

**National Employment Standards Exposure Draft Submission to the  
Workplace Relations Policy Group  
Department of Education, Employment and Workplace Relations  
by Dr Michael Lyons and Ms Meg Smith  
School of Management, University of Western Sydney, April 2008.**

**Preliminary**

1. This submission is does not necessarily reflect the views and opinions of the staff and management in the School of Management or the University of Western Sydney.

**Introduction**

2. We welcome the opportunity to comment on the National Employment Standards (NES) Exposure Draft and Discussion Paper, and note the contrast with the secretive process of the former Coalition government when developing the Australian Fair Pay and Conditions Standard (“the Standard”) during 2005. We acknowledge the Government’s desire for the NES is to deliver fairness to working people, flexibility for business and promote labour productivity is not an easy task. However, the experience of agreement making under the Work Choices system shows that some employers will abuse their market and bargaining power to disadvantage employees even when legislated employment conditions apply (see Table 1). Consequently, it is important to stress the motivation for employment protection regulation such as the NES. In the vast majority of employment relationships the employee has less market power than the employer and is therefore a “price taker”. Employment protection regulation erects a set of terms and conditions that are likely to apply if the parties had an equality of bargaining power. Therefore the comments in this submission focus on the delivery of the first of the Government’s desired objectives of the NES.

**Table1: Relationship between AWAs and the Standard (%).**

<i>Standard's condition</i>	<i>Above to the Standard</i>	<i>Equal to the Standard</i>	<i>Below the Standard</i>
Award pay scale *	78.3	15.9	2.6
Ordinary working hours (38 hours per week)	8.0	76.5	15.6
Annual leave (4 weeks paid)	13.2	78.6	8.2
Personal/sick leave (10 days p.a. paid)	17.9	60.5	21.6
Parental leave (52 weeks unpaid)	11.9	87.2	0.9

*Source:* Davies (2007). Note: \* excludes “unknown”

*NB:* sample of 3973 AWAs lodged between June to September 2006.

### **Coverage of the NES**

3. The Discussion Paper (DP) raises questions about the coverage of NES (DP pp. 4-5). With respect to “managerial employees”, we submit this class of employees is not easily defined. ANZSCO (Australian and New Zealand Standard Classification of Occupations) defines “managers” as employees who “plan, organise, direct, control, coordinate and review the operations of government, commercial, agricultural, industrial, non-profit and other organisations, and departments” (ABS cat. no. 1220.0, p. 70), but also notes the difference between senior managers and more junior managers. It is our view that managers who have responsibility to make decisions about the hiring and termination of staff should not be covered by the NES, as they are not generally disadvantaged in the labour market. But, this class of employee cannot always be defined with precision.
4. Likewise, we submit the class “high-income employees” should be defined. Often an employee may be appointed to a managerial position – as defined by the ANZSCO – yet still be on a moderate income. For example, in May 2006 average weekly earnings for full-time managerial employees were \$1,355, while the full-time all persons’ weekly average was \$1,045 (ABS cat. no. 6310.0). In light of the difficulty in defining “managerial employees” who are not in need of the employment protection of the NES, we submit that income or earnings should be used as the measure to limit the coverage of the NES.
5. In November 2007 full-time adult weekly total earnings was \$1,162.20, with the male AWTE of \$1, 243.20 (ABS cat. no. 6302.0). We submit a multiple of full-time AWTE or the male full-time AWTE should be the benchmark to limit the coverage of the NES. For instance, a multiple of 2.5 male AWTE would limit the coverage of the NES to moderate-income managers, but exclude truly “high-income employees”. In addition, an AWTE benchmark would also capture new and emerging industries or occupations. To retain the relevance of the AWTE benchmark in future years, we submit the AWTE threshold should be that which applies in the most recently published Australian Bureau of Statistics (ABS) data on the commencement of the NES (i.e. November 2009) and be adjusted annually on the anniversary of the NES (i.e. November 2010, 2011, 2012 etc).

### **Maximum weekly hours**

6. The DP (pp. 8-9) raises questions about the NES maximum weekly hours standard. In responding to these questions it is worth recalling some of the concerns highlighted regarding the Coalition’s 38 hour week under the Standard.

[T]he employees found this to be one of the most awful of their whole rostering arrangements because the individual employees quickly in any 12 month period lost track of where the hours were that they owed the company or the company owed to them compared with a standard 38 hours. When they got to a quiet time they were given time off. The tendency of the company was to give them, say a one or two hour later start on a day or a one or two hour earlier finish on a day, rather than giving them the time off in useable amounts such as whole days off. There was also no regard by the company as to when the employee might like to take the time off in the quiet times. The company simply dictated when it suited them, and that would not necessarily suit the employees. (Opposition Senators 2005, paragraph 1.57)

7. The State and Territory governments also raised concerns about this aspect of the Standard, as it is possible for an employee who has worked consistently in excess of 38 hours per week to be dismissed yet only be paid for the period of notice based on 38 hours per week, and not on the excess hours worked (Joint Governments 2005, p. 19).

8. In response to Question 1 (DP, p. 8), we submit that if the NES expressly allowed employees to be exempted from the working hours safety net because the additional hours was done so at their own volition, the value of the NES would be diminished because this would be abused by some employers. As Table 2 shows, under Work Choices many employees surrendered “protected” award conditions seemingly at their own volition. We contend this outcome was not due to employee preferences, but due to employers unilaterally imposing their will on employees by including a “catch-all” clause in agreements (e.g.: “This Agreement expressly excludes all Protected Conditions.”). We predict a similar outcome would occur to the working hours protection if an “own volition” exemption was allowed. We submit that additional hours should only be worked in “exceptional circumstances”, such as unplanned staff shortages or unforeseen peaks in production. Otherwise, it is likely some employers will rely on existing staff consistently working additional hours (often without any compensation) as an alternative to proper human resource planning and the engagement of new staff (e.g. when other staff on absent due to parental leave). We submit these “exceptional circumstances” should be irregular, and the requirement for the additional hours should be expressed in writing setting out the period(s) when the additional hours are to be worked, and detailing the relevant compensation for working those additional hours.

**Table 2: AWAs excluding protected award conditions.**

<i>Protected condition</i>	<i>Condition excluded (%)</i>
Rest breaks	30.3
Insensitive payment & bonuses	70.0
Annual leave loading	71.1
Public holidays	22.5
Public holiday pay	52.6
Substituting public holidays	66.7
Overtime loading	51.7
Shift loading	75.9
Penalty rates	68.0
Allowances for skill & experience etc	57.3

*Source:* Davies (2007).

*NB:* sample of 998 AWAs lodged between June to September 2006.

9. With respect to Question 2 (DP, p. 9), the day(s) on which any additional hours are worked and the time of day the hours are worked are factors to consider. Working additional hours on weekends and early in the morning or late of an evening often restricts the ability of an employee to actively participate in their community and can disrupt household and family relationships. Consequently, we submit that any additional hours worked in these periods should only be in “exceptional circumstances” with the same written notice requirements outlined above. If an employer requires an employee to consistently work these “unsociable” hours, this can be facilitated with an agreed to variation of the employee’s contract of employment that still retains the integrity of the working hours protection.

### **Flexible working arrangements**

10. While we welcome the flexible working arrangements of the NES, we note its limitations for employee who have care responsibilities for others who are not “a child under school age” (DP, p. 10). We submit this aspect of the NES should be expanded to capture employees who have caring responsibilities for elders and persons with a recognised disability. Further, in response to Question 7 (DP, p. 13) we submit that what constitutes “reasonable business grounds” should be defined. A definition similar to “the business/organisation cannot perform its essential functions if the request is granted” would be appropriate.
11. However, we also note that industries, firms and workplaces that are dominated by women employees (i.e. who in proportionate terms are far more likely to be the primary carers of young children) may perceive that they are disadvantaged by this aspect of the NES relative to workforces dominated by men. We also note that employees without the named caring responsibilities might perceive they are disadvantaged by not having the opportunity to make such flexible working arrangement requests and/or being consistently allocated work at “unsociable” days/times because of the granting of carers’ requests. While we note these perceptions there is a clear social and generational requirement for employment regulation to support flexible working arrangements for employees with caring responsibilities.

#### **Parental leave**

12. The DP raises some issues regarding parental leave (DP, p. 21). In response to Question 9 we submit that it is appropriate for an employer to request from an employee necessary evidence that they are medically and/or psychologically fit to perform their duties when the employee has informed their employer they have recognised “condition” (for want of a better term), including pregnancy. This requirement is consistent with the employers’ duty of care obligation to provide both a safe workplace and a safe system of work. However, we submit that once the requested evidence has been supplied the mother’s desire to work should be complied with, to avoid situations where employers direct late term mothers or breast feeding mothers to take leave.
13. We have concerns with the concept “to satisfy a reasonable person”. Is the reasonable person an employer, an employee, a mother, or a father? A reasonable employer might have different measures of satisfaction to a reasonable mother in the particular circumstances.

#### **Annual leave**

14. The DP raises issues regarding annual leave (DP, p. 29). We submit the NES should include a right for an employee to request to take annual leave at half pay and thus double the period of leave, but this request can be refused due to “reasonable business grounds” discussed previously.
15. In response to Question 22, we submit that “base rate of pay” for paid annual leave should be calculated on the average weekly pay the employee received in the three (3) period immediately prior to the taking of leave. This proposal is intended to cover situations where an employee usually receives penalty or overtime pay and thus would be financially disadvantaged if paid leave was calculated on their “base rate”. However, this method of calculating paid leave could be varied if the employee is paid an “annual leave loading” of the community standard of 17 per cent or higher. Further, any increase in the employee’s base rate of pay that commences in the period in which the leave is taken should also form part of the paid leave amount.

#### **Personal/carer’s leave**

16. With respect to paid personal (“sick”) leave, we submit an additional employee protection should be included in the NES. That is, the employee who claimed paid personal leave and supplies to their employer the necessary evidence of an inability to work on the day or days, should not be treated less favourably than other employees of the employer. This proposal is intended to address situations where employees who are absent from work on Mondays and/or Fridays are treated less favourably than employees who are absent from work on other days of the week as occurred in Australia Post in 2003 (see Sappey et al. 2006, pp. 307-9).

### **Community leave**

17. We submit an additional category of community leave should be included in the NES. That is, when an employee is compelled to attend (by way of summons or similar instrument) the proceedings of a court or tribunal to give evidence as a witness is deemed to taking community leave. This additional category of community leave advances public participation in Australia’s judicial, industrial, and anti-discrimination systems, and overcomes situations where an employee is financially disadvantaged because of participation in those proceedings.

### **Termination and redundancy pay**

18. We submit the concept of “continuous service” should be defined so that employees who access unpaid parental leave should not be disadvantaged when the amounts of termination and redundancy pay are calculated. Otherwise, incidences of sex-based less favourable treatment could result.

### **Conclusion**

19. The proposals discussed in this submission advance, we assert, the Government’s desired objectives of the NES. They are, however, more “employee friendly” than they might have been had the experience of the “employee unfriendly” behaviour of some employers under the Coalition’s Work Choices laws not occurred. While there are other aspect of the draft NES that should be, we believe, revised, it is more appropriate for stakeholders with more intimate knowledge of their industry, industry sector and specific circumstances to nominate such proposals.

### **References cited:**

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