

Public Consultation on the National Employment Standards Submission of the Qld Council of Unions

Overview and commentary

1. The Queensland (Qld) legislation framework provides for a range of minimum employment conditions. This has been a feature of the Qld system since the inception of state industrial relations legislation. For a range of statutory minimum employment conditions, those conditions have been in part, or in whole, transposed into state awards. However through the effluxion of time a number of employment conditions have been dealt with more comprehensively within the state legislation than within the award structure. The most obvious cases in point are family leave and long service leave. In practice this has resulted in a referral point for employment conditions across an award with reference into the legislation.
2. The legislation in its current form was generated in 1998/1999 as a result of a holistic review involving all stakeholders. The legislation has been subject to amendment though in substance the legislation remains principally unaltered from its 1999 enactment.
3. The Qld Council of Unions (QCU) is the peak union council in Qld. We represent over 40 affiliated unions and over 350 000 union members. The QCU has offices in Brisbane and regional centres throughout the state.
4. The QCU provides advice in regard to the operation and application of the Qld legislation to its affiliated unions.
5. The QCU notes that in the proposal for a set of national employment standards (NES) that the referral point in developing those standards may be in part from existing award content, or key cases determined before industrial tribunals. Although there are a number of employment standards in Qld that have been developed in that way (for example redundancy entitlements) this is not a clear feature for statutory minimum conditions within the state's industrial relations system.
6. Note should be made that the application of the legislative employment standards operating in Qld generally apply to both award regulated and award free employees. The legislation does provide in some instances for a caveat in regard to reading between an award and the legislation for the purposes of determining which is the applicable employment condition.
7. The capacity for a range of legislative minimum conditions to have equal application to both award and award-free employees, and employees disregarding wage level, is a feature of the Qld statute. See for example ss.10 (sick leave) and 11 (annual leave).

8. The QCU notes that at point 24 of the discussion paper that “modern awards are intended to complement the NES”. In Qld it is often the case that the statutory employment condition complements the award (with family leave as an example).
9. The matters that arise in regard to the proposed NES and the statutory minimum conditions that operate in Qld are issues of intercession. For example the NES discussion paper is couched in terms where the NES would be the minima and the capacity to build on that minima would be through the award. See points 28 and 32. This is the inverse of the Qld system where in some instances the legislative prescription is the detailed provision, and the award contains a referral point, or provisions less than the legislation.

Appendix – draft provisions

10. **Division 1 (preliminary)** of the NES draft provisions defines at s.5 the meaning of service as “no break in continuity of service for periods of paid or unpaid leave approved by the employer”. This terminology is broadly consistent with Qld legislation: see s.71.
11. Section 71 at ss.(4) deals with re-employment of the employee if the employee terminated their employment as a result of injury or illness and has not been re-employed in a calling between termination and re-engagement.
12. Subsection (5) deals with re-employment of the employee within a period of three months. Subsection (6) deals with terminating an employee with the intent to avoid any employment obligations; or as a result of an industry dispute and the employer re-employs the employee. Subsection (7) deals with termination as a result of slackness of trade and where the employer re-employs the employee. Subsection (8) determines that service with a corporation includes service with any of its subsidiaries.
13. Note that continuity of service in Qld statute applies generally. This contrast to the NES wherein there is delineation between the applications of continuity of service based on the type of NES referred to.
14. Note that the statutory definition of continuity of service provision is not replicated in awards. Reference is therefore to the legislation in regard to issues relating to service.
15. At s.7 of the draft provisions reference is made to absences on workers’ compensation (which is an unpaid but authorised leave). The discussion paper outlines some latitude in the application of the NES on reference to other legislation. This is principally in reference to workers’ compensation legislation. See for example point 132 and the accrual of annual leave whilst on workers’ compensation. Qld Workcover legislation provides for accrual of leave entitlement whilst absent on illness or injury for which they are receiving workers’ compensation. Is the presumption that this will be covered by the Regulations: see s.6(2)(b)(ii).

16. The draft provisions outlined at **Division 2 (maximum weekly hours)** detail surrounding working hours. The Qld legislation provides at ss.9 and 9A detail in relation to working time including rest pauses, overtime, loadings etc. These matters are principally reflected in awards.
17. **Division 3 (request for flexible working arrangements)** are provisions dealt with principally under Qld legislation. The approval process for accessing flexible working arrangements is 14 days, whilst the NES prescribes 21 days.
18. In **Division 4 (parental leave and other related matters)** the QCU notes that the definition of spouse does not include same sex couples. The Qld legislation defines spouse broadly.
19. Eligibility for parental leave under Qld statute includes eligibility for long term casual employees (defined as a casual employee engaged by a particular employer on a regular and systematic basis for several periods of employment during a period of at least one year immediately before the employee seeks to access the entitlements. The NES places a caveat around this definition by identifying that there would have been a reasonable expectation of continuing engagement by the employer.
20. Notice periods also differ. The NES provides that written notice for accessing leave must be given 10 weeks prior to taking leave; whilst the Qld statute requires the employee not to have to provide exact start and finish dates until four weeks prior to commencing leave.
21. The special maternity leave provision of NES are unclear as to whether paid personal/carer's leave can be accessed prior to taking the unpaid "special" maternity leave. The Qld legislation provides for the taking of either unpaid special maternity leave and or paid sick leave for as long as the doctor certifies it as necessary.
22. The NES provision relating to transfer to a safe job due to risks arising out of the pregnancy or the work being performed is narrower than the Qld statute which allows the transfer to occur for both pregnancy and breastfeeding.
23. In the return to work provisions of the NES refer to an employee returning to the employee's pre-leave position or "if that position is no longer available" an available position. The Qld statute refers to the position no longer existing. The latter terminology denotes that the position has been made redundant; and the former NES proposal that the position could have been given to someone else. This anomaly also exists in relation to "replacement employees".
24. The QCU also notes that the Qld statute further protects casual employees by indicating that if a long term casual employee's hours were reduced because of pregnancy before starting leave, then those hours must be restored.
25. The return to work guarantee provided for in the NES refers to the pre-leave position and pre-leave hours and is not specifically drafted as the Qld legislation.

26. The QCU notes that the NES has no provision allowing for an employee to request the shortening of parental leave, as provided by s.30 of the Qld statute.
27. Regarding a request by an employee to extend parental leave, the NES limits an employee to considering business factors. The Qld statute (s. 29D) requires an employer to give consideration to a broader range of factors. Most specifically the employer must consider the impact of a refusal on the employee as a caregiver and the employee's dependants.
28. The NES requires an employer to consult an employee on parental leave in respect of change that has a significant impact on the employee's "status or pay". The Qld statute contains a broader requirement for an employee to be consulted about any "significant change in the workplace".
29. The NES allows for the ceasing of parental leave where an employee ceases to be responsible for a child. The Qld statute anticipates more complex circumstances and requires consideration of all the factors where determining if an employee is no longer a primary care giver.
30. The continuity of service provision also reflects anomalies between the NES and Qld statute. The Qld provisions allow at s.11(5) that any period of approved leave over three months will not be counted as service for the purposes of calculating recreational (annual) leave. The period less than three months does result in the calculation of annual leave.
31. There is no provision dealing with dismissal because of pregnancy in the NES; whilst the Qld legislation indicates at s.34 that an employee cannot be dismissed due to pregnancy etc.
32. **Division 5 (annual leave)** reflects provisions that are principally covered in state awards. However s.11(7) of the Qld legislation provides that annual leave accumulates (unless an industrial instrument provides otherwise). This means from year to year. This is not dealt with in the NES.
33. Further s.13(2) of the Qld legislation provides that payment for annual leave is at the "ordinary rate" wherein ordinary rate is defined as the rate prescribed in the award. This differs from s.29(1) of the draft provisions as pay rate is not necessarily the base rate of pay as prescribed in the NES.
34. Note also that there is no provision made in the NES for annual leave loading. Section 13A of the state legislation provides for standard leave loading of 17.5%. Leave loading is also reflected in awards.
35. Section 30(1) of the NES provides for the cashing out of annual leave. This is specifically precluded in Qld legislation except in the case of termination of employment (see s.13 of the Qld legislation).

36. In **Division 6 (personal carer's leave and compassionate leave)** there is no provision for accessing annual leave for the purposes of carer's leave. The Qld legislation provides that up to five days can be taken in any one calendar year with the deferment of leave loading for single day absences until such time as five days are accessed.
37. Similarly there is no provision for TOIL (time off in lieu) or make-up time for the purposes of carer's leave, whilst these provisions are available under Qld statute.
38. **Division 7** deals with **community service leave**. Eligible community service includes jury service. Jury service leave is an award entitlement generated from a *Statement of Policy* decision in Qld. Separately a statutory reference is contained at s.14A of the Qld legislation. The Qld provision is not dissimilar to the NES.
39. In regard to question 31 of the discussion paper, note should be made that the tribunal decision dealing with the establishment of a jury service provision dealt with the question of a small business exemption. Clearly the capacity to be able to draw a jury in a state where around 97% of all businesses are "small" businesses would create a limited pool of jurors.
40. **Division 8 (long service leave)** of the NES provides that an employee is entitled to long service leave in accordance with the applicable award-derived entitlement: see s.46(1). However the entitlements for long service leave in Qld are prescribed by legislation.
41. The QCU notes that point 236 of the discussion paper does refer to award and legislative entitlements operating but this is not replicated in the draft provision.
42. Note also that points 237 and 238 deal with the relationship between workplace agreements and LSL provisions in awards and statute. Point 238 suggests that when an agreement etc ceases to operate then the referral point is to the pre-modernised award or NAPSA and only if there is no underlying award or NAPSA then the employee would be entitled to LSL under applicable state statute. As Qld NAPSA's principally do not accommodate for LSL in the same manner as the statute, the reference point for LSL is the legislation. There would need to be a referral point to the legislation even if there was an underlying award as the legislative prescription is the standard. This would need to be reflected in the draft provision.
43. Note also that legislative LSL arrangements exist for portable LSL in the building and construction industry and contract cleaning industry. These are regulated through Qld statute.
44. The draft provisions outline at **Division 9 (public holidays)** detail in regard to public holidays. Section 15 of the state legislation provides for payment on a public holiday including stipulation of entitlement of minimum hours to be worked of four hours (unless the industrial instrument provides otherwise).

Accommodation is also made in the Qld legislation for the calculation of payment if overtime is worked on a public holiday. These arrangements are not accommodated in the NES.

45. The QCU notes that Labour Day is not identified in the list of named public holidays.
46. **Division 10** outlines detail in regard to **notice of termination and redundancy payment**. Although Qld legislation provides for notice periods, redundancy entitlements are not a state legislative provision but are reflected in awards. The standard adopted for awards reflects the outcome of a *Statement of Policy* decision generated by the QIRC which is not the provision adopted federally.
47. There are components of the *Statement of Policy* particularly relating to defining employers that are not accommodated within the NES. This definition which was subject to full bench determination is a useful mechanism for establishing which employers are subject to the payment of redundancy entitlements. This assists in answering question 44 of the discussion paper.
48. The Qld standard differs in relation to quantum for redundancy over period of employment.
49. There is also no accommodation for consultation in regard to termination, change and redundancy. This is a clear feature of the Qld provision. It is also a statutory provision: see s.90A.
50. Section 90 separately provides for a process for giving notice in relation to proposed dismissals which details the provision of information required if such terminations occur.
51. The QCU notes that the discussion paper highlights Qld as an example whereby access to redundancy entitlements for employees engaged in businesses employing fewer than 15 employees, does not exist. Note should be made that the Qld *Statement of Policy* provides for a mechanism for the Qld industrial tribunal to deal with such matters on application.
52. The final provision in the draft standards deals with the **Fair Work Information Statement** (Division 11).

Comment

53. The QCU has not sought to answer each of the questions posed in the discussion paper. Rather we have overviewed the statutory provisions along with decisions generated from the Qld industrial relations tribunals in regard to identifying the anomalies that exist between the proposed NES and the Qld minimum standards.

54. The QCU rejects any notion that the federal NES would result in a diminution of the minimum entitlements that operate within Qld.
55. As indicated above, to a large extent the minimum standards operating in Qld are contained within the *Industrial Relations Act 1999*. These provisions, where superior to those operating within Qld awards, take precedence.
56. In many instances the legislative prescription has equal application to employees whether they are covered by an award or not.
57. There is a real potential in the exercise being undertaken in formulating “national” employment standards that those standards will be less than the standards operating at a state level. The QCU rejects this notion.

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