



The Law at Work Report

Devine Law at Work

JUNE 2008

The material contained in this magazine is provided by way of general information only and is designed to raise your awareness. It is not intended to be and is not a substitute for advice which evaluates the circumstances of your workplace. This work is copyright. Apart from any use permitted under the Copyright Act 1968, all other rights are reserved.

NATIONAL EMPLOYMENT STANDARDS ANNOUNCED

On 16 June 2008 the Federal Government announced the new National Employment Standards (NES) which, subject to the agreement of Parliament, will take effect on **1 January 2010**.

Contrary to what you might hear in the media, the NES essentially confirm four of the five standard conditions introduced by the then Federal Government in March 2006 with its WorkChoices amendments to the *Workplace Relations Act 1996* (the Act) and then extend them to a total of 10 guaranteed conditions.



Background

Traditionally, Australian industrial regulation has focused on the terms and conditions of employment of a large number but not all Australian employees. Those workers employed in the trades, in clerical and administrative work and in particular industries, have traditionally been the subject of awards. An award is an industrial instrument, with the legal status equivalent to legislation, which is made by the appropriate Industrial Relations Commission. Awards outline the minimum terms and conditions of employment which apply to an employee the subject of that award. The parties to an award are usually employer associations and unions.

The employment of many white collar and senior employees within blue collar industries has not traditionally been the subject of industrial regulation. Rather, the terms and conditions upon which these non-award employees have been employed has primarily been a matter of the common law of contract and relevant legislation. The key exception to that approach in Federal industrial legislation has been in the area of termination of employment; in particular, minimum periods of notice and protection from unfair dismissal and unlawful termination.

This traditional approach to industrial regulation changed in March 2006 when the then Federal Government's reforms to the Act took effect. These were colloquially known as the WorkChoices amendments. Among other things, WorkChoices introduced the Australian Fair Pay and Conditions Standard (AFPCS); five standard conditions applying to **all** employees, whether award or non-award employees. These five standard conditions are:

- wages—including a Federal Minimum Wage (FMW);
- maximum ordinary hours;
- annual leave;
- personal leave (including sick leave, carer's leave and compassionate leave); and
- parental leave.

continued page 2



The National Employment Standards

Each of the 10 proposed NES are explained below. As you will find many conditions under the AFPCS remain unchanged or have only minor changes. In our view, the most significant change introduced by the NES is the standard relating to **redundancy** which, for the first time, will apply to non-award employees as well as award employees. The guarantee of minimum wages currently included in the AFPCS will not be replicated in the NES and will instead be a provision in modern awards.

1. Maximum ordinary hours

Under both the AFPCS and the NES the maximum hours which an employer can require an employee to work per week are 38 plus any "reasonable additional hours". Under the AFPCS the 38 hour maximum can be averaged out over the course of 12 months, however will not be permitted under the NES. In the case of award employees, there is scope for a provision to be included in a modern award which permits averaging out. This means that employers will not have the option of averaging out hours worked by non-award employees.

"Reasonable additional hours" is defined under the AFPCS by reference to a number of relevant factors. This definition will also apply under the NES and will include these *additional* relevant factors:

- whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects the expectation of, working additional hours;
- the nature of the employee's role and the employee's level of responsibility;
- the usual patterns of work in the industry or the part of an industry in which the employee works.

The addition of these relevant factors is quite significant and should ease the concerns of many employers regarding compliance. Traditionally, non-award employees are remunerated by reference to their seniority, skills and market status rather than the specific number of hours worked (the method which applies to most award employees). As they commonly work more than the 38 ordinary hours worked each week by award employees, the introduction of the guarantee of maximum ordinary hours for all employees in 2006 caused consternation among many employers of non-award employees. By recognising additional factors that have direct relevance to non-award employees, the NES regarding maximum ordinary hours proposed by Labor is more pragmatic than the original guarantee introduced as part of the AFPCS in 2006.

2. Request for flexible working arrangements

This entitlement was not previously included in the AFPCS but was found in awards. It will permit an employee who is a parent or a person with caring responsibility for a **child under school age** to **request** a change in working arrangements to assist the employee in caring for the child.

Only permanent employees who have provided at least 12 months continuous service and casual employees who have been engaged on a regular and systematic basis for at least 12 months and who have a reasonable expectation of continuing employment will be eligible to make such a request. The employee's request must be made in writing and must set out the details of the change sought and the reason for the proposed change. The employer must respond in writing within 21 days of the request being made. Where the request is refused, the employer must include the reason(s) for the refusal in the response. An employer may only refuse a request for a change to working arrangements on "reasonable business grounds". This term is not defined in the proposed NES, however it is likely to involve consideration of the costs associated with and the capacity of the business to accommodate the request. As with all requests for non-standard/flexible work arrangements, employers will need to do more than simply reject a request; they will be required to consider each request carefully and apply objective and fair criteria.

3. Parental Leave and Related Entitlements

This is a long standing entitlement of all employees and is subject to eligibility criteria being satisfied, most notably that the employee has provided at least 12 months continuous service. This entitlement is currently included in the AFPCS. The entitlement will remain largely the same under the proposed NES, with some important additions noted below.

This NES will include the right of an employee to request an extension of 12 months unpaid parental leave by a further 12 months which employers may only refuse on "reasonable business grounds", a term which is not defined. As discussed above, employers will need to do more than simply reject a request; they will be required to consider each request carefully and apply objective and fair criteria.

This NES also includes an express obligation on employers to take all reasonable steps to give an employee who is on parental leave information about and an opportunity to discuss the effect of any decision made by the employer which will have a significant effect on the status, pay or location of the employee's pre-parental leave position. This requirement will be a useful prompt to employers, minimising the risk of other potential compliance breaches (e.g. discrimination on the ground of family/carer responsibilities).



4. Annual Leave

The entitlement to annual leave was introduced into the Act as part of the AFPCS in 2006, having previously been sourced from State and Territory legislation. The current provisions in the Act allow for the accrual of annual leave on a four weekly basis, calculated by reference to nominal hours worked during the period. Further, subject to certain requirements being met, the Act permits the cashing out of a portion of an employee's annual leave entitlement. Current provisions also permit an employer to require an employee to take annual leave during a period of annual shutdown and in circumstances where an employee has accrued excessive amounts of annual leave.

Under this NES, the annual leave entitlement of an employee for each year of service will be four weeks which will accrue progressively throughout the year. Employers must not unreasonably refuse to agree to a request by the employee to take paid annual leave. Shift workers will be entitled to an additional week's annual leave where they are the subject of a modern award which provides for same.



Further, under this NES it will only be possible to cash out annual leave or to require an employee to take annual leave in particular circumstances where the employee is the subject of a modern award (see the April 2008 'Law at Work Report' for a discussion of modern awards). This means that an employer will not be able to have an arrangement with a non-award employee to cash out a portion of his/her entitlement to annual leave once the NES take effect. Further, the employer will have limited rights with respect to requiring a non-award employee to take annual leave in particular circumstances.

5. Personal/Carer's Leave and Compassionate Leave

The entitlement to this form of leave was introduced into the Act as part of the AFPCS in 2006, having previously been sourced from State Awards. Under the current provisions of the Act, the entitlement to paid personal/carer's leave accrues on a four weekly basis and is calculated by reference to the nominal hours worked during the period. Under the proposed NES, paid personal/carer's leave will accrue progressively throughout a year of service.

Under the current provisions of the Act, subject to certain requirements being met, an employee may cash out a portion of his/her entitlement to paid personal/carer's leave. Under the proposed NES this will only be possible if a provision to that effect is included in a modern award. This means that an employer will not be able to have an arrangement with a non-award employee to cash out a portion of his/her entitlement to personal leave once the NES take effect.

6. Community Services Leave

This entitlement permits absence from work when an employee engages in an eligible community service activity (jury service, a voluntary emergency management activity, or an activity prescribed under the regulations) for a period consisting of: time engaged in the activity; reasonable travelling time; and reasonable resting time immediately after the activity. Except in the case of jury service, engagement in the activity must be reasonable in all the circumstances.

Notice of engagement in the activity must be given by the employee to the employer as soon as reasonably practicable and must include information regarding the expected period of the absence. If required to do so by the employer, the employee must produce evidence that would satisfy a reasonable person that the absence is because of the employee's participation in the community service activity.

An employer will be required to pay the employee at his/her base rate of pay during the period in which s/he engages in jury service, less any amount of jury pay received by the employee. The requirement to continue paying the employee during jury services applies only to the first 10 days of the absence. An employer may require an affected employee to produce evidence that s/he has taken all necessary steps to obtain any amount of jury service pay to which s/he may be entitled.

7. Long Service Leave

The entitlement to long service leave is a long standing one and has always been sourced from State and Territory legislation. Under the proposed NES the entitlement will be included in the Act to the extent that the entitlement to long service leave will be acknowledged as deriving from an applicable award except where the employee has the entitlement under another source; for example, State legislation. It is understood that the Federal Government will undergo discussions with each of the States and Territories in the period leading up to the commencement of the NES to obtain agreement either to the harmonisation of long service leave laws throughout Australia or to having the States refer their powers in respect of long service leave to the Federal system.

8. Public Holidays

Having been introduced as part of the AFPCS and a long standing award entitlement, this condition will remain. An employer is entitled to request an employee to work on a public holiday and the employee is entitled to refuse that request if either the request is unreasonable or the refusal is reasonable. What is reasonable is determined by reference to a number of contextual factors; including: the nature of the workplace/enterprise; the employee's personal circumstances; whether the employee could reasonably expect the employer to request him/her to work on the public holiday; compensation; and, the amount of notice.



Devine Law at Work

Tel: (02) 8985 7312

Fax: (02) 8985 7373

Email:

elizabeth@devinelaw.com.au

Do you find legal and industrial jargon confusing?

See our Glossary of Legal and Industrial Terms on our website www.devinelaw.com.au.

Devine Law at Work is in the business of *helping people work together for better results*. We are a law firm and consultancy which specialises in Australian workplace law and workplace relations.

We are a multi-disciplinary practice which integrates skill and expertise in: workplace law; legal education; communication (including negotiation, conflict resolution and facilitation); workplace systems and business development.

We provide services in: advice; legal representation; legal education; negotiation; conflict resolution; systems development; legal health checks and workplace investigations.

We invite you to find out more about Devine Law at Work from our website www.devinelaw.com.au

NATIONAL EMPLOYMENT STANDARDS

from page 3

9. Notice of Termination and Redundancy Pay

The entitlement to a prescribed minimum notice period under the Act is a long standing award entitlement of employees the subject of the Federal industrial system who are employed by an employer of 15 or more employees. The extension of this entitlement to all employees of employers of 15 or more employees (other than employees employed for a specific period or project, employees on probation/qualifying period, employees who are terminated for serious misconduct, casual and seasonal employees and trainee and apprentice employees) is a **significant new entitlement for non-award employees**. Previously severance pay was only an entitlement of non-award employees if included in a provision of an employment contract or company policy.

10. Fair Work Information Sheet

In May 2007 the then Federal Government introduced a Workplace Relations Fact Sheet for mandatory distribution to all employees the subject of the federal industrial system. The current Federal Government's rescission of the requirement to distribute the Fact Sheet took effect in March 2008. Despite this, the Federal Government appear to now think that the Fact Sheet is a good idea and have included the requirement as one of the NES.

Conclusion

Australian workplace law is characterised by its many layers and sources; in particular, the range of awards and legislation which can apply. In view of this, one of the best features of the Work Choices amendments to the Act in 2006 was the introduction of the AFPCS, when a range of basic terms and conditions of employment were drawn together in one place and were applied to all employees. The Rudd Labor Government is taking further steps along the path begun by the Howard Coalition Government in 2006 by implementing 10 basic terms and conditions of employment which will apply to all employees, including all but one of the original AFPCS (wages).

When they have taken effect, the NES will offer employers and employees certainty about where they stand in relation to what are basic terms and conditions of employment. In the case of award employees, the NES will work together with the 10 provisions of each modern award to provide a safety net of minimum terms and conditions. Both the NES and modern awards are designed to be simple to understand and this simplicity will be an aid to compliance.

Surprisingly, the Rudd Labor Government is not in a rush to implement these changes, planning to have NES and modern awards take effect on 1 January 2010. This will be more than two years after it was elected and almost four years after the contentious WorkChoices amendments to the Act took effect. The period prior to implementation can be used by employers to ensure that they are ready for the changes, particularly by ensuring that HR personnel, Managers and employment documents are up to date.