



**AUSTRALIAN GOVERNMENT
DEPARTMENT OF EDUCATION, EMPLOYMENT and WORKPLACE RELATIONS
DISCUSSION PAPER**

NATIONAL EMPLOYMENT STANDARDS EXPOSURE DRAFT

**SUBMISSION OF THE ASSOCIATION OF PROFESSIONAL ENGINEERS,
SCIENTISTS AND MANAGERS, AUSTRALIA**

INTRODUCTION

1. The Association of Professional Engineers, Scientists and Managers, Australia (“APESMA”) is an organisation registered under the Workplace Relations Act 1996 (“the Act”) representing over 25,000 professional engineers, scientists, veterinarians, surveyors, architects, pharmacists, information technology professionals, managers and transport professionals throughout Australia. We are the only industrial association representing exclusively the industrial and professional interests of these groups.

National Employment Standards

2. In accordance with its “Forward with Fairness” policy, the government intends to introduce a new set of legislated minimum standards to replace the current Australian Fair Pay and Conditions Standard (AFPCS). The National Employment Standards (“NES”), together with a new system of modern awards, will form the basis of minimum terms and conditions for working Australians. It is intended that “industry specific” detail, relevant to the operation of the NES, will be included in modern awards in addition to the 10 allowable matters.

BACKGROUND

Award Safety Net - Professionals and Managers

3. Professional and managerial employees within APESMA's traditional area of coverage have enjoyed the benefits of award coverage, in some cases dating back to 1946. Typically, APESMA awards have application at all levels ranging from new graduates to senior professionals/ managers. Exclusion from award coverage on the basis of income has not been a feature of APESMA awards.
4. Most private sector professional and managerial employees have their salaries and conditions regulated by some form of common law employment. However these contracts have been underpinned by the protection of the award safety net. In this regard it is important to note that there is very little collective bargaining for these employees.
5. The protection offered by the award safety net has meant that many professional and managerial employees have entered into individual contracts of employment with the knowledge that their basic workplace rights are safeguarded. For instance, it has meant, for example, that professionals and managers have been able to insist that they are compensated for the working of additional hours and negotiate around work/life balance etc. It should be noted however, that while the awards regulating professionals and managers have established basic entitlements, these have operated in a flexible manner. This fact is evidenced by the longevity of these awards over time and the virtual lack of disputation surrounding their application.
6. It has been often assumed that private sector professional and managerial employees are better able to negotiate favourable outcomes for their employment terms and conditions and, as such, do not require the protection of the award safety net. However, there is little evidence for this proposition. Whilst it is correct that in some areas of professional employment relatively high salaries are paid on account of the skills shortage, the overall situation is not uniform.
7. In addition, there is the issue of the general conditions of employment that should apply. Employers sometimes assume that the payment of a reasonable salary absolves them of the obligation to provide for access to work/life balance and other conditions of employment.

8. APESMA believes that all employees, irrespective of income, should continue to have the right to basic conditions of employment such as reasonable working hours; parental leave; minimum redundancy entitlements etc.

What happens to an employee that is not covered by a modern award?

9. The Federal Government has indicated that it is its intention to legislate to exclude “high income earners” from future award coverage. APESMA estimates that if a “high income earner” is defined as an employee who earns in excess of \$100,000 per annum then that would exclude approximately one third of technology based professionals currently covered by awards.
10. In addition, it is proposed that awards will also not apply to “employees, such as managerial employees who, because of the nature and seniority of their role, have been traditionally award free”. The sole safety net for these employees will be the National Employment Standards.
11. In paragraph 37 of the exposure draft it is acknowledged that consideration needs to be given to the best way that the NES operate effectively for these employees having regard to the principle that the NES are minimum entitlements. One possible remedy as raised in paragraph 38 of the exposure draft is the possible introduction of “default rules” for managerial and high income earning employees in order to provide for “flexibilities”.

Employees – “award covered” and “traditionally award free”

12. In the consideration of this issue it is important that a distinction is drawn between two categories of employees.
13. Firstly there are those who have traditionally been award free whose current safety net is the Australian Fair Pay and Conditions Standard.
14. Secondly, there are those designated as “high income earners” who include technology based professionals and who currently enjoy the protection of the

award safety net. The potential for these employees is to not only lose access to award entitlements, but to suffer a further disadvantage with the introduction of “default rules” that may provide for an inferior set of NES than those that will apply to the workforce generally.

National Employment Standards – A Fair Safety Net?

15. In all the circumstances APESMA’s primary position is that the NES should act as a fair and genuine safety net. In order to achieve this objective the Association believes that it is important that the standards are comprehensive and sufficiently detailed in order to provide a high level of certainty for all employees.

“Default Rules”

16. However, if it is considered desirable that a system of “default rules” should be put in place then existing award coverage or the lack thereof should be taken into account.
17. Firstly, in the case of those managerial employees etc which have never been covered by awards, it is proposed that the NES contain machinery provisions that will allow the effective operation of the standards through access to “industry specific detail”. This could be achieved through either deeming the relevant provision in the major industry award to apply, or by the designation for this group of employees of the proposed “catch-all” award as set out in paragraph 38 of the exposure draft.
18. Secondly, in respect of “high income earners” who will be excluded from awards for the first time, there are two basic options:
 - Firstly, the NES could contain machinery provisions whereby in respect of the relevant “industry specific detail” the provisions of the relevant award for the occupation or industry would apply;

- Secondly, where there was no applicable award or if it was deemed to be more convenient, a default award could be nominated for particular occupations. For instance in the case of Professional Engineers the industry specific detail contained in the Technical Services Professional Engineers (General Industries) Award 1998 could constitute the “default rules” for Professional Engineers in the private sector. Likewise specific awards could be nominated for other occupations. As mentioned above, provisions typically contained in APESMA awards are typically flexible in their operation and the designation of these awards could provide a fair safety net that would operate in a flexible manner.

National Employment Standards – Specific Matters

19. The National Employment Standards will consist of 10 matters as follows:
 - (a) Maximum weekly hours
 - (b) Request for flexible working arrangements
 - (c) Parental leave and related entitlement
 - (d) Annual leave
 - (e) Personal/carer’s leave and compassionate leave
 - (f) Community service leave
 - (g) Long service leave
 - (i) Notice of termination and redundancy pay
 - (j) Fair Work Information Statement

20. The ACTU in its submission will canvass many issues that are of concern to employees generally.

21. In this submission comment will be made primarily on those issues of particular concern to professional and managerial employees in the context of attempting to ensure that the NES provide a fair and genuine safety net that provides for basic entitlements.

(a) Maximum Weekly Hours

22. Hours of work are an extremely important issue for professional and managerial employees. Unfortunately it is sometimes assumed that professionals and managers can be expected to work as often as required by management with scant regard as to whether the additional hours of work are adequately compensated for and/or are reasonable.
23. APESMA rejects this discriminatory approach and believes that professionals and managers are entitled to the fullest protection in respect of this matter.
24. Turning specifically to the draft provision APESMA has a number of concerns as follows:

(i) Compensation for working additional hours for professional employees

25. The NES should address the issue of overtime payments and penalty rates so that award-free employees and high-income earners can have access to these entitlements.
26. In this regard it is a well-established standard that when technology based professionals regularly work additional hours, employers should compensate them. For instance the Technical Services Professional Engineers (General Industries) Award 1998 and Metal, Engineering and Associated Industries (Professional Engineers and Scientists) Award 1998, entitle employees to receive some form of compensation but provide for flexibility as to the method used.
27. These awards which apply to a large number of private sector technology based professionals provide for 3 options to apply as follows:
 - Taking this factor into account in the fixation of annual remuneration;
 - Granting special additional remuneration; or
 - Granting other compensation such as special additional leave.

(ii) Employee works additional hours at their own volition

28. APESMA acknowledges that there is often a cultural expectation that professional and managerial employees work additional hours and that this is a regular occurrence. As mentioned above it is a long established practice that employees are compensated for doing so. In fact many employees have an allowance for the working of additional hours included in their annual salary. This is in accordance with the provisions contained in awards and provides for a flexible approach. However, in the absence of any provision for compensation any working of additional hours should not occur.

(b). Request for flexible working arrangements

29. APESMA believes that the capacity for employees to balance their work and family responsibilities should be a fundamental right. In this regard it should be noted that it can sometimes be very difficult for professionals and managers to achieve this balance.

30. In respect of the detail of the draft standard there are a number of queries.

I. Definition of the term ‘employee with responsibility for the care of a child under school age’

31. APESMA believes that the NES should define the term ‘employee with responsibility for the care of a child under school age’ to include those in a parent-like relationship. The definition of the term is explained in the discussion paper but it is not defined in the draft legislation. To avoid any dispute or confusion, a definition should be included in the legislation.

II. Grievance procedure

32. APESMA notes that the NES is silent on the issue of a disputes procedure in order to provide redress where a request for flexible working arrangements is unreasonably refused. The general issue of access to dispute resolution procedures is dealt with later in this submission.

III. Flexible working arrangement to care for elderly people

33. The NES only provides for flexible working arrangements to care for children under school age. APESMA believes that the NES should also allow employees with responsibility for the care of elderly people such as their parents or close relatives to request similar flexible working arrangement.

(c) Parental leave and related entitlements

34. APESMA believes that this proposed standard should be increased to the level of the current Test Case standard.
35. In addition, there are concerns in respect of the enforcement of the right to request an employer for an additional period of up to 12 months' unpaid leave. The issue of access to dispute resolution procedures is dealt with elsewhere in this submission. However, it should be noted that those who will be excluded from future awards need to have access to a process which allows this provision to be speedily and effectively enforced.

(d) Annual leave

36. There are a number of issues concerning the operation of this provision.

I. Shift Work

37. The NES provides that shift workers are entitled to an additional week of paid leave. However, the definition of shift workers is not included in the NES but will be included in awards to allow for industry-specific detail. As a result, award-free employees or employees excluded by awards who perform shift work will not have access to this entitlement. APESMA proposes that a general definition of shift work should be included in the NES to ensure that no employee will be worse off if they are award-free. Alternatively, there should be a machinery provision contained in the NES to the effect that award free employees are deemed to be covered by the

definition of shift work that is contained in the relevant award that otherwise would have been applicable.

II. Annual leave loading

38. Annual leave loading is a standard entitlement under major awards covering professional employees. Examples of such awards include the Metal, Engineering and Associated Industries (Professional Engineers and Scientists) Award 1998 and Technical Services Professional Engineers (General Industries) Award 1998.
39. Under the above-mentioned awards, annual leave loading for an employee is paid at the rate of 17 -1/2 per cent of his or her annual leave entitlement. However, awards allow alternative arrangements to apply in the following circumstances:
- Where an employee's total remuneration has been fixed having regard to this entitlement; or
 - Where an employee is in receipt of a benefit from their employer which is related to their annual leave and which is established as being of equivalent value or greater value than the loading provided; or
 - Where an employee and their employer mutually agree on an arrangement other than the loading provided in awards. Such arrangement shall stand in place of the loading.
40. Unfortunately the annual leave provision contained in the NES does not include annual leave loading. It is proposed that annual leave will be paid according to an employee's 'base rate of pay' for their ordinary hours of work in the leave period. As such, professional employees whose earnings are in excess of \$100,000 will lose the benefit they have enjoyed under awards.
41. Therefore APESMA proposes that the NES should incorporate a standard annual leave loading provision that allows for the flexibilities outlined above.

III. Interaction of the NES with other kinds of leave or absences provided by a contract of employment or industrial instrument

42. Other types of leave often provided for under a contract of employment and other kinds of industrial instruments include Rostered Days Off or Time in Lieu etc. APESMA proposes that the NES should provide that an employee is not deemed to be on paid annual leave while taking these other forms of leave.

(e) Community Service Leave

43. There is one query in respect of the Community Service Leave NES.

I. Reasonable rest period for afternoon and night shift workers

44. The NES allows for reasonable rest period following the activity and before commencing work. It is unclear as to what constitutes reasonableness for the rest period. To clarify this issue, the NES should specify the length of rest period for shift workers to be at least 12 hours.

(f) Long Service Leave

45. The draft NES provides that existing long service leave arrangements in awards, workplace agreements or state and territory laws will be preserved until a uniform long service leave is developed. Whilst this proposal protects existing entitlements it only does so on an interim basis and leaves the question as to the treatment of differential long service leave entitlements for future consideration.
46. APESMA submits that in the development of long service leave standards there will be an on-going need to preserve existing more favourable arrangements.
47. For instance, employees in the coal mining industry in Queensland accrue long service leave entitlement at the rate of thirteen weeks for each eight years of continuous service. This entitlement is more beneficial than the long service leave provision under Queensland *Industrial Relations Act 1999*.
48. It is recommended that a machinery provision which preserves existing long service leave entitlements should be incorporated into the NES to ensure that

employees who currently benefit from generous long service leave provisions under relevant awards will not lose this benefit if as a “high income earner” they are excluded from awards in the future.

(g) Public holidays

49. Section 48 of the draft NES provides that an employer may request an employee to work on a public holiday if the request is reasonable. One of the factors used to determine whether a request to work on a public holiday is reasonable is whether an employee is entitled to receive overtime, penalty rates or other forms of compensation for working on a public holiday. Overtime and penalty rates are dealt with in awards. However, award-free employees will not have access to these entitlements. Accordingly, APESMA proposes that the NES contain machinery provisions that would deem the provisions of the relevant occupationally based or industry award to apply to “high income earners” excluded from awards that otherwise would have applied to them.

(h) Notice of termination and redundancy pay

I. The minimum period of notice

50. Under the proposed NES, the default minimum period of notice for employees whose period of continuous service with the employer is less than 1 year is 1 week. The minimum notice period is not comparable to the standard provided under most awards covering professional employees. For instance, under the Metal, Engineering and Associated Industries (Professional Engineers and Scientists) Award 1998, the minimum notice period is one month. APESMA proposes that the NES should incorporate this into the legislation to apply to professional and managerial employees and any other class of employee that currently enjoy this entitlement.

II. Redundancy

1. Calculation of number of employees

51. The NES provides that employees are not entitled to redundancy pay if they are employed by a business with fewer than 15 employees. In this regard there is uncertainty as to method of calculation of the number of employees. For instance, it is not clear whether casual employees employed on a regular and systematic basis are to be counted as employees for this purpose.

(i) Fair Work Statement

I. Fair Work Statement for existing employees

52. It is proposed that the NES only requires employers to provide new employees with a Fair Work Statement. APESMA believes that the NES should extend this requirement to existing employees. This is to ensure that all employees are made aware of the new industrial relations system that will apply from January 2010.

OTHER MATTERS

Entitlements excluded from the NES

53. Common award entitlements excluded from the NES will include:
- Rest breaks;
 - Incentive based payments and bonuses;
 - Monetary allowance for work related expenses;
 - Loading for working overtime or shiftwork; and
 - Penalty rates.

The NES does not address these matters. They are left to be dealt with in awards. As such, employees earning in excess of \$100,000 will lose these entitlements. Therefore provision should be made for them in the NES.

Dispute resolution procedure

54. All existing awards must contain a dispute resolution procedure. Employees earning in excess of \$100,000 will potentially lose access to this option if they are excluded from award coverage. Accordingly APESMA believes that the NES should contain a machinery provision that would allow award excluded employees to have access to dispute resolution provisions on the same basis as award covered employees.

Casual Loading

55. At present, the provision of casual loading is dealt with in the Australian Fair Pay and Conditions Standard (AFPCS). Casual loadings are also contained in awards applicable to professional and managerial employees. Award-free employees are entitled to a default casual loading of 20 per cent under AFPCS. Under the proposed NES, the casual loading is not included and will be dealt with in awards. It is suggested that a machinery provision should be included in the proposed NES which allows award-free employees to have access to the casual loading provision in any relevant award that may be applicable to their occupation or industry.

Interaction between the NES and Awards

56. The Workplace Relations Amendment (Transitional to Forward with Fairness) Bill 2008 empowers the Minister to make a request to the AIRC to modernise awards. A draft Award Modernisation Request states that awards cannot exclude or operate inconsistently with the NES. However, there are exceptions to this. For instance, if awards provide for retrenchment pay for employees employed in a business with less than 15 employees, this may be allowable even if inconsistent with the NES provision. This could be on the basis that that awards can build upon the NES, to the extent necessary to ensure a fair safety net of conditions, having regard to the existing entitlements of employees (paragraph 29 of the exposure draft).
57. In addition, the Exposure Draft accompanying the proposed NES provides that awards can provide provisions that are more beneficial to employees than those

provided under the NES due to the nature of work in a particular industry (paragraph 30 of the exposure draft).

58. Again, in the context of those employees who will be excluded from awards there should be machinery provisions included in the NES to ensure that any enhanced entitlements can continue to be accessed. For instance it would be fair for example to base enhanced personal leave provisions on income.

59. Finally, the Association has welcomed the opportunity to contribute to the discussion around the exposure draft of the proposed National Employment Standards. APESMA would urge the federal government to ensure that the final legislation establishes a fair and genuine safety net for all employees including professionals and managers.

This submission was prepared by APESMA National Research Officer Natacha Dao-Chaeng and Acting Executive Director, Industrial Relations Michael Butler.

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