



## **Submission on Discussion Paper**

### **National Employment Standards Exposure Draft**

#### ***Introduction***

The Furnishing Industry Association of Australia (Vic/Tas) membership is made up of mainly small businesses in the manufacturing sector. The sector is largely governed by the *Furnishing Industry National Award 2003*, and obviously, the Australian Fair Pay & Conditions Standard.

In this submission, comments on the proposed National Employment Standards have been made where members have felt it necessary, and questions were answered where it was felt the question was relevant to members.

Although a number of members have made a wide variety of comments about the proposed NES, probably the overarching tone of those comments is that the word 'reasonable' features far too heavily. The concept of 'reasonableness' is not an objective measure, and to base employment rights and obligations on such a nebulous concept is to create within the system a structural basis for disputes and arguments. As a general rule, the proposed NES is far too short on detail and guidance.

#### ***Hours of work***

The definition of "reasonable additional hours" is too vague and open to interpretation. More often than not, it is so difficult to determine whether the requested hours are reasonable that the employer simply gives up, meaning that the right to request reasonable additional hours becomes meaningless.

One of the more common complaints we hear from employers is that they are unable to meet client deadlines in some circumstances because employees simply refuse to work any overtime, despite the payment of overtime penalties. There must be some recognition of the fact that the survival of the business depends on meeting customer needs, and that overtime is part of that picture.

The application of the Hours of Work NES to high income earners is simply unworkable. Senior employees are expected to get the job done – not count hours. Applying the same rules to a senior employee on a high income as are applied to someone on an award wage means that employers potentially face complaints from disgruntled senior employees attempting to apply the letter of the law to situations for which it was not designed.

With respect to that aspect of the NES, there should be an income cap on the application of this NES, and a definition of "high income".



This NES also raises the spectre of an employee simply refusing to work in excess of 38 hours per week, which creates a culture that is not conducive to productivity and successful enterprise.

*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?

The maximum hours NES should only be invoked where an employee is directly requested or directed to work hours in excess of their ordinary hours.

### ***Requests for flexible working arrangements***

The biggest issue that members of the association saw with this NES was the potential for it to create disputes within the workplace. Most members of the association work in a manufacturing environment, which is not conducive to many of the suggested types of flexible working arrangements. Further guidance on what constitutes “reasonable business grounds” for rejecting a request for flexible working arrangements is critical. We suggest that the guidance material provide many examples across a range of different types of industries, including manufacturing, and that the needs of the business be given great weight in the consideration of this issue.

### ***Parental leave and related entitlements***

During consultation, members of the association objected strongly to the suggestion that they would be obliged to agree to an extra twelve months’ parental leave unless they can demonstrate “reasonable business grounds”. Again, it comes down to the fact that the interpretation of “reasonable business grounds” is a subjective judgement, not objective fact, and therefore potentially leads to disputes within the workplace.

When an employee is on parental leave, they are often replaced by a temporary employee, and therefore the employee’s decision to extend their leave affects a number of people within the workplace. In this environment of full employment, many people may shun a job with an uncertain timeline, particularly where the uncertainty exists because another person, usually a stranger, may decide they wish to take more leave. Under those circumstances, it can be quite difficult for a small business owner to fill a parental leave replacement position.

*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?



While an employee is at work, the employer is generally responsible for the health, safety and welfare of that employee, as a result of OHS legislation. Therefore, the employer should have the right to ensure that employees are fit to work.

### ***Annual leave***

There are two points on the proposed Annual Leave NES that must be made emphatically.

Employers must have the ability to direct employees to take their annual leave. Some employees 'hoard' leave, refusing to take leave on a regular basis. There are two problem with this:

- employees who work long stretches without a break face an increased risk to their health and safety – employers must have the ability to direct an employee to take leave for their own health and safety and to ensure the employer is meeting their legislative obligations;
- where an employee has not taken leave for some time, the size of the liability on the employer's books increases with each passing year, both the amount of leave and the rate of pay at which the leave is paid. Employers must have an ability to manage this liability for the sake of the health of the business.

The proposed Annual Leave NES does not provide employers with the ability to direct an employee to take leave without pay if the employee does not have enough annual leave accrued. This right is particularly important in situations where there is a planned maintenance shut down. Until March 2006, most awards, and certainly the *Furnishing Industry National Award 2003*, provided employers with the right to direct employees onto unpaid leave for the duration of a planned shut down.

The proposed NES should be modified to provide employers with the right to:

- direct an employee to take accrued leave in excess of one year's entitlement; and
- direct an employee to take unpaid leave where there is a planned shut down and the employee does not have enough leave accrued to cover the time of the shut down.

### ***Personal/carer's leave and compassionate leave***

Probably the most vehemently opposed matter within this proposed NES when discussions were held with the members was the requirement that an employee provide to an employer "evidence that would satisfy a reasonable person" that the leave they wish to be paid was justified.



A small proportion of employees will abuse any paid leave entitlement, and taking away an employer's ability to specifically request a medical certificate to justify absence due to personal injury or illness is removing a valuable management tool. Employees who abuse these entitlements create morale problems within the workplace, as employers are increasingly finding that their hands are tied when attempting to discipline errant employees. Other employees, who don't abuse the entitlement, become disenchanted when they see someone behaving unethically, and getting away with it because the law has become so vague as to be useless to the employer.

The issue of what evidence would satisfy a 'reasonable person' is likely to lead to regular disputes within the workplace – no person believes that they are unreasonable, and therefore, each person involved would believe that the evidence they are requesting, or the evidence they are providing in the case of the employee, is reasonable by dint of the fact that they believe it to be so.

An employer must have the ability to withhold paid leave in the event that the employee fails to provide a medical certificate to justify leave where requested. The system of "two uncertificated days per annum, not next to weekends or public holidays, otherwise a medical certificate is required for payment to be made" seemed to work well in the past. Members of the association would like to see that method of managing this entitlement reinstated.

Another matter that drew unfavourable comments was the lack of a cap on paid compassionate leave. The question was asked, "what happens when an employee needs paid compassionate leave often and regularly because a member of their immediate family or household is ill or injured? How many days' leave is the business required to bear?" This is an important question for a small business and one that should be addressed in the proposed NES.

Members also requested the right to direct employees to a particular doctor if the employee has a history of absenteeism.

### ***Notice of termination and redundancy pay***

One matter that does need to be clarified is what payments should be included when calculating pay in lieu of notice. Recent changes have sparked arguments about whether pay in lieu of notice should include superannuation (although the Australian Taxation Office specifically states that this type of payment is not superable), motor vehicle payments, and bonus payments, to name a few.

Members of the association requested that the exemption on payment of severance pay should be extended to businesses with fewer than fifty full time equivalent employees.



### ***Other comments***

The interaction between the proposed NES and the various awards must be made clear, as over the past two years, the relationship between the Australian Fair Pay & Conditions Standard and award entitlements has been the source of a number of disputes and much confusion.

### ***Conclusion***

Members of the association felt that the proposed National Employment Standards were deficient in a number of areas:

- definition of 'reasonable additional hours'
- treatment of the hours of work of senior employees
- definition of 'reasonable business grounds'
- lack of ability to direct employees to take annual leave, and lack of ability to direct employees onto leave without pay during scheduled shut downs
- use of 'evidence that would satisfy a reasonable person' to justify personal/carer's leave and compassionate leave
- potential for abuse of uncapped compassionate leave entitlement
- clarification of payments to be included in pay in lieu of notice
- guidance on interaction of proposed NES with other entitlements, e.g. award entitlements.

As a result, members felt that the proposed NES, if implemented as set out in the Exposure Draft, would lead to problems within the workplace.