



## **Express law** *fast track information for clients*

5 August 2008

### **Key features of the National Employment Standards**

The Minister for Employment and Workplace Relations released the final [National Employment Standards](#) (NES) on 16 June 2008. The draft NES were initially published on 14 February 2008 for public consultation; 129 submissions were received.

The NES will be minimum statutory entitlements for all federal system employees, including employees in the Australian Public Service. The NES will be introduced in legislation later this year which will also deal with compliance with the NES, and the interaction of the NES with agreements, existing industrial instruments and contracts of employment. However, the NES will not come into operation until 1 January 2010, when it is expected to replace the [Australian Fair Pay and Conditions Standard](#) (the Standard), and the award modernisation process will be completed.

Below is a summary of the key features of the NES and, where relevant, a comparison of the NES with equivalent entitlements under the Standard and the [Workplace Relations Act 1996](#) (WR Act).

#### **What are the National Employment Standards?**

---

The NES are standards for:

1. Maximum weekly hours
2. Requests for flexible working arrangements
3. Parental leave and related entitlements
4. Annual leave
5. Personal/carer's leave and compassionate leave
6. Community service leave
7. Long service leave
8. Public holidays
9. Notice of termination and redundancy pay

## 10. Fair Work Information Statement.

### ***Preliminary provisions***

---

The NES contains overarching definitions and rules that apply to all the entitlements. This contrasts with the Standard, which has entitlement-specific definitions in each Part.

#### **Relationship between the National Employment Standards and modern awards**

A modern award must not exclude the NES and has no effect to the extent it purports to do so. However, a modern award may deal with a matter dealt with by the NES insofar as the award provision:

- is ancillary or incidental to the operation of an employee's entitlement under the NES
- supplements the NES
- is not detrimental to the employee in any respect when compared to the NES.

An ancillary provision is one which, for example, deals with when payment for annual leave must be made. A supplementary provision is one which, for example, increases the minimum entitlement for an employee, such as an increase to the amount of annual leave to which an employee is otherwise entitled. A detrimental provision would be, for example, a requirement that an employee give more notice of parental leave than required by the NES; this is because such a provision is more onerous for the employee.

These rules will replace the 'more generous' test that currently applies to the relationship between an award and the Standard.

#### **Rates of pay**

The NES provides definitions of 'base rate of pay' and 'full rate of pay'. Base rate of pay is the amount payable to an employee for their ordinary hours of work, which excludes:

- incentive-based payments and bonuses
- loadings
- monetary allowances
- overtime and penalty rates
- any other separately identifiable amounts.

An employee's full rate of pay is the amount that the employee actually receives for actual hours worked. That is, the full rate of pay includes all loadings and allowances.

The definition of base rate of pay is almost identical to the current definition in the Standard of 'basic periodic rate of pay'.

Unlike the current WR Act, actual minimum rates of pay will not be included in the NES. Modern awards will set minimum rates under the new system.

Also, the NES will not deal with piece rates of pay. Rather, a modern award will provide methods for calculating equivalent rates of pay for pieceworkers.

## **Child**

The NES will expressly provide entitlements to same-sex couples for the first time. The definition of 'child' will be amended to include a child who is a product of a person's relationship with another person, regardless of whether that other person is of the same sex.

## **Service**

Also for the first time, the NES will provide a definition of 'service'. However, there is not a universal definition; rather, two definitions apply depending on the nature of the entitlement.

For annual leave, personal/carer's leave, redundancy pay, community service leave and long service leave, a period of service by an employee with an employer is the actual period of employment, not including the following excepted periods:

- any period of unauthorised absence
- any period of unpaid leave or unpaid authorised absence other than community service leave or other prescribed leave.

An excepted period will not break an employee's continuous service, but does not count towards the length of service.

For requests for flexible working arrangements, parental leave and notice of termination, service is the actual period of employment with the employer, not including a period of unauthorised absence. A period of unauthorised absence will not break the employee's continuous service but is not counted towards the length of service.

## **Workers' compensation**

Under the NES, an employee is not entitled to take or accrue any leave or absence during a period when the employee is absent from work and is receiving a payment for workers' compensation. An absence on workers' compensation will generally count as service if it is a paid absence.

## **School-based apprentices and trainees**

The NES provides that a modern award may provide for loadings to be paid in lieu of:

- paid annual leave
- paid personal/carer's leave
- public holiday pay.

This provision is similar to Part 23 of the WR Act, which allows for loadings to be paid in lieu of certain entitlements under the Standard to school-based apprentices and trainees.

## ***Maximum weekly hours***

---

Under the NES, a full-time employee's standard hours of work for an employer must not exceed 38 hours. A part-time employee's maximum weekly hours are the lesser of 38 or the employee's ordinary hours in a week.

In addition, the employer may request or require the employee to work reasonable additional hours in the week. The employee may refuse to work the additional hours if they are unreasonable.

The NES will set out factors that will go towards reasonableness, such as whether there is a risk to the employee's health and safety in working the additional hours, and the employee's personal circumstances.

Averaging arrangements are now provided for by a modern award, rather than in the WR Act itself. An averaging arrangement in a modern award may be for any specified period (unlike the current maximum of 12 months).

### **Workplace Relations Act v National Employment Standards**

The key differences are:

- under the Standard, the maximum weekly hours were 38 plus any reasonable additional hours; the effect of the NES therefore is that each request to work additional hours above the employee's ordinary hours must be considered in terms of its reasonableness
- under the NES, both the request or requirement and the hours requested or required must be 'reasonable'.

### ***Requests for flexible working arrangements***

---

This is a new entitlement and loosely reflects arrangements in the United Kingdom.

Under the NES, an employee who is a parent or otherwise has responsibility for a child under school age may ask their employer to change working arrangements to assist with caring for that child.

'School age' is not defined by the NES; rather, applicable state and territory legislation will apply.

An employee may make a request in accordance with the NES only if the employee has completed 12 months of continuous service – or, if the employee is a casual employee, has completed a period of at least 12 months of regular and systematic employment and has a reasonable expectation of a continuing engagement with their employer.

The request must be in writing and set out the details of the change that the employee is asking for. The employer must then respond in writing within 21 days, setting out whether they refuse or grant the request. An employer, however, can refuse a request only on 'reasonable business grounds'. And, if the employer does refuse the request, the response must set out why.

The NES will not define 'reasonable business grounds'. It is expected that Fair Work Australia will assist employers and employees with what will constitute reasonable business grounds.

Note that even though the NES contains an express right to ask for flexible working arrangements, an employee could still ask for flexible working arrangements outside the scope of the provision. For example, an employee who has not completed 12 months continuous service would not be prevented from asking their employer for a change in working arrangements. This is the case even though the request would not be made under, or regulated by, the NES.

## ***Parental leave and related entitlements***

---

This entitlement covers unpaid parental leave, unpaid pre-adoption leave, unpaid special maternity leave, consultation, the return to work guarantee and paid 'no safe job' leave. The NES does not provide for paid maternity leave.

### **Parental leave – birth of a child**

This entitlement applies to an employee, other than casual employees, who has completed (or will have completed) at least 12 months continuous service with their employer immediately before the date, or expected date, of birth of the child.

Casual employees are entitled to parental leave if:

- the employee has, or will have, been engaged by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months immediately before the date, or expected date, of birth of the child
- the employee has a reasonable expectation of continuing engagement by the employer on a regular and systematic basis, but for the birth of the child.

An employee is entitled to 12 months of unpaid parental leave in relation to a child born to the employee or the employee's spouse or de facto partner and the employee has, or will have, a responsibility for the care of the child. (The definition of 'de facto' includes same-sex relationships).

Where only one member of an employee couple (married or de facto couple) intends to take parental leave, the employee must take leave in one single continuous period. An employee who is pregnant may take leave up to six weeks before the expected date of birth of the child but must commence leave no later than the date of birth of the child. The employee may be asked to provide a medical certificate stating that she is fit to work during the six-week period. Otherwise, the employee must start leave on the date of birth of the child.

Where both members of the employee couple intend to take leave, each employee must take their leave in a single continuous period. A female employee who is pregnant may take leave up to six weeks before the expected date of birth of the child but must commence leave no later than the date of birth of the child. The employee may be asked to provide a medical certificate stating that she is fit to work during the six-week period. Otherwise, she must start leave on the date of birth of the child, and both employees' periods of leave must immediately follow the other.

### **Concurrent leave**

A member of an employee couple may take concurrent leave at the same time that their spouse or de facto partner is taking parental leave. The concurrent leave must be for a period of three weeks or less and, unless their employer agrees otherwise, the concurrent leave must not start before, and must not end three weeks later than, the date of birth of the child.

Concurrent leave is an exception to the usual rules about:

- taking parental leave in a single continuous period
- when the employee's period of parental leave must start.

### **Extending periods of parental leave**

An employee who has unused parental leave may extend their parental leave period by giving notice to their employer four weeks before the end of the original period of parental leave. If the employer agrees, the employee may extend the period one or more times; however, the extension may not go beyond the 12-month entitlement of the employee.

In addition, an employee may request up to an additional 12 months unpaid parental leave, to immediately follow the end of the first 12 months of unpaid parental leave. The employer must agree to the extension, unless they have reasonable business grounds for refusing. Similarly to the flexible working arrangements entitlement, 'reasonable business grounds' is not defined in the NES.

With respect to employee couples, the combined total amount of unpaid parental leave that may be taken is 24 months. That is, both members do not have an entitlement to 24 months unpaid parental leave each.

### **Other leave**

An employee may access other paid leave, such as annual leave, while on a period of unpaid parental leave. However, an employee may not access unpaid leave or community service leave while on parental leave.

### **Parental leave – adoption leave**

The rules for adoption leave mirror the birth-related leave provisions except that:

- leave must start on the day of placement of the child
- adoption-related leave may be taken only in relation to a child who:
  - is or will be under school age at the day, or expected day, of placement of the child
  - has not lived continuously with the employee for a period of six months or more before the day, or expected day, of placement of the child
  - is not a child of the employee's spouse or de facto partner.

### **Unpaid special maternity leave**

An employee is entitled to a period of unpaid special maternity leave if she is unfit for work because she has a pregnancy-related illness, or if she has been pregnant and the pregnancy ends within 28 weeks of the expected date of birth of the child otherwise than by the birth of a living child. The employee is required to provide notice and evidence of the reason for taking unpaid special maternity leave.

The 12-month unpaid parental leave entitlement is reduced by the amount of unpaid special maternity leave taken by the employee.

### **Transfer to a safe job**

An employee may be transferred to an appropriate 'safe job' where the employee is fit to work but should not continue in her current position because of illness or risks arising out of her pregnancy, or hazards associated with that position.

The employee will be paid her full rate of pay in respect of her previous position for the hours that she works in the safe position.

If there is no appropriate safe job, the employee must take 'no safe job' leave, which will be paid at the employee's base rate of pay for her ordinary hours of work that she would have otherwise worked.

### **Consultation**

If an employee is on unpaid parental leave and the employer makes a decision that will affect the employee's employment, the employer must take reasonable steps to give the employee information about the decision and an opportunity to discuss the effect of the decision.

### **Return to work guarantee**

The employee is entitled to return to the position they were in before taking parental leave or, if that position no longer exists, another suitable position.

### **Unpaid adoption leave**

All employees are entitled to up to two days unpaid pre-adoption leave to attend interviews or examinations required to obtain approval to adopt a child. However, this type of leave is a 'last resort'; an employee must take another form of leave if they are able and their employer would prefer they use that other leave.

### **Workplace Relations Act v National Employment Standards**

The key differences are:

- employees will have up to 24 months unpaid parental leave (rather than 52 weeks)
- there appears to be no reliance on the external affairs power so all parental leave provisions are co-located
- there will be a new entitlement to consultation (consistent with the Family Leave Test Case)
- there will be no requirement that an employee take parental leave for six weeks after giving birth
- concurrent leave will increase for birth-related leave from one week to three weeks
- an employee may 'mix' paid leave with unpaid parental leave; there is no requirement to take paid leave at the beginning or end of a period of parental leave
- the relevant adoption age will be 'school age' as defined by relevant state and territory legislation.

### ***Annual leave***

---

All employees, other than casuals, are entitled to paid annual leave of four weeks for each year of service. A shift worker (as defined by a modern award) will be entitled to five weeks of paid annual leave for each year of service.

An employee's entitlement accrues progressively according to ordinary hours of work.

An employee may take leave by agreement with their employer; agreement to leave must not be unreasonably refused.

An employee will not be taken to be on annual leave on a public holiday or where any other form of leave (for example, personal leave) is granted, not including unpaid parental leave or community service leave.

An employee is entitled to be paid their base rate of pay for their ordinary hours of work they would have otherwise worked during a period of annual leave.

Unused annual leave will be paid on termination of employment.

A modern award may provide for, for example, cashing out, or purchasing additional leave. However, cashing out provisions must prohibit an employer from exerting undue influence on an employee to cash out leave and must not reduce the amount of payment the employee would have received if they had taken annual leave.

### **Workplace Relations Act v National Employment Standards**

The key differences are:

- crediting arrangements will be removed
- nominal hours of work concepts will be removed
- there will be no provision for forced annual leave for shut-downs.

### ***Personal/carer's leave and compassionate leave***

---

#### **Personal/carer's leave**

All employees, other than casuals, will be entitled to 10 days paid personal/carer's leave for each year of service. Personal/carer's leave accrues progressively according to the employee's ordinary hours of work. The employee is entitled to be paid their base rate of pay for the ordinary hours of work the employee would have otherwise worked, but for the taking of the leave.

An employee may take paid personal/carer's leave because the employee is unfit for work or to provide care and support for a member of the employee's immediate family or a member of their immediate household.

An employee will not be taken to be on personal/carer's leave during a period that is a public holiday.

Modern awards may provide for the cashing out of personal/carer's leave.

#### **Unpaid carer's leave**

All employees will be entitled to two days of unpaid carer's leave per occasion to care for a member of their immediate family or a member of their household.

#### **Compassionate leave**

All employees are entitled to two days of compassionate leave per occasion when, for example, a member of their immediate family or a member of their household dies or

contracts an illness that poses a serious threat to that member's life. An employee, other than a casual employee, will be paid for compassionate leave.

### **Workplace Relations Act v National Employment Standards**

The key differences are:

- removal of crediting arrangements
- removal of the cap on carer's leave
- streamlining of notice and evidence requirements (in particular medical evidence requirements)
- a new entitlement to unpaid compassionate leave for casual employees.

### ***Community service leave***

---

An employee will be entitled to be absent from work to perform an eligible community service activity. 'Eligible community service activity' means jury service under a Commonwealth, state or territory law, voluntary emergency management activity (within the meaning of s 659 of the WR Act) and any prescribed activity.

An employee is entitled to be absent from work for the period of activity, including:

- time when the employee engages in the activity
- reasonable travelling time associated with the activity
- reasonable rest time immediately following the activity.

An absence (not related to jury service) must also be 'reasonable in all the circumstances'.

An employee, other than a casual employee, is entitled to base pay for up to 10 days of their ordinary hours of work for attending jury service. This amount will be reduced by the amount of payment (if any) the employee receives for attending jury service – for example, from the court they served.

### ***Long service leave***

---

The NES will not provide a national entitlement to long service leave. Rather, the NES will preserve existing entitlements so that:

- if an employee is bound by a workplace agreement or AWA, their entitlement to long service leave is that contained in the agreement (even if that amount is zero)
- if an employee is bound by another industrial instrument (other than an award or notional agreement preserving a state award (NAPSA)) and that instrument expressly deals with long service leave, their entitlement to long service leave is that contained in the instrument
- if an employee is bound by another industrial instrument (other than a workplace agreement or AWA) that does not deal with long service leave, their entitlement to long service leave is that contained in an award or NAPSA that would apply to the employee if they were not covered by the other industrial instrument
- if the employee is bound by an award or NAPSA that deals with long service leave, their entitlement to long service leave is that contained in the award or NAPSA

- where an industrial instrument (including a workplace agreement or AWA) ceases to apply to an employee, their entitlement to long service leave is that contained in the award or NAPSA that would have applied to the employee but for that industrial instrument.

If an award or NAPSA does not deal with long service leave, the employee will be entitled to long service leave under the relevant state or territory long service leave law.

### ***Public holidays***

---

The NES provides for eight public holidays. In addition, any other day or part-day observed generally in a state or territory is also a public holiday for the purposes of the NES (unless excluded by regulation). A substitute day will also count as a public holiday; substitute days may also be included in a modern award.

An employee is entitled to be absent from their employment on a public holiday in the place where they are based for work. If the employee is absent, they are entitled to be paid at the employee's base rate of pay for the ordinary hours of work the employee would have otherwise worked on that day. The NES does not provide for penalty rate payments (these may be included in modern awards).

An employer may request an employee to work on a public holiday, if that request is reasonable. An employee may refuse the request if it is not reasonable or the refusal is reasonable.

The NES sets out factors to be considered to determine whether the request, or refusal, is reasonable.

### **Workplace Relations Act v National Employment Standards**

The key difference is that the reasonableness obligation is imposed on both the employer and the employee under the NES, whereas the obligation was only imposed on the employee under the Standard.

### ***Notice of termination and redundancy pay***

---

#### **Notice of termination**

An employer must not terminate an employee's employment without giving the employee written notice of the day of termination (which cannot be before the day the notice is given).

The amount of notice required is set out in a sliding scale. Payment in lieu of notice can also be made to an employee.

### **Workplace Relations Act v National Employment Standards**

The notice of termination provision operates very similarly to the current provisions; for example, the sliding scale of notice and the exclusion provisions have remained the same. However, this is the first time written notice has been expressly required, and the rules relating to a transmission of business have been modified to correspond with the transmission of business provisions of the WR Act.

## **Redundancy pay**

For the first time in federal workplace relations legislation, redundancy pay will be a statutory entitlement. The redundancy pay provisions are modelled on the 2004 Termination, Change and Redundancy Test Case provisions with the amount of redundancy pay that an employee is entitled to being set out in a sliding scale.

Fair Work Australia may vary the entitlement to redundancy pay where an employer is unable to meet their obligations, or the employer obtains 'suitable alternative employment' for the employee. This might be, for example, a position at the same level and the same remuneration with another employer.

Generally speaking, an employee will not be entitled to redundancy pay where the employee accepts employment with a new employer in a transmission of business or where the employee rejects an offer of employment with the new employer in a transmission of business.

The small business exclusion will apply so that an employer with fewer than 15 employees will not be obliged to pay redundancy pay.

In addition, employees such as specified term employees and apprentices are excluded from the redundancy pay provisions.

## ***Fair Work Information Statement***

---

Fair Work Australia will publish an information statement that will set out information about the NES, modern awards, agreement making, freedom of information and the role of Fair Work Australia.

An employer must give a new employee a Fair Work Information Statement.

## **Workplace Relations Act v National Employment Standards**

The requirements relating to the Fair Work Information Statement are similar to those for the now repealed Workplace Relations Fact Sheet. However, there is no obligation to provide an information statement to an existing employee.

*For further information please contact:*

Leah Edwards  
Senior General Counsel  
T 02 6253 7090 F 02 6253 7304  
M 0409 271 351  
[leah.edwards@ags.gov.au](mailto:leah.edwards@ags.gov.au)

Amanda Johnston  
Senior Lawyer  
T 02 6253 7591 F 02 6253 7304  
[amanda.johnston@ags.gov.au](mailto:amanda.johnston@ags.gov.au)

---

**Important: The material in *Express law* is provided to clients as an early, interim view for general information only, and further analysis on the matter may be prepared by AGS. The material should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in this message.**

This message may contain confidential or legally privileged information. Only the addressee has the right to use or disseminate this information. If you think it was sent to you by mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS. Find out more about AGS at <http://www.ags.gov.au>.

If you do not wish to receive similar messages in the future, please reply to: <mailto:unsubscribe@ags.gov.au>