay. Therefore a definition of “reasonable additional hours” or at least some guidelines as to what this might mean would minimise this possibility.

*Preliminary question 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?*

Further to the comment above, the NES should address the issue of unreasonable additional hours by reference to the hours normally worked by the employee. This would also assist part time workers who have difficulty working additional hours, for instance, due to set child care arrangements.

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

Employers should be required to set out the hours of work for part time workers to ensure that part time workers have set hours so they are not used like casuals.

## Request for Flexible Working Arrangements

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

Some employers may benefit from the certainty provided by a limit to the number of times an employee can request a change to working hours such as an annual review unless the employer agrees to an earlier timeframe.

## Parental Leave and Related Entitlements

*Paragraph 96: Can an employee take other leave during parental leave?*

The exposure draft refers to the taking of paid leave during parental leave not extending the employee's right to be absent from work for more than 12 months. Given that the NES will establish a right for an employee to request a further 12 months unpaid leave, the restriction of the initial paid and unpaid components to 12 months appears to create inflexibility. This could then set up the burden of an employee returning to work for a day so that they can request their paid leave entitlements. The payment of leave entitlements is a cost the employer must bear at some point and allowing the leave to be taken at this time might suit both parties. WorkSight recommends that this restriction be removed.

*Paragraph 98: Can an employee extend a period of unpaid parental leave?*

The proposal that an employee can request an additional 12 months unpaid parental leave only when their spouse chooses not to take their parental leave entitlement may have the unintended consequence of discriminating against single parents. If the Government considers that it is appropriate for a parent to take up to 24 months leave following the birth of their child this should apply to all parents and not just to those families with two parents. The establishment of a right to request the extension of the total period of parental leave to 24 months should not require a reference to the arrangements of a spouse. It should be made clear that the special rules for employee couples do not detract from the rights to request additional leave for an employee parent who is not an employee (or other type of) couple.

*Paragraph 104: What happens when an employee ceases to have responsibility for the care of the child?*

Where an employee ceases to have responsibility for the care of a child the draft states that "an employer may give written notice requiring the employee to return to work on a specified day...." The employer may not be aware that the employee is no longer responsible for a child. The NES should include a provision that in these circumstances the employee is required to advise the employer of this and discuss an appropriate return to work date.

*Paragraph 117: Consultation during parental leave*

The inclusion of consultation during parental leave requirements is welcomed as this may reduce the instances of employers taking action against employees on parental leave where proposed changes are made without their knowledge. These changes are often not in their interest, contrary to award consultation requirements and prove difficult to address or reverse when the employee returns from leave at a later date.

*Preliminary question 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?*

The NES should include this provision but such requests should be limited and require reasonable cause. Employers should not be allowed to require weekly medical evidence without any basis for questioning a woman's ability to work close to the expected birth of her child.

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

See response to para 98 above – the capacity for single parents to access 24 months leave should be clearly stated in the NES.

*Paragraph 122: Same sex couples*

The NES should ensure that the parental leave entitlements established in the standard apply to same sex couples on the same basis as to other parents.

## Annual Leave

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

The NES should include the right for an employer to direct an employee to take leave when they have accrued a large amount (e.g. 40 days) and also when there is a closedown period. The accumulation of leave entitlements creates a financial burden particularly for small business which they need to be able to manage and maintain financial control over.

The standard should make it clear that an employer is not in breach of the standard where they employ a school based trainee who is in receipt of a loading in lieu of leave entitlements including both annual leave and personal leave (such employees are not regarded as casuals because of the commitment to a period of employment required under their training contract). This provision is contained in the National Training Wage Award.

## Personal/Carer's Leave and Compassionate Leave

Evidence and notice requirements:

*Preliminary question 25: In what circumstances might the rules relating to notice and evidence be inadequate or too onerous for employers and employees?*

The evidence requirements proposed under the NES do not give the employer discretion to require evidence for every absence. The draft also refers to restricting modern awards so that an employer cannot “require a medical certificate for every absence”. The employer should have discretion to seek evidence of illness in cases where it is suspected that an employee is not genuinely ill without having to wait for a number of days to elapse or for repeated absence. Non-genuine absences are costly to employers. In order to implement an open and transparent personal leave scheme, many employers apply an evidence requirement to every personal leave absence and should have the capacity to continue with such arrangements.

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

The term “reasonable person” could lead to disputes about what a “reasonable person” believes whereas the requirement to provide a medical certificate is the opinion of the medical practitioner who is qualified to make such a judgement. If the NES were to include some latitude in relation to the provision of medical certificates it should be limited to a maximum of 3 single day absences without a certificate annually.

*Preliminary question 28: What other matters should be taken into consideration when finalising the proposed personal/carer’s and compassionate leave NES?*

As stated in relation to annual leave question 24 above, the standard should make it clear that an employer is not in breach of the standard where they employ a school based trainee who is in receipt of the award based loading in lieu of leave entitlements including both annual leave and personal leave (such employees are not regarded as casuals because of the commitment to a period of employment required under their training contract).

## Community Service Leave

*Preliminary question 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’s obligation to pay jury service leave?*

The provision of paid jury duty service can be costly for an employer, particularly in cases where the trial continues beyond one or two days. The provision of a small business reimbursement for make up pay in relation to trials in excess of 1 week should be considered.

## Long Service Leave

*Preliminary question 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 laws?*

The proposed NES should make clear what instrument applies where there are some beneficial aspects contained in both the Agreement or Award and the State or Territory legislation.

## Public Holidays

*Preliminary question 41: Are there any other matters that need to be taken into consideration when finalising the public holiday NES?*

The proposed NES should allow businesses to choose to adopt a particular public holiday that is outside their local area if they want to – for example an employer in non-Metropolitan Melbourne or even in NSW may choose to have a public holiday on Melbourne Cup Day.