

## **UPDATE – The National Employment Standards**

The Rudd Government has released **The National Employment Standards (“The NES”)** on 20 June 2008. The NES will apply to all employees in the Federal system regardless of industry, occupation or income.

The Work Choices standard provides five minimum conditions. The NES, in contrast provides 10 protections.

The matters dealt with by the NES include:

1. maximum weekly hours of work
2. requests for flexible working arrangements
3. parental leave
4. annual leave
5. personal/carers leave and compassionate leave
6. community service leave
7. long service leave
8. public holidays
9. notice of termination and redundancy pay, and
10. an obligation to issue the fair work information statement to employees.

### **1. Maximum weekly hours of work –**

Standard working hours for a full time employee will continue to be 38 hours per week, plus reasonable additional hours. Reasonableness will be determined having regard to a number of listed factors, including penalty rates or other compensation for the additional hours worked and the needs of the enterprise. Rules dealing with averaging of hours will not be included. Any such rules would be dealt with in modern awards.

### **2. Requests for flexible working arrangements –**

An employee who is a parent of, or has caring responsibilities for, a child under school age will be entitled to request flexible working arrangements. Employees must have met 12 months service before they have a right to request flexible work arrangements. Flexible working arrangements are not defined, but examples could include reduced hours, different start or finish times or home-working arrangements.

Not dissimilar to the model provisions resulting from the federal Commission’s Family Provisions Test Case, the employee must make the request in writing, and the

employer must only refuse the request on “reasonable business grounds”. These will not be defined. The employer must respond to the request within 21 days.

### **3. Parental leave and related entitlements –**

Each parent who is an eligible employee would have a right to 12 months’ unpaid parental leave in relation to the birth or adoption of a child. However, couples will only be entitled to take up to 3 weeks’ parental leave concurrently. If both parents wish to take parental leave, the remaining periods of leave must be taken consecutively.

In addition, if one parent would prefer to take a longer period of leave, they can ask their employer for an additional period of up to 12 months’ unpaid leave. The employer could only refuse this request on “reasonable business grounds”.

This NES also provides for return to work and other related entitlements.

### **4. Annual leave –**

As is currently the case, all full time employees will be guaranteed 4 weeks’ paid annual leave, with an extra week for shift workers. Part time employees would receive a pro rata amount. Casual employees would not be entitled to annual leave.

### **5. Personal, carer’s and compassionate leave –**

All full-time employees will receive 10 days’ paid personal and carer’s leave per year of service (pro rata for part-time employees). Employees would also be entitled to 2 days’ paid compassionate leave per occasion. Casual employees will not receive these entitlements.

If paid leave entitlements are exhausted, all employees will be entitled to 2 days of unpaid personal leave for “genuine caring purposes and family emergencies”. This unpaid leave will also be available to casuals.

### **6. Community service leave –**

Employees will be entitled to be absent from work to engage in prescribed community service activities. Examples include jury service and defined emergency service duties. The entitlement would cover all periods the employee is required to provide the community service, including reasonable travelling time and time for rest immediately following the activity.

Community service leave will be unpaid leave, although employees (other than casuals) on jury service leave will be entitled to make-up pay.

### **7. Long service leave –**

Currently, State legislation deals with long service leave entitlements. This NES would preserve long service leave entitlements in an AWA or workplace agreement,

or where there is no such agreement, in pre-modernised awards, NAPSAs and state or territory laws, until nationally uniform long service leave standards are attained.

#### **8. Public holidays –**

Employees will be entitled to be absent from work on public holidays, and to be paid for the ordinary hours they would have worked at their base rate of pay.

If an employee works on a public holiday (which may only occur at the reasonable request of the employer), they may be entitled to a penalty rate or other compensation as set out in an applicable modernised award.

#### **9. Notice of termination and redundancy pay –**

As is currently the case under the Workplace Relations Act, most employees will be entitled to minimum periods of notice of termination of their employment (or pay in lieu of notice), based on their period of continuous service.

In addition, employers who employ more than 15 employees will be obliged to make a severance payment to an employee terminated on the ground of redundancy. The quantum of severance payment required is determined by reference to a scale depending on the period of continuous service by the employee. These reflect the current federal award standard. Certain employees are excluded from this right, including those serving a qualifying period, those on a fixed term or seasonal contract and casual employees.

Perhaps the most significant implication of the NES is the introduction of a statutory entitlement to redundancy pay. The NES provides that on application by an employer, Fair Work Australia may reduce the amount of redundancy pay where the employer obtains alternative employment for an employee. An automatic exemption from the redundancy pay obligation applies in a “transfer” of business situation where either (i) the new employer recognises the transferring employee’s service with the old employer or (ii) the employee rejects an offer of employment with the new employer which is on no less favourable terms and recognises past service. This provision will need to be considered carefully in any business restructures or sale once the new legislation commences on 1 January 2010.

#### **10. Fair Work Information Statement –**

Employers will be required to provide all new employees with a “Fair Work Information Statement” as soon as practicable after they commence employment. The Statement will be published by Fair Work Australia and will contain information about the NES, awards, making agreements, freedom of association and Fair Work Australia.

In addition, the following are worth noting;-

- **Relationship with industrial awards and agreements:** the NES expressly provides that an award must not exclude any provision of the NES. However, the NES is silent on the relationship between the NES and collective agreements. It may be that the Government will introduce similar provisions in the substantive IR legislation to make it clear that collective agreements cannot exclude or provide less favourable outcomes than the NES
- **Same sex couples:** the NES amends certain definitions, for the purposes of carer's leave, to include same sex couples
- **Cashing out of leave entitlements:** the NES provides that the cashing out of annual leave and personal leave entitlements may be provided for under the terms of an award. However, the NES does not make any provision for the cashing out of these leave entitlements for non award employees (for instance, managerial staff). Employers who previously utilised AWAs to cash out annual leave have experienced this to be a problem since AWAs were abolished by the Rudd Government

The Government will shortly issue a revised Award Modernisation Request to the Australian Industrial Relations Commission (AIRC) attaching the NES to assist in its task of modernising awards.

Legislation will be introduced coming into effect 1 January 2010