

Australian Education Union



Submission

to the

Workplace Relations Policy Group

Department of Education, Employment and Workplace Relations

on

National Employment Standards Exposure Draft (NES)

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1. Introduction

- 1.1 The NES provides an opportunity for some minimum standards of employment to be enshrined as entitlements potentially due to all workers in Australia. Together with modern awards and collective agreements the NES is a foundation-stone of the post-Work Choices industrial relations system to be introduced by a substantive reform Act by the Federal Government.
- 1.2 The NES will thus form a basic element of the ‘safety net’ in the new national industrial relations system. A modern award will not be able to exclude a term of the NES nor operate inconsistently with a term. As such the opportunity for consultation provided is inadequate.
- 1.3 The draft NES will be issued following consultation on the Exposure Draft conducted by a Policy Group within the Department of Education, Employment and Workplace Relations. The Minister will then provide the NES to the Commission which will proceed with the task of Award Modernisation. By the time the NES is included in the substantive reform bill later in 2008 and that bill is subjected to open parliamentary scrutiny during 2009 the NES will have been a reference point for the consolidating and revision of awards by the Commission.
- 1.4 While submissions on the draft NES will be recorded on the department’s website, the AEU believes this is not an adequate process for consultation on such an important set of employment standards relevant to most Australian workers.

2. Effective Collective Bargaining

- 2.1 An enforceable safety net of rights contained in the objects and terms of the substantive Act, modern awards and the NES is the best precondition for effective collective bargaining in the interests of improving employment terms and conditions and economic growth. The rejection of ‘Work Choices’ by the Australian community and workforce was largely due to the insecurity which was created by the Howard Government’s failure to provide a secure safety net above which individual contracts and collective agreements could be made. This was compounded by the Howard Government’s intrusion into bargaining and limits placed upon the powers, role and independence of the Australian Industrial Relations Commission.
- 2.2 Instead of encouraging collective agreements which met the needs of employers and employees, ‘Work Choices’ saw the political hand of the Coalition intervene in bargaining to prohibit issues being agreed and by undermining the capacity of unions to organise. While many of these restrictions have been removed, the draft NES does not adequately address the need for a secure safety net because its enforceability is not evident, leaving employees without certainty about the entitlements it purports to create.

- 2.3 Neither does the NES provide information on how it will be reviewed and modified over time to provide a relevant set of standards as a safety net to ensure effective bargaining can occur. Unless this is explained and an adequate process developed, collective bargaining itself will be threatened by a safety net the standards in which make bargaining a risky business because the drop to the NES would potentially be at great cost to employees.
- 2.4 A particular concern for unions like the AEU which principally operates in large public sector departments is how the NES will relate to Enterprise Awards where all the employees are employed by a single business. The Explanatory Document is silent on the relationship between the NES and Enterprise Awards leaving a question mark over AEU members currently subject to Federal provisions and those potentially subject to them as a result of referral of state powers.
- 2.5 It is not clear how the NES relates to Modern Awards despite the attempt in the Transition Act and the Discussion Paper to do so. Modern Awards may “build on” NES provisions to ensure a fair minimum safety net for employees, having regard to existing award entitlements. However, the NES may not be excluded but may be dealt with in ways which could otherwise be seen as “modifying or excluding” the entitlement. But otherwise the AIRC must not include a term in a Modern Award where the substance of the term is dealt with by the NES. The possibilities for confusion in these formulations are legion.
- 2.6 In relation to awards covering school teachers for example, attempts to render the NES and Modern Award relationship will need to comprehend professional practice whereby employers and employees accept that as part of salaried employment working hours will often exceed the 38-hour maximum. However, whether or not the expectation is reasonable cannot be determined by reference to whether the employee is entitled to receive overtime payments, because they are not under any circumstances.
- 2.7 The effective determinants of workload of teachers lie in the number of contact hours as well as the nature and number of students concerned. Whether this can be considered dealing with the NES in ways which could otherwise be seen as modifying or excluding the 38-hour standard is unlikely.

3. Legislating Standards of Employment

- 3.1 The Government intends to continue the practice introduced by ‘Work Choices’ of establishing employment standards by regulation, replacing the four leave conditions contained in the Australian Fair Pay and Conditions Standard with six leave conditions by adding community leave and long service leave, although the latter is deferred until a national minimum standards is developed.
- 3.2 Setting employment standards by regulation will inevitably mean the politicisation of employment standards in future; they will run a gauntlet of political will and opportunity in the houses of the Federal Parliament. This is not a good basis upon which to construct a system which must gain the respect if not the goodwill of the industrial parties.

A return to the establishment of employment standards by Test Cases in awards by an independent commission mandated to resolve disputes by conciliation and arbitration provide a much better chance of surviving winds of political change and opportunism.

4. Standards Without Entitlements

- 4.1 The draft NES raises the importance of some employment issues in the architecture of the new system, notably flexible working arrangements for parents and carers, parental leave for childbirth or adoption, paid personal and carers leave for sickness and injury of the employee, their immediate family or household member. The elevation of the importance of these issues is welcome.
- 4.2 However, there are a number of aspects of these standards which fall short of the opportunities the NES provides.
- 4.3 The NES purports to establish employment standards which create entitlements. However, in the case of the Fair Work Information Statement NES...the entitlement is to receive a description of the government's industrial relations legislation as included in the government *Gazette*. This trivialises the NES and would play no useful role in establishing the employment standards of most employees.
- 4.4 It is not clear from the draft NES how the 'entitlements' the NES purports to establish are to be enforced. An 'entitlement' is something which can be ensured by some legal process. If an 'entitlement' is removed or unreasonably denied there must be a means of restoring or enforcing it.
- 4.5 For example the 'parental leave' NES entitlement is highly codified but gives an eligible employee no more than a right to request the leave. The request may be refused 'only on reasonable business grounds' for which reasons must be given. 'Reasonable business grounds' is not defined but 'would be given its ordinary meaning' including 'costs to the employer, the employer's ability to reorganise workloads and the availability of replacement staff.' This provides a script for the employer in refusing a request.
- 4.6 The AEU believes that a definition of 'reasonable business grounds' should be given precisely because, contrary to the para 120 of the Discussion Paper, the grounds for refusal should be limited. An inclusive list of factors could be included which must be considered, including the needs of the parents concerned. In addition to Fair Work Australia providing 'general information and assistance to employers' (para 121) the same assistance should be available to parents in seeking the benefits of the parental leave NES where the employer is claiming 'reasonable business grounds' for refusal.
- 4.7 The parental leave NES imposes an 'obligation' upon the employer to agree or otherwise in writing within 21 days, in which case reasons must be given. How or where is an employee to take a refusal if they do not accept the reasons given? The NES does not provide an answer, leaving that to the substantive Bill. It is impossible to do other than speculate then on the value of the parental leave NES at this stage. This detracts substantially from the value of the present consultation on the Exposure Draft.

- 4.8 Consequently, and despite the processes and eligibilities it specifies, the Parental Leave NES fails because without providing a means to require compliance the Parental Leave NES cannot be described as an entitlement. This is further discussed below.

5. Failure to Provide Entitlements

- 5.1 There is a general failure of the draft NES to create entitlements if the employer refuses to meet them, making them less than entitlements in fact. The Discussion Paper makes this clear in relation to refusal of requests for flexible working arrangements which ‘will not be subject to third party involvement’. (para 61) This explicit rejection of any recourse to the tribunal or any court or mediator transforms the NES from a statement of statements creating entitlements to a set of guidelines for employers and employees which they may ignore at will.
- 5.2 In relation to the NES generally the Discussion Paper says that a compliance regime ‘will be settled’ with the reforms and the establishment of FWA, (para 35). This leaves making a submission on a critical aspect of the NES difficult and open to assumptions.
- 5.3 This failure to outline compliance is linked to the legislative approach governing the NES. They are created by legislation as the first part of the government’s ‘safety net’ not by an independent tribunal in settlement of a dispute. There is no reference in the Discussion Paper or elsewhere to review and maintenance of the NES for relevance or new issues.
- 5.4 Formerly an award of a tribunal could be enforced. However, the NES does not establish how compliance will be achieved, making submissions on the NES highly speculative. Unless the substantive legislation to commence in 2010 specifies how this part of the safety net is to be enforced, it is not a safety net at all. The FWA as an independent tribunal empowered to hear and determine a denial of the NES is essential for the integrity of the legislation as a whole. Where a Modern Award contains terms which relate to matters contained in the NES (para 26) it is essential that the dispute resolution processes in the Award are available to applicants denied NES entitlements.
- 5.5 The NES does not establish a minimum standard for wages, although the Discussion Paper envisages that modern awards should ensure that all employees have the benefit of a minimum wage. (para 6) However, evidence before the Senate Inquiry into the Transition Bill from Mr Kovacic of DEEWR that up to 100,000 employees earning less than \$100,000 could be outside the award system and need to rely on the NES.

6. Principals in Public Schools and Colleges

- 6.1 The AEU represents Principals in public schools and colleges in all states and territories as well as Departmental officers on secondment from schools in some systems of education. Some of these members may earn in excess of \$100,000 in salary, depending on how that is defined, and thus be excluded from the protection of the award system.

- 6.2 The Transition Act requires that the creation of Modern Awards is not intended to ‘result in high-income employees being covered by modern awards’ and nor are they intended to apply to ‘managerial employees.’ However, the AEU has several thousand members who could be defined in one or both of these categories. A figure of \$100,000 was mentioned during the election campaign and some principals will earn that amount prior to the enactment of the substantive Bill.
- 6.3 Principals in public schools and colleges are employees of large education systems who are not able to bargain individual contracts of employment in any meaningful sense and are entitled to the protection of a safety net either by award or NES regulation. The draft NES and proposals for modern awards do not provide either.

7. State-Territory specific Employment Standards

- 7.1 In the event that a national system of industrial relations is created by referral and/or the consequences of the High Court decision in ‘Work Choices’ the standards contained in the NES are inferior to those of AEU members in a number of respects. The principle contained in the Long Service Leave NES of not overriding state or territory Long Service Laws should apply across the board.
- 7.2 The Australian Education Union has specific concerns regarding those NES which are inferior to public sector standards or indeed to past AIRC national test case standards. In particular, those NES which relate to flexible working arrangements, parental leave and personal/carers’ leave. The AEU believes there are considerable gender equity issues within (and outside) the paid employment in Australia, due to the role mostly women play, in family care. The AEU represents almost 120,000 women working in public education systems across the country. This means women account for 71% of the AEU’s membership. Hence the AEU believes the Government must ensure the NES reflect best practice to both demonstrate successful models and to best promote the equal distribution of unpaid care responsibilities and culture change possible within the workplace.

8. Requests for flexible working arrangements

- 8.1 Firstly, the ‘prior service’ required to be eligible to request flexible working arrangements is 12 months. The AEU believes in some sectors, particularly female dominated ones with high turnover rates, very few would access this standard and therefore 6 months would be a more reasonable service requirement and broaden the entitlement.
- 8.2 Secondly, the exposure draft lists examples of ‘flexible arrangements’ which could be considered by employers. We believe that whilst the legislation should not be prescriptive in this sense (to not limit options) there needs to be sufficient information about possible flexibilities within the “Fair Work Information Statement” provided to employees so they are fully aware of their options, given that it is the employee who must make the request in writing and it is up to them to make the case for a modification.

- 8.3 The AEU's main concern with this standard however, is that it is actually very weak in terms of enforcement and therefore cannot be considered a 'standard' with the robustness such a word suggests. The AEU believes that some aspects of the AIRC's 2005 test case into work and family better enshrined both rights and processes and that the NES needs to be improved. In particular we refer to the employers' ability to refuse the request and therefore how fragile the 'entitlement' actually is.
- 8.4 Specifically, the Flexible Working Arrangements NES does not define the term 'reasonable business grounds' which an employer must give for refusing a request, despite the fact that an AIRC test-case decision did so. Why should those grounds not be adopted?
- 8.5 In lieu of providing a definition of 'reasonable business grounds', the Discussion Paper says that the intention is to 'avoid limiting by legislation the grounds on which an employer may reasonably refuse...' and that 'Instead Fair Work Australia will provide general information and assistance to employers as to what may constitute reasonable business grounds' (para 75). The applicant is thus not only able to establish with any objectivity whether the employer's refusal is sanctioned by the NES but FWA will assist the employer to meet the requirement, vague as it is.
- 8.6 As said earlier, having the refusal of requests for flexible working arrangements not 'subject to third party involvement' (para 61) explicitly rejects any recourse to affirm the entitlement and transforms the NES to a set of guidelines which they may be ignored at will.
- 8.7 Further, though Fair Work Australia has a notional role in delivering 'fairness' paragraph 73 stipulates that this standard is cannot be imposed by FWA because the Government seeks for the NES on requesting flexible work to principally set out a process for encouraging discussion between employees and employers. The ideal is stated in paragraph 73 as employers and employees being 'encouraged to discuss their working arrangements and where possible, reach an arrangement' which though ideal again is not a standard.
- 8.8 Understanding the needs of employers and employees regarding the matter of flexible working, the AEU would rather see an NES that operates with a greater emphasis on the employer's "obligation to accommodate" a request not just to 'reasonably consider' one. For example, in the 2005 AIRC Test Case decision (into work and family) the employer was asked to consider the request "having regard to the employee's circumstances" *as well as* their own business case. The international move toward supporting and diversifying the role of caring with that of paid work should demonstrate the benefits are recognized both for business, individual working parents and the community as a whole.
- 8.9 Further, the rejection of any form of appeal or dispute resolution process goes against international experience. In a system which denies measurable 'business grounds' for refusals and with no recourse once refused, the commitment to the benefits of flexible working is shown to be weak, and as highlighted by the Discussion Paper, (paragraph 61) is internationally inconsistent.

- 8.10 The UK experience is specifically emphasized by the paper, though there are other countries with models worth supporting also. In the UK however, there is the right to apply for work flexibility (provided under the Employment Act 2002) where employers have ‘a duty to consider requests seriously’. The right, unlike the Australian NES proposed, begins to cover employees at 6 months (rather than 12 months) service. The UK legislation does exhaustively define the ‘valid business grounds’ on which a refusal can be made and the process does include an avenue to appeal the refusal (and does allow third party support) – initially to the employer internally, then either via the workplace grievance procedure or taking an external dispute to the Advisory, Conciliation and Arbitration Service (Acas) or the Employment Tribunal. Though the appeal can only dispute incorrect procedure or incorrect facts, not to contest the business case. Remedies of the appeals process can be compensation or reconsideration, and ensures no future discrimination by the employer, if an employee lodges and appeal. (Lake, A., 2003)
- 8.11 Further, and even better, both Germany and Netherlands do have the option to appeal in court if a request is refused and where internal grievance mechanisms are exhausted (Hegewisch 2005a; 2005b and Kornbluh 2005)
- 8.12 The AEU argues that both clearer grounds for refusal must be defined and at least some avenue for appeal be part of the standard because not only are we years behind fellow OECD countries in this regard but it would be economically foolish to not heed the wisdom being shown elsewhere, when drafting new and presumably long standing employment standards.
- 8.13 We note that whilst the Australian NES remains modest, the UK are indeed in the process of *extending* their ‘right to request’ to potentially another 4.5 million parents. At present estimates are that 14 million employees (almost half the workforce) work flexibly, with official figures indicating that 91% of requests for flexibility are granted. (Lake, A., 2007)
- 8.14 The AEU is pleased that the right to request flexible working arrangements is extended to casual employees, as this will enable many of our TAFE members an opportunity they’ve not yet enjoyed.
- 8.15 The AEU is also supportive of paragraph 70 regarding those with the ‘responsibility for the care of a child’ being intentionally not restricted to legal responsibility so as to encompass guardianship or fostering. The AEU therefore welcomes the broadest understanding of family structures in the standard’s application.
- 8.16 In summary, the AEU believes the NES on requesting flexible work should be as rigorous and prescriptive as possible to both provide clear options for employees as well as defined grounds to which employers can only refuse a request on, because by international standards we are behind in this regard and the AEU would like to see a rapid increase in flexible working in Australia, as the UK and others have proved the economic and social benefits of such.

9. Parental leave

- 9.1 Regardless of the NES on parental leave proposed the AEU first and foremost supports and recommends the ILO standard, (in Convention 183 Maternity Protection, 2000), regarding the provision of 14 weeks *paid* maternity leave. The AEU notes with disappointment the silence in the exposure draft regarding any relationship the NES may have with the Productivity Commission’s task to produce a model for national paid maternity leave and the incongruence of the NES timeline with that of the Commission.
- 9.2 Nevertheless, there are a number of considerations within the ILO standard that should be considered in relation to the NES on parental leave, including references to ensure:
- the paid leave ensures a suitable standard of living (article 6, no.2);
 - paid leave is “based on previous earnings, the amount of such benefits shall not be less than two-thirds of the woman’s previous earnings” or an average resulting from calculations based on the woman's previous earnings (article 6, no.3);
 - conditions to qualify for paid leave can be satisfied by a large majority of the women (article 6, n.5); and
 - paid leave be provided through compulsory social insurance or public funds, or in a manner determined by national law and practice (which may allow, by agreement, employers directly contributing to the cost) (article 6, n.8).
- 9.3 Should the Government *not* enact the ILO convention 183 as the NES, the AEU is supportive of paid parental leave advocated by the ACTU which argues for 14 weeks paid maternity leave, provided by the Government at the Minimum Wage (taxable) to all mothers, which includes continuity of 9% superannuation during the leave. However, we strongly believe that, in accordance with ILO considerations above, paid leave for working mothers should *be based on previous earnings* and therefore would prefer that NES 3 insist employers contribute, as a top up to replacement wages, to the 14 weeks paid maternity leave should it soon be Government provided.
- 9.4 Regarding *unpaid* parental leave, again the NES requires 12 months prior service though we believe 6 months would be a more reasonable service requirement and broaden the entitlement.
- 9.5 Again, though the 12 months unpaid leave (with the ability to request an additional 12 months) is welcome as a minimum right for working parents in a modern economy, our main concerns centre on the lack of definition, (par 79) lack of support for applicants’ knowing their rights (par 101) and poor enforcement through a lack of appeal or grievance procedure.
- 9.6 The NES on unpaid parental leave acknowledges that where two parents wish to both undertaken a period of care for their child they are both entitled to 12 months, unpaid leave. However, where parents opt for one parent to undertake the care, or in the instance of sole parenting, the employee’s ability to extend their unpaid leave for an additional 12 months is based on a request being made by an eligible employee and agreement by the employer, which may be refused ‘only on reasonable business grounds’ for which reasons must be given.

‘Reasonable business grounds’ is not defined but ‘would be given its ordinary meaning’ including ‘costs to the employer, the employer’s ability to reorganise workloads and the availability of replacement staff.’ (par 100)

- 9.7 The AEU reiterates its concern that proposing such a ‘right’ without clarity or enforcement is a wasted opportunity when establishing presumably long standing basic entitlements. It is of particular concern that the AIRC Work and Family Test Case of 2005 had (before ‘Work Choices’ nullified them) established parental leave and related provisions above those being proposed in the NES.
- 9.8 In comparison to the NES the AEU supports the earlier Test Case standard which allowed 8 weeks concurrent parental leave above the NES 3 weeks stated. Further, without reasoning, the NES places a restrictions on Paternity Leave only being taken following (but not prior to) the birth (or adoption) of the child, (par 91). The AEU believes this restriction is arbitrary and disregards many potential scenarios which either demand for greater flexibility in the commencement requirements or at least for the restriction on the leave being consecutive to be dropped.
- Firstly , the requirement of Paternity Leave being taken from the date of the birth of the baby, can be disadvantageous if it is the first child and the mother is required to spend some time in hospital (sometimes for up to 7 days). Often the spouse will choose to continue to work during this time, whilst his/her partner and child are in hospital care, preferring to take the leave to be with them once they return home.
 - Secondly the restriction denies the very real possibility that a spouse would want to be present and supportive of their partner in the week or weeks leading to the birth of a child. Just like time required for family bonding following a birth, so should it be recognized that late pregnancy is a time requiring maximum support and care which can as easily be accommodated by employers to partners prior to child birth as following it.
 - In the case of a second or subsequent child, the spouse may need to take the leave before the date of the birth, to take on the care of non-school age siblings who may not be in child care or family day care, whilst the mother is preparing for the birth or still in hospital with the newborn.
 - There should also be the capacity for the paternity leave to be taken at half-pay for double the period to six weeks.
- 9.9 Further to the issue of partners and parenting, the AEU wishes to point out, regarding the omission of Same Sex Spouses (paragraph 122), that the AIRC Test Case did set about reviewing notions of family which would not be discriminatory to same sex couples. Therefore it is disappointing that this approach has been disregarded in this standard and if there is a Government commitment, as stated, for discriminatory matters towards same sex couples be considered in a whole of government manner, then surely the drafting of NES a first and welcome opportunity to end any such discrimination in legislation.
- 9.10 The ‘related entitlements’ to unpaid parental leave in the NES are mostly based on the 2005 test case and are supported by the AEU. In some cases the NES is a welcome improvement on the test case.

- **Return to work** – (paragraph 80) allows employees to return (following parental leave) to the position they held prior or to a position comparable in status and pay with that former position. This being the test case standard, it is supported by the AEU. Paragraph 81 also supports the test case ensuring that if a female employee reduced their hours or transferred positions due to the pregnancy, she is entitled to return to her former position and hours held, prior to the transfer or reduction.
- **Special Maternity Leave** (paragraph 105-108) is slightly better than Test Case standard which places the aggregate of paid sick leave, special maternity leave and parental leave, to not exceed 52 weeks. In the case of miscarriage, the special leave is basically “unlimited” – good
- **Transfer to a Safe Job** - is welcomed as the previous test case standard. However, the NES provision for cases where there is ‘no safe job’ (paragraph 109), the AEU wholly supports as it not only complies with the ILO convention 183 standard but in establishing “paid no safe job leave” it allows *paid* leave rather than simply the option to commence parental leave, which may have been unpaid.
- **Pre-adoption leave** – (paragraph 116) though reflective of the test case the AEU believes it is unreasonable that employers can require adoptive parents to use other forms of leave (for example annual leave) if it is available, rather than honouring the purpose of adoption leave which should be to recognize, just as parental leave does, the importance of parent/child bonding and the right to balance work with care – whether toward a biological child or otherwise.
- **Consultation about workplace change** – The AEU believes the NES falls short of the test case as it focuses just on workplace change affecting only the “status or pay” of the employee’s former position, whereas the test case also covered circumstances where the employer may “introduce significant change at the workplace” and also emphasized early communication of employee’s return to work plans.

9.11 Again the AEU is pleased that the right to request flexible working arrangements is extended to casual employees, as this will enable many of our TAFE members an opportunity they’ve not yet enjoyed.

10. Personal/carers’ leave and compassionate leave

10.1 Despite the issues raised earlier noting most AEU members benefit from superior personal/carers’ leave entitlements being in the public sector, at least this NES is reflective of the AIRC 2005 Test Case standard, which the AEU supports.

10.2 Another important distinction made in this NES, which disallows discrimination toward same-sex couple is to extend caring to a “member of the household”. The AEU welcomes this definition and believes this should have also be a consideration regarding NES on parental leave which could and should recognise same sex spouses.

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