



NES Exposure Draft submission  
GC 31  
Workplace Relations Policy Group  
Department of Education, Employment and Workplace Relations  
GPO Box 9879  
CANBERRA ACT 2601  
Via email: NES\_comment@deewr.gov.au.

The Federation of Ethnic Communities' Councils of Australia (FECCA) is pleased to provide the submission to the Department of Education, Employment and Workplace Relations on the National Employment Standards (NES) Exposure Draft.

FECCA is the national peak body representing Australians from Culturally and Linguistically Diverse (CALD) backgrounds. Our role is to advocate, lobby and promote issues on behalf of our constituency to government, business and the broader community.

FECCA gratefully acknowledges the contribution of Ms Carol Andrades, Consultant to Ryan, Carlisle, Thomas Lawyers, in the development of this submission.

We welcome the opportunity to discuss or clarify any of the issues raised in this submission. Please feel free to contact the FECCA office on (02)6282 5755 should you wish to do so.

Yours Sincerely

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3 April 2008

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## **SUBMISSION OF THE FEDERATION OF ETHNIC COMMUNITIES' COUNCILS OF AUSTRALIA ON THE NATIONAL EMPLOYMENT STANDARDS EXPOSURE DRAFT**

### ***Introduction***

1. The Federation of Ethnic Communities' Councils of Australia (FECCA) is the Australian peak national body that supports multiculturalism, community harmony and social justice. FECCA plays an important national role in representing the needs, aspirations and achievements of people of culturally and linguistically diverse backgrounds.
2. In the field of employment, as in other fields, FECCA is an advocate for people from Culturally and Linguistically Diverse (CALD) backgrounds and is a catalyst in identifying issues for further research and development.
3. FECCA welcomes this opportunity to comment on the proposed National Employment Standards (NES). We note with appreciation that the Government is particularly interested in hearing about the interaction of NES with diverse or atypical working arrangements<sup>1</sup>. CALD Australians routinely find themselves working with such arrangements because of the insecure and unpredictable nature of their work.

### ***People From CALD Backgrounds and the Workplace***

4. In order to put our submission in context, it is important to understand that CALD workers are less likely to have meaningful negotiating power in the workplace.

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<sup>1</sup> Par 12 Exposure Draft Discussion Paper

5. People from CALD backgrounds tend to be concentrated in sectors of the job market which create a potential for exploitation. Typical workplace disadvantage stems from factors such as:

- geographic dislocation;
- a history of multiple displacement which has denied them normal benefits (such as educational opportunities) associated with continuity of life patterns;
- lack of English language proficiency;
- different levels of education and literacy;
- unfamiliarity with a new culture and customs;
- heavy responsibility to provide financial support for family in the country of origin;
- likely life-experience of trauma (such as torture, dispossession, abuse by those in authority) which makes it difficult for them to assert themselves in a situation of power imbalance;
- a greater likelihood of exploitation by unscrupulous employers;
- being the target of negative stereotypes and racist behaviour at work;
- a diminished idea of self-worth;
- difficulties with having their qualifications recognised;
- humanitarian entrants from small and emerging communities being unable to demonstrate their qualifications due to their inability to bring relevant documents from their country of origin;
- limited knowledge of services available;
- limited education opportunities;
- higher unemployment of young adults; and

- lack of childcare (including lack of access to an extended family who would normally have provided this).
6. Further to this, restrictions on access to social security entitlements on arrival in Australia have increased from two years to four years, placing even greater strain on workers to maintain employment, regardless of conditions. This translates into a willingness by CALD workers to accept whatever employment they can get and to refrain from complaining about working conditions even where they are being patently exploited or abused.

### ***Assumptions Made in the Standards***

7. While it may be argued that there are sufficient measures in the anti-discrimination provisions of the *Workplace Relations Act 1996* for interests of CALD workers to be protected, the Act and the proposed NES tend to assume that, where there is a problem, the individual employee will be sufficiently confident to raise it herself or himself. This is not the case. For many employees from CALD backgrounds, the idea of challenging an employer's decision, let alone activating a dispute settlement procedure, is unrealistic. Such is the insecurity of their position, that they will suffer rather than run the risk of being regarded as potential troublemakers, (and the risk of losing vital employment).
8. Applying this analysis to the proposed NES, we note, in relation to maximum hours of work, for example, that this standard gives an employer a significant advantage to the detriment of vulnerable workers. The relevant NES provides that, where an employer requires an employee to work additional hours, "*The employee may refuse to work additional hours ....if they are unreasonable*"<sup>2</sup>. In effect, this focuses on the point of view of the employer and puts the onus on the employee to show that the request is unreasonable.
9. There are many reasons why CALD workers may be less able to work extra hours. For example some groups of CALD workers have visa restrictions on

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<sup>2</sup> s 9 (3) NES

the amount of hours that can be worked. This is the case for international students whose visas place restriction on working hours. While primarily here to undertake study students often find themselves in circumstances that require them to work to cover rising costs of living. Consideration also needs to be given to changing circumstances at a global level where currencies may fluctuate heavily over the duration of tertiary education. In such cases the families or other sponsors may find it difficult to continue supporting the student. An international student may find it difficult to refuse extra hours given their need to maintain employment in such circumstances.

10. While phasing out of temporary protection visas is currently underway, current holders remain unable to access Government assisted English language tuition. This severely diminishes any capacity for improving employment prospects. If such workers are to attain English skills sufficient to improve their status in the workplace, they may need to pay to attend classes outside normal working hours. In such a case, an employer's request to work longer hours may be reasonable, from the employer's perspective, but this may severely disadvantage a worker who is desperate to attend a class for which he or she has paid, and which is a necessary concomitant to advancement in economic life.
11. We also note the question posed by the Discussion Paper : *"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?"<sup>3</sup>*(emphasis added). For a vulnerable employee, it is very difficult to contest an employer's request to work extra hours. What may seem on the surface to be a case of the worker working extra hours of their *"own volition"* may in reality represent surrender in the face of unequal bargaining power.
12. A worker who refuses to work the extra hours also runs the risk of being denied benefits in the future, for reasons ostensibly unconnected to the rejection of the request to work the extra hours. Further, from a practical

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<sup>3</sup> p 8 Exposure Draft Discussion Paper

perspective, by the time a dispute resolution process is invoked, the subject matter of the dispute may no longer be on foot (for example, the period for which the extra hours were required may have passed). The better solution might be for an employer to ask for volunteers to work extra hours, but not to be able to apply duress in requiring that extra hours be worked. Consideration could also be given to modifying the Standard to permit refusal both where the request is unreasonable and where the employee's refusal is reasonable (compare the Public Holidays equivalent in s. 48(3)).

13. Similar issues arise in other NES which enable denial of a benefit, depending on an employer's construction of what might be reasonable. Thus, we see the potential for exploitation of employees wherever an employer may make a decision based on "*reasonable business grounds*" (for example, refusal of flexible working arrangements<sup>4</sup> or refusal of a second set of 12 months parental leave<sup>5</sup>), especially when that phrase is left undefined and where third party review is not available<sup>6</sup>.

### ***Flexible Working Hours***

14. FECCA supports the introduction of a NES to cater for parents or carers of children under school age.
15. An emerging issue, however, especially among CALD communities where extended families and other carer relationships are common, is whether this flexibility should be applied not only to the care of young children but also to others. With the ageing population, for example, carer responsibilities for elderly parents or relatives is capable of generating just as much pressure on an employee as care for children. This is especially so where the employee may come from a background of fractured support systems, resulting in the employee often caring for those who may not (in conventional terms) be part

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<sup>4</sup> s 10(4) NES

<sup>5</sup> s 16(3) NES

<sup>6</sup> Exposure Draft Discussion Paper par 101

of the dependent person's immediate family. Consideration could therefore be given to expanding the flexibility provisions beyond care for young children.

### ***Public Holidays***

16. FECCA supports the enshrining of public holidays in National Standards. We note, however, that three of the public holidays prescribed are linked to Christian religious festivals (Christmas Day, Good Friday and Easter Monday), which may have little or no significance for many CALD employees. In addition, cultural holidays such as New Year are often celebrated at different dates.
17. While FECCA appreciates the importance of Anglo-Christian festivals in this country, consideration might be given to amending the Standard to provide for workers to request that such a holiday be substituted by another day which has more relevance to the worker's own religious and cultural background, (such as the festivals of Eid, Hannukah or Chinese New Year). There may be instances where industry might also be assisted by such flexibility in the workforce. For CALD workers who might be reluctant to suggest such a measure, mention of it in the National Standards would provide a useful way of rendering such a measure more acceptable to the wider community.

### ***The Fair Work Information Statement and Other Information***

18. FECCA notes that the Fair Work Information statement will be given only to new employees<sup>7</sup>. Further, it would seem that information about what might constitute '*reasonable business grounds*' will be given to employers by Fair Work Australia, but not to employees<sup>8</sup>. This combines to deprive existing employees of important information and all employees of valuable guidance about the circumstances in which employers might refuse them certain benefits. For vulnerable workers, such an outcome exacerbates the difficulties which they already have.

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<sup>7</sup> Exposure Draft Discussion Paper par 300

<sup>8</sup> Exposure Draft Discussion Paper pars 72,121

19. Consideration should be given to giving all workers the Fair Work Information statement (in community languages where necessary) and giving all workers access to the same information as their employers will receive from Fair Work Australia.

### ***Lost Protections***

20. The points made above reflect the general disadvantage faced by CALD people in the workplace. In recent years, they have been hard hit by the erosion of workplace protection introduced by WorkChoices. FECCA looks forward to the restoration of fairness in the workplace as a result of the new workplace initiatives, including the National Standards.

21. One of the safeguards previously afforded to CALD Australians under workplace laws was an obligation for collective agreements to be explained:

*'...in ways that were appropriate, having regard to the person's particular circumstances and needs. An example of such a case would be where persons included:*

*(a) women;*

*(b) persons from a non-English speaking background; or*

*(c) young persons.'*<sup>9</sup>

22. The Australian Industrial Relations Commission has in the past refused to certify agreements which had not been adequately explained to people in their first language.<sup>10</sup>

23. FECCA would ideally like to see a return of such a provision, with general application to industrial instruments and the like. The influence of such considerations could be reflected in the National Employment Standards, though FECCA would also like to see the requirement becoming a recurring

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<sup>9</sup> Former s 170LT Workplace Relations Act 1996

<sup>10</sup> In *Re Epona* (PR931064. 6. 5.03) the AIRC refused to certify an agreement involving a clothing manufacturer because information provided to the largely NESB workforce was inadequate.

theme in the Act (such as the making of modern awards and future agreements and the proposed *Better Off Overall Test*).

24. The key advantage of such a provision is that it shifts the onus for such a culturally-based assessment from the employee to a third party, who will examine this aspect of its own initiative, whether or not it has been raised by the employee. For reasons which are set out below, many CALD workers would be in no position to initiate a review of the meaning of workplace arrangements.

### **CONCLUSION**

25. FECCA supports the introduction of NES and the opportunity to make this submission. FECCA also welcomes the various other initiatives designed to restore fairness to the workplace. We consider that while the NES as presently drafted are a good starting point, there is room for improving them, to deal with issues such as those raised above.

26. FECCA would be pleased to elaborate on any of the material in this submission, should that be required.