



SUBMISSION BY THE
Housing Industry Association

to the
Department of Education, Employment and
Workplace Relations
on the
Discussion Paper : NES Exposure Draft

4 April 2008



Introduction

HIA thanks the Department for the opportunity to provide comment on the proposed Standards.

HIA's submission has sought to identify the key over-arching principles affecting the operation of the Standards.

We are happy to provide additional comments and further details as requested.

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1. Summary

HIA offers comments and suggestions on the five principle areas where we believe the National Employment Standards would benefit from improvement.

- The regulatory structure is complex and could be simplified by deeming all minimum standards to be included in contracts of employment.
- There is insufficient flexibility for non-award employees in relation to the application of the Standards and this could be addressed by amending the Standards or allowing companies to register their employment policies on a no disadvantage basis.
- The definitions of what is reasonable should be made more certain by including examples of situations that are definitely reasonable or unreasonable, and parties should be entitled to define what is reasonable in their workplace agreements, subject to the No-Disadvantage Test.
- The definitions of base rate of pay and full rate of pay should provide a method for calculating those rates for piecework employees who are not covered by a modern award.
- The details of specific entitlements need to be re-examined from a small business perspective.



2. Complex Structure

The legislation is setting up a regime where minimum conditions are derived from the Standards, Modern Awards, Agreements and Common Law Contracts.

It is conceivable that employers and employees would have to look in four different places to determine their employment obligations and utilise three different enforcement regimes from State courts to enforce employment contracts, Federal courts to enforce breaches of the Standards, and Fair Work Australia to enforce dispute resolution procedures under Awards and Agreements.

A solution in addressing some of this complexity involves incorporating the Standards into modern awards. Employees and employers covered by modern awards would then have a single document containing minimum employment obligations.

However, this option does not resolve the complexity that will arise in relation to common law contracts. Labor's policy for individual flexibility is based on common law contracts underpinned by flexible awards. Small business is expected to rely heavily on this method of flexibility.

Employers will have to refer to the Standards and the Award (and potentially a collective agreement) to determine whether their contract complies. If the contract does not comply there will be confusion over whether redress is sought through the State courts for breach of the contract, through the Federal courts for breach of the Standards, or through the dispute resolution procedure of the Award or the Agreement.

HIA suggests a simpler structure based on all minimum conditions being deemed included in common law contracts. This structure would be as follows:

Non-Award Employees

For employees not covered by a modern award, the Standards would be deemed to be included in their contract of employment subject to any modifications the Standards permit or require contracts of employment to make.



Awards

Modern awards would be required to include the Standards, subject to any modifications the Regulations permit or require modern awards to make to the Standards.

Award Employees

Modern awards (incorporating the Standards) would be deemed to be included in an employee's contract of employment subject to any modifications permitted under the model flexibility clause or the modern award.

Collective Workplace Agreements

For employees covered by a workplace agreement, the terms of the workplace agreement would be deemed to be included in their contract of employment subject to any modifications permitted under the model flexibility clause or the workplace agreement.

HIA recognises that this structure implies that Fair Work Australia will have some role in enforcing common law contracts. This should be constitutional because the legislation is based on the Commonwealth's power to regulate trading corporations.

HIA believes it is appropriate that contracts of employment have a simpler enforcement mechanism than state Supreme Court hearings given the importance the Government's policy places upon common law contracts underpinned by flexible awards.



3. Flexibility for Non-Award Employees

HIA anticipates that most of the comments regarding the Standards will focus on the lack of flexibility for non-award employees. For example, awards may make arrangements for cashing out of annual leave or for averaging working hours but no such flexibility exists for non-award employees.

It would be a curious outcome if award employees had more flexibility than non-award employees, if more regulation was a necessary precursor to flexibility.

There are essentially two groups of employees: employees who need protection and employees who are able to bargain for themselves. If the first group is protected by minimum standards greater flexibility should be allowed to regulations governing the latter.

All employees who need protection should be covered modern awards. Since awards will not depend on the outcome of industrial disputes, groups of vulnerable employees should not be left unprotected just because they are not industrially organized.

Instead, there should be an easy mechanism for these employees to become award protected. The suggested mechanism is for Fair Work Australia to make a generic award for this purpose. Categories of employee could be declared covered by the award as and when required. The collective bargaining rights under the Act and flexibility clauses under the award would provide flexibility for the generic award to be adjusted to individual enterprises ahead of – potentially – a more comprehensive industry award for the relevant employees.

Having protected vulnerable employees under a modern award, the employees who will be governed solely by the Standards are non-award employees who do not require award protections because their skills give them the ability to bargain. This should mean there is no danger in allowing greater flexibility under the Standards for non-award employees than is presently the case.

There are several options for allowing greater flexibility for non-award employees under the Standards. The first is to amend the Standards to prescribe the desired flexibility. This is not recommended because the



Standards will need to be massively complex to deal with existing employment practices in non-award industries or occupations.

The second option is to require industries and occupations to become award-regulated in order to access the desired level of flexibility. This also is rejected. Further regulation should not be a necessary pre-condition to an industry or occupation accessing the right to operate as it always has.

The third option is to allow companies to register their employment policies for non-award employees with Fair Work Australia. Registration would be on the basis that overall the terms do not disadvantage employees relative to the Standards.

Those companies would then be entitled to engage non-award employees under common law contracts that comply with those registered policies.

This mechanism would achieve three very important things:

- it would provide maximum flexibility for classes of employment that have developed without previous restrictions on such things as pattern of working hours;
- it would ensure fairness because the employment policies are being assessed against the Standards; and
- it would provide the Government with data on common law employment conditions and prevailing community standards to assist and assist in identifying potentially vulnerable groups or industries that do not, but should have, award protection.



4. Definitions of Reasonable

The simplicity of the Standards is welcome. Of course, simplicity leads to uncertainty, particularly with people wanting more detail around what constitutes *reasonable additional hours*, and *reasonable business grounds*.

HIA does not support a long list of additional grounds or exhaustive detail of circumstances. However, there are two potential solutions that provide greater certainty without unnecessary complexity.

The first is to amend the Standards to prescribe in more detail what is reasonable. HIA suggests the simple addition of circumstances which always be considered reasonable or unreasonable.

In particular, the Standard in relation to maximum working hours should provide that additional hours are always reasonable if:

- the Employee's base pay is higher than \$100,000; or
- the Employee is entitled to penalty rates or overtime in accordance with a modern award for those additional hours; or
- the Employee is working a pattern of hours expressly provided for in a modern award or workplace agreement.

A second solution is for the Standards to permit employers and employees to be able to negotiate certainty by defining what is reasonable within their workplace agreements or registered employment policies. These definitions would then be assessed as part of the no disadvantage test. This option has the benefit of preserving the simplicity of the Standards while ensuring further detail is both flexible and fair.

HIA notes the two solutions proposed are not mutually exclusive.



5. Definitions of Base Rate and Full Rate of Pay

The Standards include definitions of *base rate of pay* and *full rate of pay*. The definitions do not define base and full rates of pay for piecework employees, but leaves the definition to modern awards. It means there is no definition of base and full rates of pay for pieceworkers who are not covered by awards.

Pieceworkers would include employees paid wholly or in part on commissions such as salespeople and real estate agents. The implication is that you cannot be engaged on anything other than an hourly rate without a modern award saying so. This is unnecessarily restrictive.

The Standards should define base rate of pay and full rate of pay for piecework employees. An appropriate mechanism is for the pay to be based on an average the amounts paid to the employee over their previous 12 months of service. This is the approach taken under State and Territory legislation dealing with annual leave, such as section 6 of the *Annual leave Act (ACT) 1973* and section 2(2)(a1) of the *Annual Holidays Act (NSW) 1944*.



6. Specific Entitlements

HIA is concerned at the impact some of the Standards may have on small business.

Annual leave:

The Standards permit modern awards to make rules about cashing out of annual leave. The Standards should permit non-award employees to cash out annual leave under common law contracts. Otherwise, non-award employees will be less flexible than award employees.

Personal leave:

The Standards should permit employees to cash out all but two weeks of accrued personal leave as is currently the case. Cashing out unused personal leave is a flexibility many small businesses use to manage absenteeism and 'reward' consistent attendance.

Some employees take 'sickies' to access what they regard as a paid leave entitlement rather than a safety net against genuine illness. Without the ability to agree to arrangements such as cashing out a portion of unused sick leave, small businesses will have fewer options for managing chronic absenteeism.

Parental leave:

HIA recognises that the No Safe Job leave is part of the current minimum standard for parental leave. However, HIA believes the No Safe Job leave will pose significant problem for small businesses that inevitably won't have a safe job for the employee to undertake.

The Standards should allow small businesses to require employees to access annual and personal leave before accessing No Safe Job leave.

Further, the Government should consider leaving no safe job leave to be wrapped up in a government funded paid maternity leave which is currently being investigated by the Productivity Commission.

Finally, the Standards should allow employers to request medical certificates from employees stating that they are fit to work late in the pregnancy or if returning early from a pregnancy (question 9 on page 21 of the Discussion paper). These certificates should be conclusive proof that the employer has discharged its OH&S obligations towards the employee and the unborn child.



Community service leave:

The requirement to pay the difference between jury pay and actual pay could be crippling for small business who may be forced to fully fund an employee trapped in criminal trial over several months or maybe years.

The criminal justice system is a society benefit that should be properly funded by the community out of taxes. The proposed new Standard will simply allow State governments to under fund Jury Service levies and force the cost of the criminal justice system onto private employers.

If employers are forced to pay for employees to attend jury service, the Standards should allow them to refuse to release the employee on reasonable business grounds.

If small businesses are to have no ability to refuse the leave, the State should pay.