



australian
nursing federation

Comments on the Discussion Paper
National Employment Standards Exposure Draft

April 2008

Australian Nursing Federation
Level 1, 365 Queen Street, Melbourne VIC 3000
Ph: 03-9602 8500
Fax: 03-9602 8567
Email: industrial@anf.org.au
Website: www.anf.org.au

The Australian Nursing Federation (ANF) is the national union for nurses with branches in each state and territory in Australia. The ANF is also the largest professional nursing organisation in Australia. The ANF's core business is the industrial and professional representation of nurses and nursing in Australia.

The ANF's 160,000 members are employed in a wide range of enterprises in urban, rural and remote locations in the public, private and aged care sectors, including hospitals, health services, schools, universities, the armed forces, statutory authorities, local government, offshore territories and industries.

The ANF participates in the development of policy in nursing, nursing regulation, health, community services, veteran's affairs, education, training, occupational health and safety, industrial relations, immigration and law reform.

In 2007 Australians overwhelmingly rejected WorkChoices in favour of industrial arrangements that would provide reasonable and fair minimum standards, dignity at work, recognition of unions and rights before tribunals and the courts.

The National Employment Standards (NES) were proclaimed in the Forward with Fairness Policy (and the Implementation Guide) as a guarantee of minimum standards in law for all Australian employees.

Unfortunately, based on the NES Discussion Paper, it now appears that the NES will be less than promised.

There are significant difficulties with commenting on the NES Discussion Paper when so many important aspects, particularly relating to entitlement and enforcement remain unclear. Therefore a number of comments provided below are speculative in nature. This is unavoidable and less than satisfactory.

In an attempt to respond fully to the range of issues raised in the discussion paper we have set out hereunder our general comments followed by specific remarks on the proposed standards and their applicability to the nursing industry.

GENERAL COMMENTS

Extent of coverage

The reference in paragraph 17 to finalising the 'extent of coverage' of the NES in the substantive legislation is unclear and confusing. The intended coverage of the NES should be made clear as soon as practicable.

Interaction between awards and NES

Clause 3 of the draft NES states that a term of an award, agreement, etc. has no effect to the extent to which it purports to exclude the NES. Paragraph 28 of the Award Modernisation Request states that a modern award cannot exclude a term of the NES or operate inconsistently with a term of the NES.

Given this wording, the extent to which other instruments will be able to provide for *better* employee entitlements than the NES is unclear.

For example, would an award be able to provide for severance pay in relation to employers who have fewer than 15 employees?

Further, there is a tension between the terms of clause 3 and aspects of the Request which impact on NES entitlements, eg. the ability to make 'machinery rules' and 'industry-specific detail'. Despite what is claimed by paragraph 21 of the Discussion Paper, it is not at all clear that any exclusions or modifications to NES entitlements cannot occur to the detriment of employees, especially as clause 3 itself makes no mention of 'detriment'.

Enforceability

As compliance is not dealt with in the Discussion Paper, it is more difficult to comment on the content of some of the entitlements without knowing how they will be able to be enforced. We make some more comments on this point in relation to particular entitlements below.

In addition, paragraph 32 of the Discussion Paper states that the NES will be 'separately enforceable' from award entitlements. Also the Award Modernisation Request (paragraph 27) says that, where an award does replicate a provision of the NES, NES entitlements will not be able to be enforced as provisions of the award.

Does this mean that dispute resolution procedures will not be able to be used in relation to disputes over NES entitlements?

There are major difficulties in enforcing the Standard currently. The Court remedy is largely useless for most people as it is slow and expensive. It is crucial that there be a user-friendly process to resolve disputes, relating to or breaches of, NES entitlements. If there is a breach of these entitlements, an employee should not be forced to go to Court to enforce them.

Lack of transparent and robust enforcement arrangements means no enforcement at all.

Workers' compensation (Clause 7)

In relation to the proposed restriction on taking or accruing leave while receiving workers compensation, we note that some awards allow the accrual of annual leave for at least some of the period while on workers compensation. This clause would therefore represent a drop in benefits for some employees. Would modern awards be allowed to provide otherwise?

Changes to NES in future

Will there be provision for expanding content of the NES in future, as community standards change?

COMMENTS ON THE PROPOSED NES

Maximum weekly hours

It is very difficult to comment on this entitlement without knowing how disputes relating to the issue of hours are to be dealt with, ie. the issue of compliance. Having an 'entitlement' to refuse to work unreasonable hours may not actually assist an employee if they have no way to have the entitlement enforced, or it is too difficult to enforce (eg. they have to go to court to enforce it).

Entitlement

On the one hand, "may refuse to work" is better than the current 'must not be required or requested to work' (s.226) as it gives the employee a more certain entitlement. On the other hand, will it be a breach if an employer requests or requires an employee to work unreasonable additional hours?

Averaging of hours

We agree that the existing Standard is flawed in relation to the issue of averaging of hours, and that what is proposed is an improvement, ie. that additional hours worked as part of an averaging arrangement should be relevant to the question as to whether hours over 38 are unreasonable.

Clause 9(6) would allow modern awards to include provisions for the averaging of hours of work over a specified period. While it is an improvement that the averaging provision is to be in awards rather than in the Standard/NES, we consider that there should be an upper limit on what the AIRC can specify as an averaging period. The 12 months in current section 226 is too long, and can effectively make the 38 hours per week maximum meaningless.

Q.1 Own volition

The NES should not provide that there is no breach if an employee works additional hours of their own volition.

First, the meaning of the words 'own volition' is very imprecise and ignores issues of power in the workplace.

This is commonplace in nursing particularly in the residential aged care sector where staffing is invariably inadequate and staff are encouraged and inveigled to volunteer to work additional hours (often without pay) to ensure residents receive ongoing care.

Secondly, as the purpose of the entitlement is partly to address excessively long working hours, the entitlement should not encourage long hours merely because an employee wants to (genuinely or otherwise).

The issue of 'own volition', and whether employee agreement to work additional hours is truly genuine or not, is better dealt with as just one among the other (unspecified) relevant factors that are taken into account when looking at whether hours worked above 38 are reasonable.

Q2. Part-timers

Part-timers do need to be dealt with as the NES is effectively meaningless to them as the entitlement only deals with hours worked above 38.

However, we are uncomfortable with addressing the issue of unreasonable additional hours by reference to the hours normally worked by an employee. If that were the case, there is a danger that long hours can be justified by long hours. For example the fact that an employee has been working 60 hours per week for a period should not mean that working 60 hours per week then becomes 'reasonable'.

It is preferable that reference be made to 'agreed normal hours' or ordinary hours, ie. if a part-time employee agrees to work 20 hours per week, then additional hours above 20 should be assessed as being reasonable or not.

Q.3 High income

There should not be different rules for high income earners. The factors taken into account when considering whether hours worked above 38 are reasonable are also sufficient to apply to high-income employees.

Q5 other matters

It is unclear how awards interact with the NES in relation to the issue of hours of work, eg. can an award provide for fewer than 38 hours/week? Would this be 'building on entitlements' (which an award may do) or 'excluding' or 'operating inconsistently' with the NES (which an award cannot do)?

Disputes/enforceability

Although the Discussion Paper does not deal with compliance, it is crucial that there be a user-friendly process to resolve disputes relating to, or breaches of, this NES entitlement. If there is a breach of this entitlement, an employee should not be forced to go to Court to enforce it.

Among other particular issues relating to compliance, the following issues arise:

- In the example on page 8, will Alex have any remedy for working excessive hours after he has already worked them?
- Will an employee have a remedy if an employer requests or requires or puts pressure on an employee to work unreasonable additional hours?

Requests for flexible working arrangements

The terms of proposed clause 10 are welcome, however we are concerned that the entitlement will not be enforceable (see below).

Q.6 Definition

We do not consider that there is a need to further define 'employee with responsibility for the care of a child'. As noted in paragraph 70 of the Discussion Paper, the right should not be restricted to those with a legal responsibility.

Q.7 Definition of reasonable business grounds

It could be useful to define some factors which are relevant to what are 'reasonable business grounds'.

Q.8 Other matters

It is unclear how awards interact with the NES in relation to this issue. Will awards be able to provide for stronger entitlements for employees, or would this be 'inconsistent' with, or 'excluding', the NES?

There should be a provision making it unlawful to terminate someone for requesting changed arrangements.

Enforceability

Paragraph 61 of the Discussion Paper says that whether an employer has reasonable business grounds 'will not be subject to third party involvement'. FWA will not be able to 'impose' requested working arrangements on an employer (paragraph 73).

We are concerned that if there is no remedy for employees, then this entitlement is effectively meaningless. It is not an 'effective' measure to balance work and family responsibilities (as referred to in paragraph 58).

A dispute over a request should at least be able to be dealt with via dispute resolution procedures.

There should also be remedy for the failure of an employer to provide a written response with reasons within 21 days.

Parental leave

We are particularly concerned about the wording of the return to work guarantee and the lack of ability to enforce a refusal to grant an additional 12 months leave (see below).

Q.9 Should an employer be able to request evidence of being fit to work?

It is arguable that an employer can request evidence anyway.

A related question is what can an employee do if her employer requires her to go on (unpaid) leave before she wants or needs to, or will not let her return to work, ie. despite the employee holding a medical certificate saying she is fit to work? Existing remedies (unfair and unlawful dismissal, discrimination, etc) are difficult to establish, slow and expensive, and unacceptable for an employee in the latter stages of her pregnancy or with a newborn child. There needs to be a remedy which is easy to access in this situation.

Q.12-13 – refusal on reasonable business grounds (cl.16(3))

It could be useful to define some factors which are relevant to what are 'reasonable business grounds'.

Further, just as the employee must make a request in writing, the employer should be required to provide a response in writing, including setting out the business grounds if refusing the employee's request.

Q.14 other matters

There should be a provision making it unlawful to terminate someone for requesting additional leave.

Clause 16 – extending leave

An employee who ‘takes 12 months’ may request an extension. Does this mean someone who has initially said they would take less than 12 months, eg. 6 months, cannot request an extension? Is this the intention? If not, this should be changed. Maybe this should read ‘an employee who has taken a period of unpaid parental leave may request’ an extension (this could be either a period up to 12 months or even up to the end of the 24 months).

Related to this point, we note that in relation to those employees who have initially chosen to take less than 12 months, existing section 278(2)(a) allows an employee to extend maternity leave once by giving 14 days notice, ie. it does not require agreement of the employer (although the leave cannot be extended beyond 12 months in total see s.266(3)). Thus, for these employees, the proposed NES is worse than the current arrangements.

Clause 23 – return to work guarantee

Currently, subsection 280(5) of the Act says that where an employee’s pre-leave position “no longer exists”, she is entitled to return to a position nearest in status and remuneration to her former position. Proposed clause 23(1)(b) would change this wording to where the position is “no longer available”.

We view this change with serious concern as there are potentially major differences in effect resulting from the different wording. A position may be no longer available to the returning employee, but the position could still exist, eg. because the employer has simply replaced the parental leave employee with somebody else.

If this were the case, then the whole concept of parental leave is undermined, as central to the concept is a job to go back to after the leave and the first option **must** be the job the employee was performing prior to going on leave. Although the employee must be offered a position “nearest in status and pay to the pre-leave position”, often no other suitable position will exist, or an alternative position will be so unsatisfactory to the employee that they will be forced to leave their job (effectively because of taking parental leave). Consequently, we urge that the wording be amended to say ‘no longer exists’.

Related to this point, existing section 281 should be replicated or something to the same effect. An employer should be required to advise temporary employees that the position they are filling is only temporary.

Enforcement

We welcome the ability to request an additional 12 months leave, however we are concerned that if there is no remedy for employees who are unreasonably denied additional leave, then this right is effectively meaningless.

The Discussion Paper notes that there will be no right to review an employer's rejection of a request for additional leave. Will there be a remedy for other aspects of the parental leave entitlement? It is crucial that there be a user-friendly process to resolve disputes relating to, or breaches of, this NES entitlement. If there is a breach of these entitlements, an employee should not be forced to go to Court to enforce them.

Annual leave

Clause 27 of the draft NES provides that annual leave may be taken for a period agreed between the employee and employer and that the employer must not unreasonably refuse to agree to a request. The term "unreasonably refuse" raises a number of questions concerning what might constitute "reasonable grounds" an employer may rely on to refuse to grant a period of leave. It leaves plenty of room for dispute. This, combined with the uncertainty relating to dispute resolution in relation to the NES and the interaction with awards raises a number of questions concerning whether the wording should be clearer or at least guidance provided to an employer who may present any number of reasons to the employee who is then placed in the onerous position of challenging that position. The Discussion Paper states the aim of the proposed NES is to contain only those rules essential to the effective operation of an entitlement rather than lengthy, detailed and inflexible rules. However this should not be at the expense of establishing clear and enforceable standards.

Annual leave loading

The proposed annual leave entitlement does not include annual leave loading. Leave loading should be included as a community standard. This entitlement has long been regarded as such and continues to be an established entitlement in the majority of workplaces.

In relation to awards, will the application of clause 30 of the draft NES specifying the provisions awards may include, restrict awards from including the loading and/or other entitlements including penalty rates and allowances?

Ordinary hours of work (for purposes of annual leave)

The ANF supports the position that the definition of ordinary hours will be set out in awards. Separate to this point, there appears to be a contradiction in paras 134 and 135 of the Discussion Paper relating to the application of ordinary hours for part time employees working irregular hours. Para 134 states that an employee who does not have ordinary hours will accrue paid annual leave on the basis of their actual hours worked (and any other hours that count as service). (This seems a correct approach). However Para 135 could be interpreted contrary to that position so that an employee's leave is based on "contracted hours" rather than hours actually worked.

Payment for leave

Clause 30 of the draft NES does not appear to include the protection contained in para 166 of the Discussion Paper which indicates it is possible for a modern award to provide that annual leave is to be paid at a rate of pay that includes components of an employee's remuneration not included in the definition of base rate of pay where such provision is necessary to provide a fair minimum safety net for award employees having regard to existing safety net entitlements.

Definition of shift worker

The ANF supports the position that the definition of shift work and shift workers eligible for additional leave entitlements be determined in the awards in accordance with the various industry and occupational approaches.

Cashing out of paid annual leave

The ANF is strongly opposed to the provision in Clause 30 of the draft NES allowing provisions in awards for the cashing out of annual leave. The Discussion Paper correctly identifies the objective of annual leave and its purpose in providing employees with a period of rest and recreation and is an important component in balancing work and personal life and contributing to the maintenance of occupational health and safety standards in the workplace. It is an established community standard which should be maintained in the safety net and not open to dilution through provisions in awards. As WorkChoices demonstrated, many employers are quick to take advantage of opportunities to reduce wages and conditions. A provision allowing the reduction of a long held community standard and a reduction in the safety net should not be included in awards (unless already an award provision).

Personal/carer's leave and compassionate leave

Clause 32(2) of the draft NES provides for an employee's entitlement to paid personal/carers leave to accrue progressively during a year of service. Nursing awards generally provide for the crediting of leave entitlements (after the first year of service) on their anniversary date. In terms of the interaction between the NES and awards, can awards contain such a provision or will it be regarded as inconsistent with the NES and not permitted?

Is paid personal leave cumulative? Clause 32(2) is unclear in this regard. If it is not, will awards be able to provide for the unused personal leave to cumulate from year to year or will it be considered inconsistent with the NES and not permitted?

Clause 41 – Notice and evidence requirements: Subsection (3) requires an employee (if required by the employer), to provide evidence “that would satisfy a reasonable person...”. The wording will no doubt lead to disagreement and dispute and, as referred to earlier, the uncertainty relating to dispute resolution in relation to the NES and the interaction with awards raises questions about process for dealing with disputes and enforceability of the standard. It will be unworkable if separate processes are in place to deal with different parts of a particular award provision.

Subsection (4) states that: “An employee is not entitled to take leave under this Division unless the employee complies with this section”. In the absence of access to a quick, “user friendly” process to resolve issues and disputes, an employee is either faced with the choice of not taking the time off or taking the time and risking disciplinary measures or dismissal by the employer.

Community service leave

Clause 43(a) of the draft NES provides that employees are entitled to be absent to engage in an eligible community service activity, but is heavily qualified by subsection (b) leaving it to the employer’s discretion (other than for jury duty). It is not an “entitlement” if the employer has discretion not to provide the leave if in their view, “the employee’s absence is not reasonable in all the circumstances”. As referred earlier, the uncertainty relating to dispute resolution and the interaction with awards raises questions about process for dealing with disputes and enforceability of the standard.

Subsection 44(4) states that: “An employee’s absence from his or her employment is not covered unless the employee complies with this section” . Again, access to a quick, “user friendly” process to resolve disputes is essential.

Clause 45 Payment to employees (other than casuals) on jury service

The dispute resolution process and enforceability is once more an issue in the application of this clause. The employer may withhold payment on the basis that the employee has not provided evidence that “...would satisfy a reasonable person of the total amount of jury service pay...”. Is it reasonable to include such wide discretion based on the “reasonable person” criteria then place the onus on the employee to dispute the matter? Will awards be able to include detail in relation to acceptable evidence or will it be considered inconsistent with the NES? Will the dispute resolution procedures in awards be able to cover such matters or does clause 27 of the Award Modernisation request ie “... Where a modern award replicates a provision of the proposed NES, NES entitlements will be enforceable only as NES entitlements and not as provisions of the modern award”, prevent this?

Long Service Leave

Paragraph 235 asserts that confusion and complexity arises where employers are required to maintain different long service leave standards for their workforce along state and territory lines. While this may have been raised by employer groups it is the experience of ANF, the provision of long service leave entitlements as regulated by state and territory governments has not resulted in high levels of confusion or complexity.

The long service leave NES should provide for the maintenance of existing leave entitlements and access

The long service leave NES should ensure that all employees are covered by the NES and are able to transfer their accrued entitlements from employer to employer.

Public Holidays

Clauses 47 and 48 of the draft public holiday NES relates to the entitlement to public holidays and entitlement to be absent from employment on a public holiday.

The differing arrangements in the health and community services sectors arising from the enterprise specific working arrangements has resulted in nursing awards providing for a range of differences in the access , substitution and payment for public holidays.

These differences are reflected in nursing awards and further detail is provided for in industrial agreements.

Similarly, the definition and application of ordinary hours of work may differ between awards. Modern awards should allow industry specific working arrangements to be taken into account in determining the public holiday NES.

Notice of termination and Redundancy

Termination

The proposed NES notice period for termination reflects the general provisions applying to nurses.

Paragraphs 275 and 276 propose changing the definition of continuous service for the purposes of termination notice. The example given of unauthorised absence including unprotected industrial action is not supported given the expansive nature of the definition of unprotected industrial action currently provided for in the Workplace Relations Act 1996 and our understanding that, unfortunately the government has no current intentions of changing the definition.

Redundancy

The reference in the proposed redundancy NES to unauthorised absence needs to be clarified as it potentially can be used by employers to avoid their obligations to pay redundancy which would otherwise be payable.

Paragraph 288 provides for the redundancy NES not to apply to employees who are offered jobs with a new employer on substantially similar terms and conditions and whether the employer recognises the employee's prior service. Consistent with our earlier comments we have a difficulty with terms as "substantially and similar".

Given Clause 3 of the NES, will an award be able to provide for severance pay in relation to employers who have fewer than 15 employees?