



## **National Working Women's Centres National Employment Standards Exposure Draft Submission**

### **National Working Women's Centres**

Working Women's Centres in Queensland and the Northern Territory have provided industrial relations services to vulnerable women workers since 1994. The South Australian Working Women's Centre has done so since 1979. Together we form the National Working Women's Centres (NWWC).

As NWWC have extensive experience in the provision of industrial relations advice, information, referral, advocacy and support to vulnerable women workers, we are uniquely placed to provide the following submission in response to the NES Exposure Draft.

Women contacting the NWWC are primarily employed in retail, hospitality, health and community services industries, and are employed in low skilled, low paid work arrangements with a high proportion of women working on a part-time or casual basis.

Generally NWWC clients are covered by awards or agreements but a high proportion are only entitled to the minimum provisions in the Federal Workplace Relations Act to determine their working conditions. It is essential that the provisions of this Act reflect the realities of these employees.

### **General comment**

NWWC wish to make the following general comments in response to the NES Exposure Draft:

- NWWC advocate for Government funded paid parental leave. We believe this paid leave should be, at a minimum, in line with ILO standards. NWWC also acknowledge the need for paid parental leave to fall in line with UN health standards in regards to breast feeding.
- Whilst the NES Exposure Draft does not set out a compliance regime or functions of Fair Work Australia, NWWC submits that Fair Work Australia ought to have powers to determine new and adapt existing National Employment Standards. Employees who work in industries and occupations that are not covered by collective agreements, and who are some of the most vulnerable workers, will rely on the safety net of the NES and modern awards. A Fair Work Australia that is not able to determine new or adapt existing NES leaves vulnerable employees reliant on the

Federal Parliament. Minimum conditions of vulnerable employees therefore are dependent on the politics of the time and are uncertain.

- A 'catch-all' award is essential to ensure coverage for award-free employees. Further references to the importance and relevance of a 'catch-all' award are found throughout the submission.
- A national portable long service leave scheme is important, particularly for the community sector where transience is normal and part of the make up of the industry.
- NWWC submit that one of the largest challenges facing our clients is the demands of balancing work and family responsibilities. The 'Requests for Flexible Working Arrangements' NES must reflect the demands of caring responsibilities of contemporary society by making provisions for carers of people with disabilities, people that are over school age and of elderly family members.

The following information responds specifically to the 'Introduction' and each individual NES as presented in the NES Exposure Draft Discussion Paper. Feedback provided is listed against the relevant paragraph numbers and some additional comments, that do not correlate to specific paragraph numbers, are found under the headings 'General comment'.

## **Introduction**

### **How do the NES interact with modern awards?**

(24) NWWC submit that the national harmonisation and simplification of awards must not result in the loss of pay or conditions for award based workers.

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

(38) NWWC supports the approach of introducing a 'catch-all' award to cover those employees who are not covered by an award. Award-free workers are extremely vulnerable as they work in occupations with low levels of union coverage and do not share very basic entitlements such as penalties, uniform allowance or leave loadings. Award-free workers are also vulnerable because they sometimes work without the safety and support of colleagues. Such employees include tour guides, nannies and sex workers.

Many women have been offered only minimal conditions through AWA's. NWWC support the provision of a 'catch-all' award or legislated standards that will provide an important reference point for award-free employees or for those whose collective agreement is subject to a no disadvantage test. It will also provide an important safety net for award-free employees whose AWA or ITEA is terminated.

We submit that the 'catch-all' approach should include general additional protections that are generally found to be enshrined in awards. These include:

- The pay equity remuneration principles.
- Avenues for dispute resolution.
- Reasonable provisions for overtime.

It is essential that all employees have the protection of an award. A 'catch-all' award ought not to have interim operation until a modern award is made. A 'catch-all' award ought to be made a modern award along with other modern awards, to ensure that no employees slip through the safety net of award protection.

## **Maximum Weekly Hours**

### **Objective of entitlement**

(43) A definition or some guidelines as to what constitutes 'reasonable additional hours' is required.

A definition or some guidelines as to what constitutes 'normal' working hours is also required. A clear outline will ensure employees have guidelines on what they are entitled to in terms of extra benefits for working outside of these hours, whether this is 38 hours per week or maximum normal hours that can be worked in a day. Employees should be able to understand what working extra hours entitles them to in respect of time in lieu of overtime or paid overtime.

### **What factors must be considered in determining whether additional hours are reasonable?**

(48) Transport should be included as a factor in determining whether additional hours are reasonable.

*'Sally'*

*Sally was a young worker who relied on public transport to get her to and from work. Her employer requested that she did additional hours which meant that she would have to catch a later train. Sally did not feel safe catching the later train as it meant that she was walking on her own in the dark. Her employer initially demanded she work the additional hours required of her. The Working Women's Centre was able to advocate on Sally's behalf and the employer agreed to withdraw the requirement.*

We would think that additional overtime (above 38 hours) would be remunerated accordingly if averaging arrangements were not going to be part of the NES. The additional hours worked should be paid as overtime payments or penalty rates or as time in lieu of overtime. There should be consideration given to including basic overtime provisions in a 'catch-all' award.

In regards to the issue of notice of requests for reasonable overtime, NWWC submit that notice should be identified. If for operational reasons this was not possible then an employee should be able to refuse to do the additional reasonable hours.

### **Where there is an averaging arrangement, how are reasonable additional hours determined?**

(51) As it is not the intention under the NES to allow for averaging hours then the averaging arrangement in modern awards may not be a suitable or appropriate example to go by. In the example given, under the current standard the additional 22 hours worked in week 2 is not considered unreasonable because of averaging. It would be difficult to argue however that an extra 22 hours is not unreasonable if a 38 hour week is to be the normal pattern. Having a maximum of additional hours (remunerated accordingly i.e. time in lieu of overtime or paid overtime) that can be

asked of an employee (set by an appropriate authority), would assist in defining 'additional reasonable hours' as well as determining them.

NWWC reiterate however the position that a 'catch-all' award of general application be implemented to deal with issues for employees who are award-free.

### **Construction of the hours standard**

Question 1. Should the maximum hours NES expressly provide than an employer will not be in breach of the NES where an employee works additional hours of their own volition?

If an employee was to of their own volition, work extra hours, then occupational health and safety considerations become particularly relevant. An employer would have a duty of care to ensure that an employee is not working excessively to the detriment of their health. Is there scope for NES to include arrangements for a capped flexitime? This would take away any concern of the employer being in breach of the NES and the proposed maximum hours.

Employees who are the target of workplace bullying, are Indigenous or who are of culturally and linguistically diverse backgrounds require particular protection against being pressured to work additional hours. Such employees are often not in a position to reject their employer's request or demand for fear of retribution.

### **Operation of the entitlement in relation to employees who work less than 38 hours per week**

Question 2. Should the proposed maximum hours NES address the issue of unreasonable additional hours by reference to the hours normally worked by an employee? What issues might arise from adopting such an approach?

Yes. There should be a reference to the hours normally worked by an employee. An issue that may arise from this is whether or not the additional hours worked would entitle the employee to receive a higher hourly rate of pay even if they had not worked a 38 hour week. Could time in lieu of overtime provisions apply?

### **High income employees**

Question 3. Given that the NES are intended to provide minimum entitlements for all employees, how should the proposed maximum hours NES deal with the long and irregular hours worked by high income employees?

The NES could introduce an income limit. Employees who earn above the income limit would be exempt from this NES. An arrangement of 'flexi time' or time in lieu of overtime provisions could also be included in the NES to address this issue.

### **Pieceworkers**

Question 4. Should additional rules be included in the NES to deal with the application of the proposed maximum hours NES to pieceworkers?

Yes, additional rules should be included to protect pieceworkers.

## Requests for Flexible Working Arrangements

### Objective of entitlement

- (58) The objective of the entitlement states 'The Government is committed to effective measures that will help all working families balance the work and family responsibilities'. This is not reflected in the 'Outline of entitlement' which refers to and is limited to parents of a child under school age; or has responsibility for the care of a child under school age. There is no provision for carers of people with disabilities, people that are over school age or of elderly family members.

A focus on carers as only those who have responsibility for children under school age disproportionately disadvantages Indigenous people and some culturally and linguistically diverse groups. Cultural norms of such groups requires caring for a much wider group of family members than just children under school age. Nor does it recognise that caring and other non-work responsibilities make varying demands at different life-cycle stages. It also completely ignores the issue of school holidays and the other demands of school age children which can have a significant impact on availability and need for flexibility of work.

- (59) The objective of the NES refers to a 'right for *certain employees* to request flexible work arrangements from their employer *until their child reaches school age.*' This further excludes carers of people with disabilities, people that are over school age or of elderly family members.

The objective of the NES also introduces the term 'reasonable business grounds', which is reflected throughout the document. This term is very ambiguous and requires a definition. Given the experience of NWWC of employers interpreting similar clauses in many different ways in the past, we suggest that simply relying on Fair Work Australia providing examples of what is considered reasonable, is insufficient. A suitable definition should prevent those who seek to take advantage of and misrepresent the true intention of the NES from doing so.

NWWC believe that a clear definition should reflect only financial hardship or detriment to the business. Anti-discrimination legislation uses ambiguous words such as 'reasonable'. This had lead to confusion and unnecessary arguments relating to intention. In the case of the Anti-discrimination Commission in Queensland, 'unjustifiable hardship' really only refers to financial hardship.

- (60) NWWC suggest that leaving the arrangements of the implementation of flexible working arrangements to each workplace is hollow and insufficient. Leaving the implementation to be dealt with at the workplace level may lead to businesses breaching their responsibilities under other legislation such as the Human Rights and Equal Opportunities Commission Act.
- (61) NWWC submit that it is insufficient to deny third party involvement or enforcement of flexible working arrangements. This is especially true in circumstances where an employee can demonstrate an arrangement which can be accommodated, and more importantly, a need for flexible working arrangements. NWWC believe it is important that employees have the right to seek the assistance of Fair Work Australia as an independent umpire if their requests are denied. NWWC believe it is essential that employees have the right to be represented in negotiations with their employer.

Further, in circumstances where an employee is denied such a request there may be jurisdiction for redress under the Human Rights and Equal Opportunities Commission Act. Thus, the lack of redress as it pertains to this NES, will be very contradictory and confusing for employees and employers.

In our experience, business has not always been responsive to considering reasonable requests for flexible working arrangements and will need help to define what this means.

### **Outline of entitlement**

- (62) This further excludes carers of people with disabilities, people that are over school age or of elderly family members.
- (66) NWWC submit that most of our clients, along with many other women workers, are not in a position to negotiate on their own with their employer about such flexible working arrangements. The suggestion that after an employer has denied a request for flexible working arrangements, that an employee is in a position to make a counter offer, is simply untenable. It is especially untenable for Indigenous women, culturally and linguistically diverse women or women who don't have an in depth understanding of other options available. For such women the difference in bargaining power is profound yet they are more likely to have responsibility for caring for family members as cultural obligations.

#### *'Selina'*

*Selina had contacted the Working Women's Centre in regards to advice on a constructive dismissal. She had to leave her workplace as her elderly mother had become ill and she was in need of flexible working arrangements to tend to her mothers medical needs. Her employer already believed they had been reasonable and no negotiated outcome could be reached. The employer basically thought that the arrangements that they had made for her, which she needed to access to look after her children, was enough.*

#### *'Maria'*

*Maria applied for maternity leave which was granted although she was not a long term employee. While on maternity leave Maria was told her position was terminated due to a transfer of business and she would be rehired on a casual basis. Maria challenged this and requested to re-enter as a permanent part-time employee. Her employer ignored her request and has not responded to any of her efforts to negotiate her return to work.*

#### *'Emma'*

*Emma applied to return to work in a permanent part time position (8am - 4pm, 3 days a week) after the birth of second child. Her request was denied until she pointed out that it was in accordance with the EBA which allowed requests for part time set shifts for those with family responsibilities. The employer allowed her request but she was given nothing in writing. Since then Emma has fought constant battles to maintain her part time status when she has been rostered on 5 days per week and on night shifts. Emma has also received a warning for taking high levels of sick leave (6 days over 12 months).*

### **What are flexible working arrangements?**

(67) No definition of flexible working arrangements is included on the premise that the Government does not want to limit such arrangements. It would be useful however to include examples.

### **What does 'responsibility for the care of a child' mean?**

(70) NWWC submit that the right to this NES must include carers of children who are grandparents, same sex partners or household members in order to reflect the demands of Australian families. The right should resemble the definition as contained in the Human Rights and Equal Opportunities Commission Act.

(72) The Government intends for Fair Work Australia to provide general information. NWWC suggest that this information should also include details of obligations under Human Rights and Equal Opportunities Commission Act and other relevant legislation.

Question 6. Should the proposed flexible working arrangements NES include additional provisions to define the term 'employee with responsibility for the care of a child'? If so, what additional rules should be included?

We believe that the definition of 'employee with responsibility' should incorporate not just 'parent or parent like relationships involving a responsibility for the care of a child' but should also clearly set out grandparents, same sex partners and household members.

Question 7. Should the proposed flexible working arrangements NES expressly define what constitutes reasonable business grounds? If so, how can this best be achieved? What additional rules, if any, should be included in the NES?

Yes, the NES should include a definition. As stated above, the NWWC believe that a clear definition should reflect only financial hardship or detriment to the business.

### **Parental Leave and Related Entitlements**

NWWC advocate for Government funded paid parental leave. We believe this paid leave should be, at minimum in line with ILO standards.

We also acknowledge the need for paid parental leave to fall in line with UN health standards in regards to breast feeding.

### **When can an employee take parental leave?**

(90) We believe in addition to the people named as defining 'spouse' that same sex partners be included, regardless of promises made as outlined in paragraph (122).

### **Is there a mandatory period of parental leave?**

(94) NWWC support the removal of a mandatory period of parental leave but hold some concerns for the physical recovery of the birthing mother. A universal paid maternity leave scheme would for many women remove the financial pressure that forces

women to return to work sooner than desired.

**When can an employer refuse a request for additional leave?**

(100) NWWC would suggest that for an employer to refuse a request to extend parental leave on 'reasonable business grounds' they must demonstrate financial hardship or detriment to the business as submitted above.

A definition of 'reasonable business grounds' is required. NWWC refer you to the *Industrial Relations Act Queensland 1999*, 29D 'Employer to give proper consideration to application for extension or part-time work' for an appropriate framework.

**What happens when an employee ceases to have responsibility for the care of the child?**

(104) The right to return to work when an employee ceases to have responsibility to care for a child should also be enshrined in the NES. Currently there is reference made to the right for an employer to require an employee to return to work but no mention of the vice versa scenario.

NWWC have encountered a number of cases where women's babies have died at or after birth and who wish to return to work as part of getting on with their lives. These requests have been either denied or it has been made very difficult for women to have their request considered.

*'Natalie'*

*Natalie had worked for a firm for 2.5 years. She became pregnant with her first child and negotiated unpaid parental leave. Natalie and her husband were told only weeks before the birth that their baby had a congenital heart defect and would die some time after the birth. Their baby survived for a couple of weeks but then passed away.*

*Natalie took some more time off but then asked her workplace if she could return as she felt this would help her recovery. Her workplace had made all sorts of assumptions on her behalf and had in fact decided for her that she would not want to return to work at all, that it would be too hard for her to face her colleagues given the celebrations before she left and that she just wouldn't bother coming back. They had filled her position and then changed the position and claimed that her job didn't exist any more.*

*There were several changes of managers during the time Natalie was trying to negotiate a return to work. Their attitude towards her became worse. She received assistance from the Working Women's Centre to put a request in writing at which point they begrudgingly offered her a job at a much lower rate of pay and lower status than her position. She then tried to negotiate this offer but several days later the Manager wrote to say she had been terminated as she had not accepted their offer of work. Natalie is now pregnant again.*

**Transfer to a safe job**

(109) NWWC submit that there is systemic discrimination of working women who are pregnant, with unacceptable numbers of women losing their employment or being treated less favourably at work during and after pregnancy.

NWWC support the provision of paid 'no safe job leave'.

Experience of NWWC informs the view that women in small workplaces require additional protections. This is to ensure that they are not disadvantaged because their employer fears having to pay wages when there is no safe job available.

Queensland legislation provides a more comprehensive assessment process and a fairer mechanism for dealing with such situations. We refer you to the *Industrial Relations Act Queensland 1999*, Section 6, (1) to (5).

### **Consultation during parental leave**

(117) We say that any decision which would in any way affect the employee's work should require consultation with the employee, not just those decisions which 'significantly' affect the employee's pay or status.

### **Evidence of being fit to work**

(118) NWWC suggest that this clause incorporate a time frame in which it is appropriate for the employer to request medical certification assessing the safety of the woman wishing to return. We say this time frame should be 6 weeks prior to the birth and 6 weeks post the birth of the child.

### **Same sex couples**

(122) The parental leave NES should deal with entitlements for same sex partners. Same sex partners should be included in the definition of 'spouse'. In South Australia the term 'domestic partner' is now used.

## **Annual Leave**

### **Outline of entitlement**

(126) & (139) An extra week for shift workers is in the NES but the definition of 'shift worker' is to be determined in the modern award. This could lead to problems and discrepancies with the definition of 'shift worker'. A definition of 'shift worker' should be in NES. It could be done in such a way that allows flexibility to extend the definition of 'shift worker' in modern awards but that there would be at least a base level definition in the NES.

(128) (147) & (148) NWWC submit that the NES should include a definition of 'unreasonable'.

### **What is meant by 'ordinary hours of work' for irregular part-time employees or pieceworkers?**

(135) Determining the days of leave for irregular part-time employees could be problematic.

### **What does 'base rate of pay' for 'ordinary hours of work' mean?**

(137) The option to take longer periods of leave at reduced payment should be included as a NES.

### **What are pieceworkers paid while on annual leave?**

(138) Pieceworkers should have protection of entitlement to annual leave under the NES.

**What information will an employer be required to give an employee about their accrued annual leave entitlements?**

(142) & (143) An employer should be required to provide information about the accrual of annual leave to the employee regularly, with the provision of payslips.

**How does annual leave interact with public holidays and other kinds of leave?**

(152) If there are substantive changes, as proposed, to leave of absences under other industrial instruments, the way this interacts with the NES may need to be addressed. NWWC are not in a position to support the view that it doesn't need to be in the NES without information regarding what will be included in other industrial instruments and how these are to be administered.

**Can accrued annual leave transmit to a new employer on transmission of business?**

(153) Transmission of business rules should be included in the NES.

**How does the NES entitlement to annual leave interact with modern awards?**

(155) NWWC concerns regarding the cashing out of annual leave include; the employees' health and wellbeing and the need for time off, the potential for an annual leave entitlement to be absorbed into wage increases and the real ability for employees to negotiate this agreement, especially more vulnerable workers.

**General comment**

Many aspects of employee entitlements to annual leave in particular circumstances rely on industrial instruments that have not yet been developed. This is taking a risk. For example, there is still no definite answer to what will happen for award-free employees. All aspects of minimum entitlement should be covered in the NES.

**Personal / Carer's Leave and Compassionate Leave**

*'Jill'*

*Jill worked for 2 months and in that time had been promoted to Manager. Her husband had come in to the workplace one day and caused problems. After another incident at home she rang her boss to say she would be in a bit late as she was at the police station reporting a domestic violence incident and had been delayed. He sacked her as he said she was just too difficult.*

**General comment**

WWC SA in conjunction with the University of SA has been involved in research on the impact of domestic violence on women and their workplaces. A state wide phone in was held in March 2008 and women clients of WWC SA are increasingly telling stories of having to take leave to find safe accommodation, move children from their schools, attend hospitals or other medical appointments because of physical injuries and/or attending police stations or courts to report violence and/or secure an apprehended violence order. The common experience of women is that once they disclose any of this information their work situation becomes precarious. Most employers feel ill equipped to deal with employees who have this sort of work/life issue.

*'Mary'*

*Mary requested assistance from WWC SA when she had to have an X ray*

*on a Monday morning after being physically assaulted by her partner over the weekend. She had been admitted to hospital after the assault but there were no X ray facilities available over the weekend. The hospital suspected that Mary had sustained serious internal injuries but couldn't assess what they were. When Mary rang her boss to report that she was in the X ray department and why, she was told she'd have to choose between having an X ray and her job.'*

The other times when women experience back lash in their jobs is when they disclose they have experienced rape. If the rape occurs out of work time and not as a workplace issue, again employers most often do not deal with this information well, do not afford women time off to recover or attend to health and legal appointments and just want the woman to leave.

The ideal would be for workplaces to incorporate consideration of such instances into a work/life policy. At the moment many employers only see work/life issues as being about time off to have a baby or care for an elderly relative or time to compete in significant sporting events. Most employers in our experience are keen to see difficult personal circumstances as nothing to do with them and would rather the woman leave, especially in cases where her partner is threatening violence on the workplace as well. Often it is not safe for women to disclose to her workplace, details about her personal living arrangements or situation as there is no policy or procedure in place at the workplace to guarantee her safety from a violent family member. The reality in our view is that if women have to disclose these sorts of details in a statutory declaration (188) or have to supply a medical certificate (190) then she is putting her employment relationship at risk. Women experiencing domestic violence or rape that impacts on their work need financial certainty and the sanity that work often offers at this time. Some further guidelines to cover these types of situations need to be spelled out.

*'Sylvia'*

*Sylvia worked as a community support worker. She was experiencing domestic violence. Her partner was coming in to the workplace, she was often late for work etc. Sylvia was eventually terminated for performance issues (lateness).*

*Sylvia left the relationship. She has an apprehended violence order (AVO) against husband which covers her in her workplace i.e. expressly states her husband is not to approach her at work.*

*Sylvia applied for a job at another organisation, did very well at the interview and felt sure they would offer her work which they did. They then rang the former employer for a reference. He told them that Sylvia had heaps of personal and family problems, that there'd been issues with attendance and that the abusive partner had been coming to the work premises.*

*The organisation has not withdrawn the offer of work but have requested a statutory declaration (they emailed her what they want her to sign) from her saying she has nothing to do with the ex partner. They also want a copy of the AVO as they say it covers them.*

*'Lucille'*

*Lucille's husband had found a text message from her co-worker which said 'I'm sitting at your desk.' This co worker was from interstate and had been flown in for the day. He sent the text as a courtesy. Lucille worked part time and was not at her workplace on this day.*

*The husband flipped when he saw the text message, rang the workplace and told them, 'The last person who had a crush on my wife spent 6 months in hospital.' Lucille left the family home taking her children with her. Her husband and 2 of his mates then spent the day outside the workplace in the city and watched everyone who left to see if they could identify the person who may have sent the text. The worker had already been flown back to his home interstate due to the threat.*

*This all happened on a day when Lucille did not work anyway. When she got back to work the employer summoned Lucille to his office. Lucille let him know that she had left her husband. The employer said, 'I can't believe you have the audacity to think you can have your job back.' The husband had told her to pack her shit and get out which she had done.*

*Lucille felt she was not at risk but would be once her husband learnt that her moving out was final. She made it quite clear to the employer that she had no intention of resigning, that she was the victim and not responsible for her husband's behaviour, that she loved her job, that she'd left him, that she had 2 children to support and now had no home and that there had never been any performance issues in the past.*

A commonly implied reason for NWWC clients to be subjected to disciplinary action, including termination of employment, is their absence from work due to caring responsibilities. The termination may be disguised with cited performance issues.

NWWC submit that it is important to have entitlements spelt out in the legislation so that proposed entitlements provide for brief caring related absences for employees. NWWC also submit that the lack of comprehensive unfair dismissal provisions for all employees, especially those in small business, is needed to allow women to access these provisions without penalty.

**How does paid personal/carer's leave accrue? What do 'service' and 'ordinary hours of work' mean?**

(178) NWWC support the introduction of a 'catch all' award to ensure that no employees are award-free. If however a 'catch all' award is not introduced, what will happen to non award employees once modern awards become effective?

**Community Service Leave**

**Outline of entitlement**

(208) Although NWWC recognise that there is no intention to prescribe additional activities at this time, we believe it is important to state that we would like to see what constitutes 'community service' as a broader application. NWWC would like to see this include cultural and artistic pursuits, sports, school activities, local council activities and volunteering for community events for example planting trees for

Trees for Life and Walk Against Want to name a few.

**What kinds of emergency service does community service leave cover?**

(216) In relation to voluntary emergency management, further information is required to clarify if this applies to employees who volunteer in an administrative capacity. Will these employees be granted the same provisions?

**What are the payment obligations in relation to jury service?**

(225) We believe casual workers who have worked regular and systematic hours for a period of 6 to 12 months should be entitled to payment in relation to jury service.

**Long Service Leave**

**General comment – *National minimum standard for long service leave***

There is a need for a national minimum standard for long service leave. WorkChoices has created a great deal of uncertainty around entitlements to long service leave. NWWC submit that it would be preferable to have a uniform minimum standard that applies across jurisdictions.

***Uncertainty of entitlement to long service leave***

For women with more than 7 and less than 10 years service, particularly those who have terminated their positions or have been terminated by their employers, their entitlements to pro rata long service leave are less assured. For instance, requests for assistance have been made to NWWC in negotiating pro rata long service leave with employers who resist granting it. On several occasions pro rata long service leave payments have been withheld upon termination of employment and in such cases women have been required to argue an unfair dismissal in order to secure their entitlements. When unfair dismissal provisions do not exist, a worker has little redress to attempt to secure their long service leave payment.

***Termination of employment to avoid long service leave obligations***

NWWC have had many clients whose employment has been terminated to avoid long service leave obligations.

*'Dorothy'*

*Dorothy is a woman in her 50's who was subjected to very severe verbal abuse and a series of disciplinary measures with what appeared to be a thinly veiled attempt to get her to resign after 9 years and 11 months of service. The business of her employer had transmitted 6 months prior.*

*'Cecilia'*

*Cecilia was entitled to long service at 7 years according to her EBA. Only a few weeks short of reaching her 7 years her position was made redundant. Upon investigation of the Working Women's Centre the employer was unable to provide any clear criteria for making her position redundant.*

A clear statement of entitlement and general access to pro rata long service leave on termination after 5 years of service would deter these situations for long serving workers.

***Work and family responsibilities of women points to the need for portable and flexible long service leave minimum entitlements***

While the paid workforce has been increasingly occupied by both men and women over the past 30 years, the unpaid work of care and home still remains in most cases the responsibility of the woman, but not without costs to her status and job security in the workplace and the toll on relationships at home.

Any opportunity for reviewing institutionalised worker entitlements like long service leave that are of benefit to the majority of workers who have long tenure should recognise the situation of women. Although women have access to paid work and often work for continuous periods, their capacity to access any benefits of mainstream work is reduced through broken employment, casual and part time work and increasingly contract work.

This comment is exemplified by the fact that Australian women have no guaranteed entitlement to access paid leave at one of the times it is most crucially needed, i.e. at the point of pregnancy, child birth and early parenting.

NWWC clients have reported to us the need to access their long service leave, not for the intended purposes of a career break, but because of outside responsibilities that many require their attention such as the need to care for a young or unwell child, an elderly parent or partner. In these types of instances the employee may return to work exhausted, having exhausted all leave, with on going caring responsibilities. This may defeat the general intention of long service leave, however acknowledgments of these outside pressures in the context of considering all leave entitlements may enable a more flexible approach to accessing and granting leave.

Once again the experiences of NWWC clients is that the majority do not maintain long tenures with the same employer. This is certainly the case with the major transitions that women (and some men) experience with their status as parents and carers with high domestic responsibilities. Portable long service leave contributions may assist to facilitate access to paid leave in these circumstances, but need to encompass casual and short term contract workers.

An area of portable long service leave that may need to be considered carefully is the growing number of franchise operations drawing on pools of labour, but which are independently operated.

***Incentives for small business to maintain staff approaching long service leave entitlements***

Government and larger employers are able to easily maintain employee payments and replacement staff during an extended period of absence like long service leave. NWWC recognises that the burden placed on smaller business could be a contributing factor towards preferences for shorter term employees, or as in our documented client cases, the termination of employees to avoid entitlements. The establishment of a fund similar to portable long service leave funds could assist long term saving for these events. Small businesses would no doubt have a wealth of creative ideas on how to assist with maintaining valued long term staff, if surveyed.

## **Public Holidays**

### **Outline of entitlement**

(247) The issue of pro-rata access for part-time and job-share employees needs to be considered and should be fairly decided to benefit all employees. While some awards deal with this many are silent and it has been identified as a contentious issue for our clients who may simply be rostered on an alternative day (in the case of part-time employees) to avoid payments to staff when they are not at work due to a public holiday.

### **What factors must be considered in determining whether a request to work or a refusal to work on the public holiday is reasonable?**

(259) Some additional factors to be considered in determining whether a refusal to work on public holidays is reasonable:

- Transport – public transport is often limited or ceased on public holidays making it difficult for employees to attend work.
- Cultural meaning – for particular groups in which the public holiday has special meaning or requires them to take part in cultural activities e.g. ANZAC service people and their families wishing to take part in the activities surrounding this day.

Here, once again, we would insist on the implementation of a 'catch all' award to ensure a safety net for those workers not covered by a modern award.

## **Notice of Termination and Redundancy Pay**

### **Notice of termination**

(267) Employees aged over 45 years should get a minimum of 4 weeks extra notice. This is a more reasonable consideration of the difficulties inherent in finding alternative employment for this age group.

### **Redundancy pay**

(268) & (270) These provisions should apply to employees in organisations with fewer than 15 employees. Under the NES all employers have the right to apply to Fair Work Australia to reduce their obligations for genuine financial reasons. This is an appropriate safeguard.

Furthermore there should be a funded safety net payment available in these cases e.g. small business redundancy insurance for employees paid by employers or subsidised by Government.

### **Which employees are excluded from the notice of termination NES?**

(280) & (287) Long term casual employees with regular and systematic work should be included unless the NES can allow for such casuals to be made permanent. As it is, this provision would allow employers to keep employees engaged on a casual basis as a way to avoid having to pay notice periods. This would particularly affect vulnerable workers.

Trainee and apprentice employees also require this protection if it is not available through another instrument.

Seasonal employees who are terminated during the time they would reasonably expect to be working should also be covered by this provision.

This protection should also apply to employees employed under a contract of employment for a specified period of time or a specified task who are terminated during the term of their contract.

### **Outline of entitlement – redundancy pay**

(283) Why does the provision go down at 10 years service? It should remain at the maximum.

### **How is an employee's period of 'continuous service' determined?**

(284) NWWC submit that unpaid leave counts towards continuous service.

The parental leave NES (87) states that continuous service means all periods of employment other than any unauthorised absences. Redundancy provisions should be clarified to ensure that they are not in conflict with the parental leave entitlement and that continuous service is not broken by parental leave.

### **How is redundancy pay calculated?**

(286) Redundancy should be paid at 'normal' rate of pay as opposed to 'base' rate.

## **Fair Work Information Statement**

### **Objective of entitlement**

(294) These should be available as translated documents for all employees from culturally and linguistically diverse backgrounds.

### **Prospective employees**

Question 46. Should changes be made to the proposed information in the workplace NES to allow an employer to provide the Information Statement prior to the employee commencing employment (e.g. at the time an employee considers a letter of offer)?

We suggest that providing the Information Statement prior to the employee commencing employment allows them to seek advice about terms and conditions and to give more careful consideration to their options. Clients of the NWWC have reported accepting offers of employment, resigning from their existing position, in some cases moving interstate to take up a position only to find that terms and conditions have been changed on commencement. The more information that can be provided at the time of offer, such as where prospective employees can seek assistance, including Working Women's Centres in NT, SA and Qld the better.

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