# LAW SOCIETY OF NSW SUBMISSION

## National Employment Standards Exposure Draft

## BACKGROUND TO SUBMISSION

These submissions are made by the Law Society of New South Wales and have been the subject of consideration by the standing Employment Law Committee of the Society. Submissions have been limited to matters of public interest. The Law Society is a body with no political affiliations and represents both employer and employee solicitors. As such, its submissions can be taken to be genuinely objective with no bias towards either employer or employee interests.

## Introduction to NES Discussion Paper and Division 1 - Preliminary of the Proposed Standards

The Society supports the concept of minimum basic employment conditions for all employees and generally supports the thrust of the National Employment Standards ("the NES") as proposed, but subject to the matters raised in this submission.

The Society believes that the continuation of the principle that all employees are entitled to a common set of minimum conditions irrespective of the type of employment engaged in, is fair and equitable, and is capable of underpinning a reasonable balance of interests between parties in the workplace. The Society also believes that the structure of the NES will be very workable and will achieve general application of the standards. Legal enforcement of these standards should be easily available to every employee if existing enforcement procedures are continued in the new legislation. This is subject to the Government being prepared to assist enforcement by providing sufficient resources to fund proper investigation of complaints and representation.

The Society considers that a framework of minimum standards coupled with award minimum entitlements can be a practicable operating system, providing that clarity is established in the legislation as to the interaction and roles of those separate sets of minimum conditions. The Society has the opinion that information presently available does not give sufficient indication as to how awards will be able to vary the NES.

As set out in these submissions, the Society is concerned that the very important definition of "base rate of pay" is amended to achieve certainty as to its meaning in the numerous provisions in which it is a key element in calculating entitlements.

The Society is also concerned at the inadequacy of the NES to provide machinery for important ancillary flexibilities for employees not covered by awards, which flexibilities appear to be intended to be available to award employees. The suggestion made in the discussion paper that there should be certain machinery "default entitlements" seems to be a suggestion that should be implemented so as to allow non award employees to benefit from similar arrangements to ones that are contemplated to be available to award employees.

The revised criteria for determining whether additional hours worked are reasonable are supported and the Society suggests a means of implementing this criteria.

These matters are more fully outlined in the body of the Society's submissions set out below.

It is noted that many matters relating to the operation of the standards, awards and agreements are yet to be disclosed. In paragraph 17 of the discussion paper it is stated that the extent of coverage of the NES will be finalized in the context of the Government's substantive legislation. The Society believes that an exhaustive appraisal of the NES is not possible until the substantive legislation is available and the submissions now made are subject to the ultimate form of such legislation.

## How do the NES Interact with Modern Awards?

This is a key question so far as the Society is concerned. It is difficult to understand how there can be two separate codes of minimum entitlements when one of such codes is specified as being able to "build on entitlements in the NES" (paragraph 29 of discussion paper). Insufficient detail is given to allow the Society to know what increased NES entitlements are contemplated by this statement. Examples of additional machinery provisions are given in paragraphs 27 and 28 but paragraphs 29 to 33 are unclear, if not contradictory, as to the ability of a modern award to vary the NES.

The last sentence of Paragraph 33 of the discussion paper indicates that additional paid annual leave can be granted if it was "necessary to do so to ensure the maintenance of a fair minimum safety net for employees who are to be covered by the award." Would this constitute power to increase paid annual leave on general grounds other than special grounds relating to the industry being covered? The discussion paper is not clear on such questions and it is submitted that the substantive legislation must be drafted on the basis that much clearer guidelines for exercising award making powers are provided. If such guidelines are not provided, there is likely to be inconsistency in the application of award making powers that will need subsequent case law to resolve.

This is an area where the substantive legislation will be all important and it is not possible to adequately assess the ultimate operation of the standards on the basis of the general descriptive material contained in the discussion paper.

Many of the changes and proposals behind the NES appear to rely on the development of modern awards with modern awards dealing with the particular industry's specific working arrangements. This of course raises the question about those who are not under modern awards and the possible loss of benefits that have arisen out of NAPSAs (e.g. leave loading)

## Compliance and Remedies

Paragraph 35 states that compliance matters will be dealt with in the substantive legislation so this is a matter that will have to await exposure of that legislation.
The Society does believe that the compliance/remedy provisions in existing legislation are a good model for similar provisions in the new substantive legislation. However it is felt that resources devoted to Governmental enforcement of industrial regulation have been inadequate over a long period of time. This has led to wide ranging breaches of minimum conditions continuing in practice in many industries. A system of compliance and remedies will only operate satisfactorily if there is sufficient Government support and

enthusiasm for enforcement. A way must be found to assist employee complaints to be made to the appropriate Government authority without the perception that will lead to job victimization. While there are appropriate laws in place to make such action unlawful, this does not of itself appear to so alleviate employee apprehension as to the consequences of complaints made by employees. This seems to be a particularly prevalent attitude among young part-time or casual employees.

The Society has concerns about the proposed disbandment of the Australian Industrial Relations Commission and the intended assignment of its powers to a new body to be called "Fair Work Australia".

These concerns centre on the undesirability of reforming an arbitral tribunal's function by complete replacement of that tribunal, rather than by amendment of its powers.

The intended wide range of functions to be assigned to Fair Work Australia is also of concern to the Society bearing in mind general principles of separation of powers.

The Society will reserve its rights to make further comments in this area until the substantive legislation is seen but urges the Government to bear in mind the reservations felt by the Society when drafting the relevant legislation.

**What Happens to an Employee who is not covered by an Award?**

The Society feels concern that the discussion paper suggests that so much machinery for flexibility in application of the NES is a matter for inclusion in the intended modern awards. Examples are as follows:-

- Paragraph 50 Averaging of hours
- Paragraph 155 Cashing out of annual leave
- Paragraph 156 Flexible options for taking leave
- Paragraph 163 Specification of "ordinary hours of work"
- Paragraph 198 More beneficial entitlements for personal/carers leave
- Paragraph 227 Specification of "ordinary hours of work" for community services leave purposes.
- Paragraph 262 Penalty rates for working on public holidays

In addition to the above list paragraph 162 states that "shift worker" for the purposes of entitlement to an extra week's leave will depend on a definition in a modern award. Furthermore 26(1) (b) appears to operate to only allow shift workers under modern awards to be entitled to an extra week's leave.

As pointed out in paragraph 36 there are many employees who are not covered by awards and will not have the opportunity to enjoy the potential award flexibilities demonstrated by the list above.

Paragraph 38 contains a suggestion that "default" rules could be included in the NES to give not award employees similar benefits to those enjoyed by award employees. The Society supports this suggestion and submits that it is a vital element to be included in the NES.

Provisions covering these flexibility benefits for all employees could apply as NES standards, unless and until variations of these provisions are included in a modern award.

The Law Society does not support the making of a “catch-all award” to grant these flexibilities to non award employees. Covering such employees by an award would be complex while attempting to ascertain and meet the requirements of such a diverse group would be difficult and time consuming for the tribunal that is charged with making the award. The Society prefers that the NES contain such flexibilities for all workers until awards provide otherwise. This could also assist in the award making processes as many flexibilities would be already in a satisfactory form in the default form and could be included in awards by simple reference to the NES.

**Definition of “Base Rate of Pay” in Section 4 of the Proposed NES**

The definition of “base rate of pay” in section 4 of the Proposed NES is confusing and inadequate.

This definition is a vital element in calculating payment for annual leave (paragraph 29), paid personal/carer’s leave (paragraph 35), compassionate leave (paragraph 40), community service leave (paragraph 45) public holidays (paragraph 49), and redundancy pay (paragraph 52).

Sub-paragraph (a) of the definition in paragraph 4 of the NES uses a definition similar to the definition of “basic periodic rate of pay” in section 178 of the current legislation and provides a clear guideline.

Subparagraph (b) of the same definition in paragraph 4 of the NES appears to substitute another definition for “base rate of pay” by reference to the base rate of pay expressed in a modern award. The reference in this paragraph to “an employee who is a ‘is the rate of pay etc” is awkwardly phrased and should be made clearer. In addition to this, the sub-paragraph appears to substitute the base rate in an award for the normal base rate in the case of an award employee, although this is by no means clear. If it does this it would appear to substitute an award minimum rate of pay for an actual paid rate of pay for purposes of calculation of entitlements. This would not be a situation acceptable to employees as leave is presently calculated on paid rates of pay and not award minimum rates. Many employees receive over-award payments and would expect to have leave entitlements calculated on the same basis, and not on the basis of the award minimum rate.

If the Society is wrong in the way that it has read this sub-paragraph it is an indication that sub-paragraph 4(b) of the NES is in need of improved drafting.

**Division 2 of Proposed Standards – Maximum Weekly Hours**

The Society firstly refers to its submissions relating to “base rate of pay” set out above and repeats those submissions in relation to the material under this heading.

The Society is concerned that there is no definition of “Ordinary hours of work” in the standard. If an employee works Tuesday to Saturday on a regular basis, then the hours worked on those days would form the employee’s “ordinary hours of work”. If a penalty was paid for working the Saturday, then the Committee submits that penalty should be included in the calculation of the employee’s “base rate of pay”. If the penalty is not included in the calculation of “base rate of pay”, a situation will arise where employees are not willing to take annual holidays or sick leave, because they cannot afford the loss of income.

Regarding Question 1 on page 8 of the Discussion Paper, the Society submits that the proposed provision will not be useful unless the standard also includes a definition of the term “of their own volition”. The committee considers that this concept is open to abuse. Consider a situation where the employer tells the employee that they cannot go home until all the day’s work is finished, gives the employee too much work to finish in one day and does not offer payment for the additional hours. The employer could then state, in response for a claim for payment for the extra hours worked, that the employee was working extra hours “of their own volition”.

What method of enforcement is proposed for the maximum hours specified in NES? What remedy is available for an employee who believes that the additional extra hours required by his or her employer are not reasonable? The Standard does not offer guidance on this point and it is presumed that the substantive legislation will deal with this and the Society will have the opportunity to comment on the matter further in the light of that legislation. In the interim the Society makes the following submission.

**What Factors must be Considered in Determining Whether Additional Hours are Reasonable?**

This question raised in the discussion paper relates to a problem that is very relevant to the members of the NSW Law Society.

The legal profession is one where long and unlimited hours of work are the norm rather than the exception. The demands of courts and clients have always placed great pressure on our members to meet deadlines necessitating long hours of work. In entering our profession there is an expectation that special effort and working time will be required. Despite this, it should be recognized that there should be some protection for employed lawyers and the Society is of the view that such protection will be available under the NES. At the same time the Society is of the view that the special demands of our profession should be taken into account in applying the NES.

It is noted that the NES contains some differing criteria for determining whether additional hours are reasonable, as compared with the current criteria contained in s.226(4) of the Workplace Relations Act 1996 (Cth). In particular clause 9 (4) (d) of the proposed NES is as follows:

- “(d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for working the additional hours.”

Such a provision is not part of the current criteria for determining whether additional hours are reasonable.

It is presumed that "other compensation" will be interpreted to include a higher salary than could be normally expected for the employee in question. This should achieve equity for employed lawyers who would normally earn a salary to take into account the additional hours necessary to carry out professional duties.

The Law Society supports these additional criteria but wishes to make a suggestion for further implementation of this criteria.

Paragraph 55 of the discussion paper raises the question of long and irregular hours worked by professionals and how this should be dealt with.

One way of dealing with this difficulty would be that Fair Work Australia could be empowered to make rulings as to whether a complaint made by an employee concerning the reasonableness of additional hours required to be worked is justified. All the special factors affecting the particular position could be considered including the demands of professional practice. An employee should be able to seek a ruling if she or he considers that the hours necessary to perform their duties are not reasonable. Protection should be afforded the employee against dismissal or victimization for making such a request for a ruling. To protect employers, the lack of the making of a complaint could be an assumed acceptance by an employee of the reasonableness of the hours worked until such time as a ruling is requested from Fair Work Australia.

Under the current legislation there is a risk to an employer that an employee may seek compensation for having been required to work beyond reasonable additional hours, and that such a claim may be made after many years of service. This possibility has not as yet been the subject of rulings by superior courts but is an area of potential unforeseen substantial liability to employers in the professions.

The Society therefore endorses the proposed NES provisions on maximum weekly hours subject to incorporation of the protections suggested above and to the suggestions made by the Society. The Society also notes the need for the substantive legislation to provide further support for these provisions.

## Does the NES Allow for Averaging of Hours?

It is noted that the proposed NES does not allow for averaging of hours unless the employee is covered by an award that prescribes rules for averaging hours of work.

In the modern employment world, averaging of hours is often a preferred arrangement for both employer and employee. It is submitted that such arrangements should be available for a non award employee and that there should be default provisions allowing such arrangements in the NES as suggested in paragraph 38 of the discussion paper. It is inequitable that such arrangements can only be made in respect of award employees.

## Operation of the Entitlement to Maximum Weekly Hours in Relation to Employees who Work Less than 38 Hours Per Week

It is submitted that a person who works less than 38 hours per week on a regular basis should not be required to work hours, additional to those hours, that are unreasonable taking into account the factors listed in paragraph 9(4) of the proposed NES.

This would appear to require an amendment to 9(3) of the NES so as to read:
"The employee may refuse to work additional hours (beyond those mentioned in subsection (1) or beyond the normal hours worked in the case of an employee who has been engaged to work less than 38 hours per week) if they are unreasonable."

This amendment would cater for both employees who want additional work beyond 38 hours, and those employees who are unable to work for longer periods due to factors touched on in the criteria in 9(4) of the NES.

There would be many part-time workers who could not work beyond the agreed part-time hours due to family commitments and it would be unfair to impose an obligation on them to work additional hours without the ability to refuse on reasonable grounds.

**Division 3 of Proposed Standards – Requests for Flexible Working Arrangements**

Paragraphs 62 – 66 of the Discussion Paper outline the entitlement as proposed in the NES. It emphasises a consultative and collaborative approach and that is welcomed by the Society. However it lacks certainty and leaves unanswered definitional and procedural problems: For example what are 'reasonable business grounds'? (see paragraph 72 of the Discussion Paper) What happens if the request is denied? (See paragraph 73 of the Discussion Paper.)

The process envisaged is covered in paragraph 61 of the Discussion Paper which states; "Whether a business has reasonable business grounds for refusing a request for flexible working arrangements will not be subject to third party involvement under the NES. The United Kingdom experience demonstrated that simply encouraging employers and employees to discuss options for flexible working arrangements has been very successful in promoting arrangements that work both for employers and employees."

Therefore an entitlement that is meant to be a critical part of the armoury in the life/work balance relies upon no real mechanism to give effect to it. This is a major risk to leave an area undefined when the opportunities for the courts to develop principles appear to be non-existent.

**The United Kingdom Arrangements**

That reference is made to the UK situation is positive and it is the Society's recommendation that it be the model for implementation.

Firstly it should be commented that the UK arrangements seem to be well and truly further down the track than anything that has occurred in this country.

The right to flexible work arrangements arise out of the Employment Act 2002. Under this legislation, parents of children under six, or of disabled children under 18, have the right to make one application in any 12 month period to request to work flexibly and to have their request considered seriously by their employer – provided they have worked with that employer for at least 26 weeks at the date of the application and they are making the application to enable them to care for a child.

Employees are able to request a change to the hours they work; a change to the times when they are required to work or to work from home. A further provision of the Act

requires all employers (regardless of size) to have both a disciplinary procedure and a grievance procedure. This could be utilised for progressing any perceived abuse of flexible working arrangements as well as a procedure where employees may appeal against what they believe to be an unfair response to a request for flexible working arrangements.

Section 80G of the Act states that an employer will only refuse an application because it considers that one or more of the following grounds applies:

**(i)** The burden of additional costs.

**(ii)** Detrimental effect on ability to meet customer demand.

**(iii)** Inability to reorganise work among existing staff.

**(iv)** Inability to recruit additional staff.

**(v)** Detrimental impact on quality.

**(vi)** Detrimental impact on performance.

**(vii)** Insufficiency of work during the periods the employee proposes to work.

**(viii)** Planned structural changes.

**(ix)** Such other grounds as the Secretary of State may specify by regulations.

Section 80H provides a basis for the employee to complain to the Employment Tribunal if the employee believes 80H(1)(a) that the employer has failed in relation to the application to comply with s.80G(1) (this in turn deals with the process as well as the grounds of refusal) or (b) that the decision by the employer to reject the application was based on incorrect facts.

Section 80I states that the Employment Tribunal if it finds that a complaint under s.80G is well founded shall make declarations to that effect and make an order for the reconsideration of the application and/or make an award of compensation to be paid by the employer to the employee. There are also relevant anti-victimisation provisions that flow from making requests etc (see s.47D and s.104C).

In short, the characterisation of flexible working arrangements in the United Kingdom in paragraph 61 of the Discussion Paper is not quite accurate. It is true that the parties are encouraged to negotiate and indeed there is a statutory framework for this negotiation. However there also is statutory support so that an aggrieved employee can take the matter further if they believe the Act has not been correctly complied with, including the criteria for refusing such an application. The criteria for refusal is also spelt out so that there is a reasonable degree of certainty for both employers and employees.

It is the recommendation of the Society that the approach in the United Kingdom should be adopted within Australia in relation to flexible working arrangements with appropriate

amendments to the Workplace Relations Act 1996 that reflect the UK situation, including granting rights to the Federal Magistrates Court in terms identical to the UK Act.

If the standard is enacted as drafted it will probably be of little value in practice as regards employees of medium and small businesses.

**Division 4 of Proposed Standards – Parental Leave and Related Entitlements**

The Society's examination of this section poses the following questions:

- Why can't parents take unpaid parental leave at the same time?
- Why must a second period of leave start immediately after the first?

The Society accepts that if an employed couple are employed by the same employer there is utility in them taking their parental leave separately. But if the "employee couple" are employed by different employers, why does the standard require that they take their unpaid parental leave at different times? The Society submits that a situation may arise where the taking of parental leave by two parents separately may not be convenient. The Society suggests the standard take a less prescriptive approach and allow the possibility of either member of the employee couple taking unpaid leave at any time during the first twelve months of the child's life (by arrangement), with the possibility of a further extension of time to twenty four months

Section 17 of the proposed standard refers to "reasonable business grounds"? The Society submits that a non-exhaustive list of reasons prefaced with the statement "including, but not limited to" would be helpful to employers and employees. The Society questions whether the decision of employers regarding requests for additional unpaid parental leave will be open to scrutiny, as to which see the Society's later submissions on enforcement and compliance.

Section 16(4)(b) of the proposed NES provides that any extension of unpaid leave is reduced by the amount of unpaid leave the other member of the employee couple has already taken. It appears two years unpaid leave is only available if only one parent accesses leave. The Standard is unclear as to whether an extension must be continuous with previous leave.

The proposed Standard at Section 19 seems to be inconsistent with the explanatory notes on page 16 of the Discussion Paper. The notes state
"… any other authorised leave taken in conjunction with unpaid parental leave forms part of the parental leave period. The proposed parental leave NES does not entitle an employee who is absent on parental leave to payment for any public holiday falling within this period".

The proposed Standard at Section 19(2) and (3) refers to personal/carer's leave, compassionate leave and community service leave but does not mention public holidays. The Committee submits that public holidays should be payable if an employee is on paid annual leave or long service leave in conjunction with unpaid parental leave.

Section 20 of the proposed NES provides that a female employee is entitled to a period of unpaid special maternity leave if she is unfit for work because of illness. Unpaid pre-adoption leave in Section 24(2) is only available, by contrast, if the employee could take

some other form of leave. The Society submits that the Standard should also provide that a female employee could take personal leave if she has an entitlement available.

**Division 5 of Proposed Standards – Annual Leave**
**Confusion About How to Accrue**

At paragraph 124 of the Discussion Paper under the heading "Objective of entitlement" the notion of pro rata annual leave for part time employees (compared to four weeks for full time employees) is put forward. Unfortunately this manifests an error which appears to have intruded into industrial law/and computer programmes that operate contrary to statutory construction. The correct situation should be that part time employees who are permanent are entitled to four weeks annual leave and not a pro rata of four weeks. This is the way that part-time annual leave is dealt with by the Annual Holidays Act 1944 (NSW). For example, if an employee works three days a week they would be entitled to four weeks leave at the pay they received for their normal week namely 3 paid days times 4 weeks or payment for 12 days. It would not be a case that they would be entitled to three-fifths of what they would normally earn in a period of four weeks, which would amount to 7.2 paid days.

This potential for error appears to have arisen out of the needs of computer programs in computing hours and the calculation of hours for the purpose of annual leave accumulation – an approach that was adopted by the changes arising out of WorkChoices.

The Society assumes that the effect of Paragraph 132 of the Discussion Paper is to leave the question of leave accruals during periods of workers compensation up to State law. The States should be made aware of the need to make this matter clear in legislation in the light of the treatment of accruals in the NES. There should be no opportunity allowed for legal disputes as to the accrual of any entitlements during periods of workers compensation.

**Base Rate of Pay**

Paragraph 29 of the proposed standards again raises the meaning of "base rate of pay", this time in relation to annual leave – see the Society's earlier submission about the problems in the definition of "base rate of pay"

**Leave Loading**

There appears to be no reference or regard to leave loading (other than in 'modern awards') and the role leave loading plays. This is a particularly significant point given its inclusion in many State Awards that are now Notional Federal Agreements Preserving State Awards ("NAPSAs"). If, for example, an employee in a workplace does not have modern award coverage, or agreement is not reached about its inclusion in a modern award, employees may be worse off when NAPSAs expire in December 2009. This situation must be avoided so that no employee will become worse off as a result of these changes. The standard and the transition bill are both silent as to the quantum of the loading. This means that only award employees will be entitled to the loading. It is not an entitlement that appears to have international recognition and rates further

consideration by the Government as to the history of it being granted and the reasoning behind the entitlement.

**The Use of Examples**

The examples given in this section are difficult to follow and raise particular problems. It is hard to understand the first example under paragraph 133 on p.24 of the Discussion Paper. Further, it appears to be a problem again raised by the reliance on hours as opposed to days. For example, if Maria is rostered to work 3 x 12 hours shifts for 4 weeks and she takes one of the days off as annual leave then one would think that she would be entitled to the 12 hours payment not 7.6 hours. The example could be perhaps be made a lot easier if her annual leave entitlement was expressed in days – 20 days. That is, payment for annual leave is based on an averaging of her daily rate of pay (that being calculated on the basis of a 36 hours week (she works 3 x 12 hour days). It seems to be confusing to then use a 152 hour calculation to work out her daily rate when in fact she works 36 hours not 38 hours. It begs the question about the calculation of sick leave.

The second example is a little clearer regarding Marcus on p 24 in the first two paragraphs of that example. However the example of Anika compounds the problem by using the notion of a pro rata share of annual leave. It would be far simpler to say that Anika is paid 4 weeks at her weekly rate of pay which is the weekly rate of pay she earns for 4 days work. The last example involving Ellie is probably the clearest and it is perhaps the only example needed.

**Paragraphs 136-137 of Discussion Pater - Base Rate of Pay**

Again there is no reference to entitlements arising out of NAPSAs or leave loading. Reference should also be made to the Society's general submissions on base rate of pay.

**Paragraph 139**

The definition of "shift worker" as discussed below raises problems. It is the view of the Committee that it is essential that it be defined in the standards otherwise the entitlement will only be enjoyed by award employees.

**Paragraph 140 Accruals**

It is of some concern to the Society that annual leave can be taken immediately upon accrual. It tends to defeat the purpose of annual leave to allow people to have proper and reasonable rest breaks. There could be a situation where someone after their first 12 months of employment has no annual leave as they had taken short spurts of leave because of particular issues including work flexibility issues. In this case the 'flexibility' tends to undermine the value of the benefit.

**Paragraph 144 and the Change of the Rate of Accrual**

This again raises the particular problems that occur when one does an hourly calculation of a day's entitlement. Rather than simply doing a proportionate calculation that reflects

the changes in salary or pay (which in the Society's view appears to be a far more simple and foolproof exercise) the NES has unnecessarily complex calculations.

**Paragraph 147**

An employer cannot unreasonably refuse an employee's request to take paid annual leave. That again raises questions dealt with elsewhere in this submission.

**Extra Week's Leave for Shift workers**

Clause 26(1) (b) of the proposed NES seems to have the result that in practice only award employees will be entitled to an extra week's leave if they are shift workers.
It is submitted that this is inequitable and that such benefit should apply to all shift workers whether covered by an award or not. The NES should so provide and should provide a default definition of "shift worker".

It is no answer to argue that non-award employees can reach agreement with their employers for such an entitlement, as this would require the agreement of an employer which could be refused. By contrast an award employee need only request the award maker to facilitate the entitlement by including a definition of "shift worker" in the award.

This results in a standard that is only guaranteed for award employees which is an inequitable situation.

All employees should be entitled to an extra week's leave if they are shift workers as defined in the existing legislation.

The definition of "shift worker" presently set out in s.228(1) of the Workplace Relations Act 1996 should be adopted by the standards for all workers, unless a modern award provides otherwise. There is a risk that employees who are entitled to this standard under the existing legislation would lose that entitlement if the proposed NES are adopted in their present form.

**Division 6 of Proposed Standards – Personal / Carer's Leave and Compassionate Leave**

In Section 32 of the proposed NSE, sub-section 32(2) does not make it clear as to when the entitlement vests. Is it daily, monthly or yearly? What about awards that may give a greater entitlement and a different method of accrual? For example the CBA Employees Award 1999 AW772290 gives 18 days on commencement of employment and a further 18 days after each completed 12 months of service.

As regards section 33 of the proposed standard, should an employee be able to take leave because of an unexpected emergency affecting that employee, rather than only for an unexpected emergency affecting a family member or member of the household?

See the earlier submissions of the Society concerning "base rate of pay" and the need for a definition of "ordinary hours of work".

The example on page 32 of the Discussion Paper is confusing. Does Jose lose money? This should be made clearer.

**Division 7 of Proposed Standards - Community Service Leave Make Up Pay for Jurors**

The Society believes that there is a fundamental distinction between community service which is obligatory in nature, and service that arises at the election of the volunteer.

As a general proposition, jury service is the subject of an obligatory regime whereas fighting bushfires, lifesaving or emergency relief is the realm of the volunteer.

The provision of juries, whether for civil or criminal proceedings, is part of the judicial system.

In that context, the judicial system should be provided to the community with no obligation for any entities, excluding the parties, to be out of pocket. It is an obligation on the State.

The juror should be entitled to be reimbursed for all forfeited remuneration. It may be that such reimbursement should be subject to some fixed limit, but there clearly should be general reimbursement.

The employer should not be obliged to provide a subsidy to the employee to cover the make up between what is paid to the employee as a juror by the State, and their usual remuneration.

Both the employee and the employer are already making a contribution.

The employee makes the contribution by the discharge of their obligatory duties and potential wage loss, and the employer makes a contribution by making adjustments to the working arrangements on a practical day-to-day basis to continue to operate its business. These arrangements must be made in the light of uncertainty as to how long the employee will be absent, and at the risk of suffering a loss of productivity and increased outgoings. The small employer in particular has the potential to suffer significant personal loss.

The proposed standard seeks to create the right to take leave, and it is only in relation to jury service that there is the right to claim the make up pay. This is inconsistent, and it is submitted that the better option would be that the State should bear the cost of the jury service rather than either the employee or the employer.

It is submitted that the various governments should work together to address this injustice.

If this submission is rejected, the Society points out that the NES already recognises the equitable need for distinction between large scale employers and small scale employers in regard to redundancy payments, and a similar approach is justified in relation to jury payments.

It is submitted an alternative option worthy of consideration would be that an employer with 15 or less employees would not be obliged to pay make up pay, but this would be payable by the relevant Government.

The Society recognizes the potential constitutional difficulties in achieving uniformity in approach among the States, but this must be dealt with if a federal overarching requirement for loss of pay for jury service to be refunded by employers, is pursued.

**Right to be Absent from Work**

Since the standard is meant to be applicable to all employees whether award regulated or not, the Society questions whether the standard adequately addresses the issue of the employee and the nature of their employment.

Can a volunteer fireman who is employed on a fulltime basis demand leave to participate in emergency relief after a local disaster?

In an area where there is a doctor shortage can an employed doctor, whether in the public or private sector, demand leave to fight fires?

There is a public policy consideration as to whether the role of the employee and the nature of the services provided by the employer (where for profit or not) should be factored in to the entitlement to be absent from employment.

If the need for the volunteer is to provide essential services for the State, such need should be able to be balanced against the need of the employer to have the services of the employee at that particular time.

**Division 8 of Proposed Standards – Long Service Leave**

The Society notes that there is legislation across Australia guaranteeing long service leave benefits to employees.

The Society supports the proposed form of the NES relating to long service leave benefits on the basis that it does not believe that any employee (not just award employees) should be deprived of long service leave benefits by agreement, at any time from now on. At the time of writing these submissions this matter appears to be about to be dealt with by legislation.

**Division 9 of Proposed Standards – Public Holidays**

Clause 47 of the proposed NES, inter alia, provides that a Public Holiday shall be:

- "(b) a day that, under (or in accordance with a procedure under) a law of a State or Territory, is substituted for a day referred to in paragraph (a) [referring to the list of public holidays specified in the NES]"

This provision appears to assume that State Governments declare days substituted for a public holiday occurring on a Saturday or Sunday, as a public holiday. In NSW this is not correct as it appears that the recent practice is to declare substituted holidays as bank holidays under section 20 of the Banks and Bank Holiday Act 1912 (NSW). It does not operate so as to extend the substituted holiday to employees not covered by NSW State awards for the reason that a bank holiday, and not a public holiday, has been declared. Examples of this practice are as follows:

On pages 3706-7 of the NSW Government Gazette No.76 on 8th June 2007 there is a proclamation by Her Excellency the New South Wales Governor that pursuant to s.20 of the Banks and Bank Holiday Act it is inexpedient that Saturday 26th January 2008 should be a bank holiday for the purpose of celebrating Australia Day and that Monday 28th January 2008 is substituted for that day to be a bank holiday.

In the same Government Gazette and on the same page 3707 there is a proclamation by Her Excellency the Governor of New South Wales that pursuant to s.20 of the BBH Act it is inexpedient that Monday 21st April 2008 be a bank holiday to celebrate the Queen's birthday and that Monday 9th June 2008 is substituted for that day to be a bank holiday.

S.19(5) of the Banks and Bank Holiday Act 1912 provides a power for the Minister for Industrial Relations to declare a substituted day for a public holiday but this power was not exercised in the examples given.

It appears that the practice adopted in New South Wales would not serve to trigger clause 47(b) of the proposed NES as the day in question would not be a lawful public holiday for employees in NSW not covered by NSW State awards.

This perceived flaw could be countered by obtaining assurances from State Governments that all substituted holidays will be declared a public holiday. Alternatively, clause 47(b) could be appropriately amended but this could be difficult to achieve if the States wish to retain their autonomy in fixing the dates of public holidays.

**Division 10 of Proposed Standards – Notice of Termination and Redundancy Pay Redundancy Payment**

It is noted at paragraph 283 that the calculation for redundancy pay under NES is capped at 16 weeks for an employee with less than 10 years service but then is reduced for employees with at least 10 years service to 12 weeks.

The rationale for this approach appears to be the proposition that the employee will have accumulated actual or contingent long service leave benefits to offset the redundancy.

The general principles associated with notice of termination benefits and redundancy pay benefits are well established, including the rationale behind such payments.

As a matter of principle, if an employee has actual or contingent long service leave benefits, that entitlement, however described, should not be used as a basis for limiting benefits payable under the redundancy pay regime.

The rationale behind redundancy pay is distinctly different to the rationale behind an entitlement to long service leave, and the two should not be confused.

Differences between long service leave entitlements in various states also render this variation in the scale illogical. In NSW for example, an employee who is made redundant would be entitled to Long Service Leave if service of 5 years had been achieved.

The lack of logic in this variation of the scale is illustrated by the case of an employee who by agreement has taken Long Service Leave before the redundancy situation. That

employee would be penalized in the amount of the redundancy payment as compared with other employees.

Accordingly an employee who has served in excess of 10 years should not be receiving a reduced benefit by way of redundancy pay. The employee who has at least 10 years service should receive a redundancy pay period of 16 weeks.

**Transmission of Business**

There is a potential for considerable controversy when an employee declines an opportunity of employment where there has been a transmission of business.

The notion of substantially similar terms and conditions incorporated in Clause 55 of the proposed NES has all the appearance of being an objective test.

What is not adequately addressed is that there may be other proper grounds which have degrees of subjectivity about them, which justify the employee not accepting the alternative employment.

Examples include:

**(i)** The incoming employer moving the base of operations.

**(ii)** The employee having serious and genuine doubts about the financial viability of the incoming employer.

**(iii)** The employee having experienced past difficulties in a personal working context with the employer.

Whilst the employee may approach Fair Work Australia to raise the issue of real payment with the old employer it would be preferable to at least on an inclusive basis identify a range of issues that could well demonstrate that the provision operates unfairly for the relevant employee. How, and at what cost, this assessment would be undertaken is not clear. This issue warrants clarification.

There could be an inference as a matter of construction under Clause 55(3), that Fair Work Australia could direct the old employer to pay less than the entitlement under s.52. This should be clarified and there should be no discretion to pay the employee less than the scale, if unfairness is found.

**Excluded Employees**

Paragraph 54 of the proposed NSE is clear that employers with less than 15 employees are excluded from redundancy pay obligations. It is unhelpful to refer to “workplaces” with 15 or more employees as in paragraph 268 of the Discussion paper. Paragraph 270 more aptly reflects the position, in terms of Section 54.
Paragraph 54 of the NSE also raises the need to have avoidance safeguards included in the substantive legislation to prevent employers splitting up its employees among related entities.

**Division 11 of Proposed Standards – Fair Work Information Standard**

The Society supports the requirement for an employer to provide prescribed Information Statements to employees, where the information relates to the rights and obligations of the employer and the employee. It is considered that this will assist the knowledge of employees as to their rights and obligations and will assist application and enforcement of the NES.

The Society would like the opportunity to view the proposed Information Statement prior to giving its complete endorsement to this proposal and it is noted that such form is not presently available.