



NATIONAL EMPLOYMENT STANDARDS  
EXPOSURE DRAFT AND DISCUSSION PAPER

SUBMISSION BY THE CONSTRUCTION FORESTRY  
MINING AND ENERGY UNION  
FORESTRY AND FURNISHING PRODUCTS DIVISION

4 APRIL 2008



## EXECUTIVE SUMMARY:

This submission identifies three areas of concern in relation to the proposed National Employment Standards (NES). In each area the application of the NES in the terms currently proposed would result in a significant reduction in existing award entitlements.

These areas are:

1. Payout of accrued but untaken personal leave.
  2. Redundancy severance entitlements for employees of small business which existed in Awards prior to the AIRC Redundancy Test Case.
  3. Part-day public holidays.
- The NES nominates a number of areas in which awards containing diverse and atypical working arrangements may modify the operation of the NES. The three issues identified above are not recognised by the proposed NES as areas where modification of the NES by a modern award will be allowed.
  - Pay-out of accrued but untaken personal leave has been an award entitlement in some industries since the 1970s. These clauses have operated effectively in awards, including some with Common Rule status, without detriment to the safety net of minimum terms and conditions in the industries where they apply, and have come to form a valued part of the effort bargain for many employees. If the NES removes access to this condition it will mean a reduction in some workers' annual pay by an amount which may be equal to up 64 hours wages. For workers on award wages this is a significant reduction.
  - The proposed NES will explicitly exclude existing award severance entitlements for employees of small businesses (less than 15 employees); this includes long standing award severance pay entitlements which date from the early 1990s.
  - The proposed NES should be altered to explicitly recognise the possibility of modification by awards in relation to pay-out of accrued but untaken personal leave and severance entitlements for employees of small business where those entitlements have existed as a matter of historical award entitlement. Such amendment would be consistent with the NES in other respects: for example, the proposed NES permits modification by awards to allow for pay-out of accrued but untaken annual leave.
  - The proposed NES should be amended to clarify its application to part-day public holidays where they are declared by State and Territory Governments. Such amendment would avoid confusion in industry and be consistent with the aim of the NES to protect public holidays where they are declared by State and Territory Governments; this would also avoid reduction in existing award part-day public holiday entitlements.
  - Draft NES terms reflecting these proposals are appended to this submission at Attachment 2.

## **A. Introduction**

1. The CFMEU Forestry and Furnishing Products Division (the Union) is the principal union covering workers in the Forestry, Furnishing, Building Products Manufacturing and Pulp and Paper Manufacturing industries.
2. The CFMEU - FFPD welcomes the opportunity to provide submissions on the proposed new National Employment Standards. This submission focuses upon the interaction between the NES and the proposed system of modern awards. In particular, the Union is concerned that the interaction of the NES with the existing terms of awards not result in reduction of entitlements which have historically been available in specific industry awards covered by the Union.

## **B. Payout of Accrued but Untaken Personal Leave**

3. The proposed NES does not advert to the issue of pay-out of accrued but untaken personal leave entitlements. The NES exposure draft and discussion paper indicate that the proposed NES will not allow for pay-out of accrued but untaken personal leave entitlements. This will result in a significant diminution of the conditions of employment enjoyed by members of the Union.
4. CFMEU-FFPD members value highly the ability to access their accrued but untaken personal leave. Pay-out of accrued but untaken personal leave is widely considered to be an important and beneficial component of the effort bargain, which has been available in the timber, glass and furnishing industries as a matter of award entitlement since at least 1979, and after WorkChoices by inclusion in enterprise agreements.
5. Payment of accrued but untaken personal leave is a feature of a small number of Federal Awards, including a number of Awards with Common Rule status, and Notional Agreements Preserving State Awards. Those Awards are listed in Attachment 1 to this submission.
6. Pay-out of accrued but untaken personal leave entitlements in awards, and provisions in collective agreements made since WorkChoices, are structured in such a way that an employee must at all times maintain a bank of accrued personal leave before they are eligible to have paid out to them any leave accrued in excess of the banked amounts. Banks are generally set at a level in excess of a year's accrual, so an employee will at all times have access to a safety net of accrued personal leave even if they have had a component paid out the previous year.

7. Pay-out of accrued but untaken personal leave gives employees access, on an annual basis, to an additional remuneration component which complements their basic wage. Often this payment is timed to coincide with the Christmas/New Year period and in some cases is characterised as a form of attendance bonus.
8. Often awards do not provide for the pay-out of accrued but untaken sick leave on termination of employment. This means that, if not entitled to be paid out during employment, employees may only take their personal leave as sick leave, or lose the entire accrual on termination of employment. In addition to the financial benefit to employees which accrues when they are able to access their accrued but untaken personal leave many employers find that this type of annual pay-out leads to a reduction in absenteeism.
9. Without some explicit permissive statement or other recognition in the NES, award entitlements which allow employees to have paid out to them accrued but untaken personal leave will be considered less beneficial than the proposed standard, and will not continue to operate once the NES is in effect.
10. Such an outcome is consistent with the situation which initially arose under Workchoices where pay-out of accrued but untaken personal leave provisions in enterprise agreements were considered to be prohibited content, as they were interpreted as being less favourable than the AFPCS and not otherwise specifically allowed by the AFPCS.
11. Prior to the passage of the *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006* and consequent amendments to the Regulations, Regulations 7.1(11A) and (11B) in Part 7 of Chapter 2 to the *Workplace Relations Regulations 2006* indicated that unless an employee accrued more than the mandated annual minimum amount of personal leave no pay-out provisions could be more favourable than the AFPCS as any pay-out would indirectly limit the accrual of leave under that standard.
12. Because the NES discussion paper indicates that a modern award may not include any limit on the accumulation of paid personal leave, it would be necessary for entitlements to pay-out of accrued but untaken personal leave, which indirectly limit accrual of personal leave to that which is not paid out, to be explicitly allowed by the NES in order to have effect in an award as a modification of the NES.

13. Entitlement to pay-out of accrued personal leave entitlements in excess of a specified bank amount should be recognised by the Standard as a benefit, which a modern award might include as an industry specific detail in modification of the Standard. The Union notes the statements at paragraphs 31 and 155 of the NES exposure draft and discussion paper and Item 30(1)(a) of the proposed terms of the NES which state that cashing out annual leave is an express modification of the NES which would be allowed in modern awards. Similar provisions in relation to personal leave would not be inconsistent with the proposed NES and would appropriately maintain industry specific award conditions.
14. In the alternative, it may be appropriate to maintain the level of access to this type of condition which is currently available under the AFPCS whereby enterprise agreement provisions which meet specific criteria are considered not to be less beneficial than the AFPCS, and so are able to continue to operate in modification of the Standard. However even this method of entitlement will require specific enabling provisions in the NES.
15. Finally, in relation to this issue, we note that Item 8 of the proposed NES states that the Regulations may permit modern awards to do things which would or might otherwise be contrary to the NES. If it were not considered appropriate to address the issue of pay-out of accrued but untaken personal leave in the body of the NES a suitable provision could be included in the Regulations which would address the Union's concerns in this area.

### **C. Small Business Redundancy Severance Pay Entitlements**

16. The *Furnishing Industry National Award 2003* and the *Timber and Allied Industries Award 1999* both contain separate scales of severance entitlements for employees employed in small businesses of less than 15 employees. This separate small business severance scale has been a feature of these two awards since 1994<sup>1</sup> and 1995<sup>2</sup> respectively. The AIRC Redundancy Test Case decision<sup>3</sup> identified only 7 industries which had this feature prior to 2004.
17. While the general effect of WorkChoices was to remove severance entitlements for employees of small business where that entitlement arose only as a result of the 2004 Redundancy Test Case<sup>4</sup>, the transitional provisions to the *Workplace Relations (Work*

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<sup>1</sup> Print L5424

<sup>2</sup> Print M1434

<sup>3</sup> PR032004

<sup>4</sup> PR032004

*Choices*) Amendment Act 2005 preserved severance entitlements for employees of small business where those entitlements were on foot prior to 2004<sup>5</sup>. Consequently the small business severance entitlements in the *Furnishing Industry National Award 2003* and *Timber and Allied Industries Award 1999* have continued to apply and be enforced.

18. The proposed NES states that the minimum standard for redundancy payments will only apply to employers of more than 15 employees and that there will be an exemption for small business.
19. The discussion paper notes that some awards may be more beneficial than the NES and modify the NES in relation to redundancy entitlements although this appears to be couched in recognition of terms of greater quanta of entitlement rather than broader bases of entitlements.
20. A Modernised Award may only replicate or build on the standard set out in the NES where the Commission is satisfied that it is necessary to maintain a minimum safety net in the context of existing Award entitlements. This indicates that it would be possible to maintain the small business severance scale in the context of the Award/NES interaction, with some modification to the proposed NES. Because a Modernised Award cannot operate inconsistently with a term of the NES, if the NES contains a positive exemption from severance obligations for small business, then existing Award small business severance scales will be inconsistent with the NES and cease to operate.
21. As currently drafted the NES will limit the application of redundancy entitlements to employers of more than 15 employees and current award protections for employees of small business would cease to have effect. This would destroy the minimum standard of severance benefits currently enjoyed by employees of small business and reduce the security of entitlements for employees of small business who have enjoyed and expected that security since the mid 1990's in the Timber and Furnishing industries.
22. These existing award severance entitlements for employees of small business which predate the 2004 Redundancy Test Case should be preserved by the NES and recognised as an area in which a modern award may include provisions which are inconsistent with the NES.

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<sup>5</sup> Item 5A , Part 2 of Schedule 4 of the transitional provisions of the *Workplace Relations (Work Choices) Amendment Act 2005*

23. We note that Item 8 of the proposed NES states that the regulations may permit modern awards to do things which would or might otherwise be contrary to the NES. If it were not considered appropriate to address the issue of existing award severance entitlements for employees of small business which predate the 2004 Redundancy Test Case in the body of the NES a savings provision could be included in the Regulations which would address the Union's concerns in this area.

#### **D. Public Holidays**

24. In relation to the issue of public holidays the Union notes that the proposed NES does not address the issue of part-day public holidays where they are proclaimed in particular localities. One of the objectives of the NES in relation to public holidays is to allow communities to celebrate important events. In many regional areas local show days, race days and other days of community significance are declared as part-day public holidays by local authorities and are given the same status as whole day public holidays by operation of the relevant State public holiday legislation.

25. The application of existing award provisions, which recognise additional public holidays declared by the States and Territories, to part-day public holidays has been a source of significant confusion in some industries. In some circumstances, where awards do not specifically refer to the notion of part-day public holidays, the standard award additional public holidays clause, which is in similar terms to the NES, has been considered not to give rise to an entitlement to a part-day holiday. If the relevant local authority had declared a full day holiday this would have been within the scope of the additional public holidays clause. At the same time other awards may apply in the same locality, which specifically advert to the notion of part-day public holidays, and employees covered by those awards will have access to the part-day public holiday. This is an irrational situation and not one which gives effect to the State governments' power to delegate the right to declare whole or part-day public holidays, if the point of the power is to give rise to a general right to be absent to work for reasons of local community significance on a particular day or for part of a particular day.

26. The proposed NES recognises that regional holidays of special local significance may be declared and have effect only in specified local areas. It would be unfortunate if the proposed NES did not also recognise part-day public holidays where such days are declared, further prolonging the interpretive confusion which has arisen in relation to the application of part-day public holidays where they are already declared. An amendment to the NES to recognise part-day public holidays where declared under State law would maintain existing award entitlements to part-day public holidays, be

consistent with the intention of the NES to recognise days of local and regional significance and give effect to the fullest extent of State and Territory power to declare public holidays.

- 27.** In addition the CFMEU – FFPD is aware of and supports the submissions made by the CFMEU Mining and Energy Division in relation to the issue of the interaction of the NES and additional public holidays in awards. We note that a similar reduction in entitlement to that described by the Mining and Energy Division in their submission is likely to occur under the *Timber and Allied Industries Award 1999* which, for example, creates a further industry holiday in NSW in addition to those public holidays proclaimed by the State.

## **ATTACHMENT 1 Awards allowing for pay-out of untaken personal leave.**

### Federal Industry Awards

Brush and Broom Making Industry - Brushmaking - Award 2000 [Transitional]	AT811456
Food, Beverages and Tobacco Industry - Aerated Waters - General Award 1998 [Transitional]	AT781510
Furnishing Industry National Award 2003 [Transitional]	AT825280CAV
Glass Industry - Glass Merchants and Glazing Contractors - South Australia Award 1998 [Transitional]	AT782094
Glass Industry - Glass Merchants and Glazing Contractors (Tasmania) Award 1997 [Transitional]	AT782093
Glass Merchants and Glazing Contractors General (Victoria) Award 1997 [Transitional]	AT782192CRV
Milling Industry - General - Award 1999 [Transitional]	AT787949CRV
Timber and Allied Industries Award 1999 [Transitional]	AT800937
Timber Industry – CFMEU Wood Panels – Award 2000 [Transitional]	AT811245

### Federal Enterprise Awards

Bax Global (Australia) Pty Limited Automotive Division Award 2003 [Transitional]	AT823444
Linfox Warehousing Timber and Building Products Award 2003 [Transitional]	AT821818
Manildra Group - Rail, Tram and Bus Union Rail Operations Award 2001 [Transitional]	AT811046
Tip Top Bakeries, Bread Trade and Bread Carters Consolidated Award 2000 [Transitional]	AT799797

### NAPSAS

Forest & Building Products, Manufacturing & Merchandising (General) (South Australia) Award	AN150055
Timber Merchants Award (Tasmania)	AN170106

## ATTACHMENT 2

### 1. **Pay out of Accrued but Untaken Personal Leave – proposal for NES provision to be inserted after existing proposed NES clause 35.**

“35A Awards may include certain kinds of provisions

- (1) A modern award may include provisions for the pay-out of accrued but untaken personal leave;
- (2) This Division has effect subject to any such provisions that are included in awards.”

### 2. **Small Business Severance Entitlements – proposal for NES provision to be inserted after existing proposed NES clause 54A**

“54A Savings provision relating to small business redundancy obligations existing before 26 March 2004.

A modern award may include provisions requiring employers of less than 15 employees to pay redundancy pay if:

- (a) before the start of 26 March 2004, a term of the award or order had the effect of requiring an employer of fewer than 15 employees to pay redundancy pay (within the meaning of the amended Act); and
- (b) that term of the award or order continued in effect until immediately before the NES commencement”

### 3. **Part Day Public Holidays – proposed modification of existing NES clause 47(c)**

“47(c) any other day, or part-day, declared by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday, other than a day, or kind of day, that is excluded by the regulations from counting as a public holiday.”