

NATIONAL EMPLOYMENT STANDARDS ANNOUNCED

The Australian Government has released the new National Employment Standards (NES). The NES are a key element of the Rudd Government's strategy to progressively dismantle Work Choices and introduce a new workplace relations system.

The NES will replace the Australian Pay and Conditions Standard that currently prescribes basic minimum conditions of employment for all Australian employees. It is scheduled to commence on 1 January 2010.

An outline of the NES were published prior to the election of the Government last year and include ten conditions that will, (together with modernised awards) form a new basic safety net of employment conditions to underpin every employment private sector employment relationship in Australia.

The NES cover the following subject matter:

- (1) Maximum weekly hours of work
- (2) Request 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

Notwithstanding a period of consultation and 129 submissions from employee and employer groups; businesses; community organisations and individuals there are not any surprises in the publication. The NES essentially reflect the current entitlements that can be found in most awards.

Legislation will be introduced into Parliament later this year to give effect to the NES. The legislation will include other aspects of workplace relations relating to the NES including compliance, interaction with agreement making and future reviews.

The impact of the NES should be viewed in conjunction with the award modernisation currently underway in the Australian Industrial Relations Commission (see article below). The aim of award modernisation is to create national industry based awards with ten minimum conditions including wages and job classifications that were separated into pay scales under Work Choices.

The resulting safety net of 20 minimum terms and conditions will for most employers be the end of the story. Workplace agreements will still be an option but it seems ominous that the new safety net will be stringently enforced and any attempt to initiate innovative employment arrangements at an enterprise level through workplace agreements discouraged. Nevertheless we will reserve judgement until the legislation is introduced and the awards modernised.

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Australian Industrial Relations Commission travels old path toward modernised awards

The Australian Industrial Relations Commission has published its first substantive decision in respect of the task to modernise the Australian award system. Unfortunately, it has adopted the same old worn out path that lead to the need to modernise awards.

The decision published on 20 June 2008 sets out the Commission's attitude toward the modernisation of federal awards and the methodology to achieve them. The Commission has chosen to adopt its own industry panel of award classification as its template to modernise awards.

This decision is likely to inhibit any chance to truly modernise awards. The Commission panel system of award classification failed. It is the problem not the solution.

The Commission has identified the following industry awards as priorities for its modernisation program: Coal mining, Glue and gelatine, Higher education, Hospitality, Metal, Mining Private sector clerical occupation, Racing, Rail, Retail, Rubber, plastic and cablemaking, Security, Textile, clothing and footwear and Vehicle manufacturing.

The Commission is required to complete the modernisation process by the end of this year.

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Workplace Ombudsman information for employers

Australia's Workplace Ombudsman has published an updated catalogue of fact sheets in line with recent changes to federal workplace legislation to guide employers and workers to meet their workplace obligations.

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The changing face of part-time employment

The Australian Productivity Commission has published an interesting report entitled "Part time employment: the Australian experience." The paper aims to provide an overview of the changing role of part-time work in Australia and was released on 12 June 2008.

Some of the key findings are:

Part time work has become an important form of employment growing from 10 per cent of total employment in 1966 to 29 per cent in 2007. The prevalence of part time work has increased for both men and women and for all age groups.

Both supply-side and demand-side factors have driven the growth in part time employment. A key supply side factor includes the entry into the workforce of people combining employment and other activities such as education and raising a family. An important demand side factor is employers using part time employment to increase operational flexibility.

The high level of casual work among part time workers means that they have less access to many conditions of full time employment.

The part time workforce is a diverse group in terms of their characteristics and attitudes to work. The household circumstances of part time workers vary, as does the contribution of their labour income to the household budget - from being the only source of labour income to a negligible source.

Part time workers are not a static group. There is considerable movement into and out of part time work both as labour market conditions change and as workers move through their life cycle and their work/life priorities change.

Since the early 1990s, 20-25 per cent of female part time workers and 30-35 per cent of male part time workers have indicated a preference to work more hours. At the same time, there is evidence to suggest that two full time workers want to move to

part time work for every part time worker who wants to move to full time work.

It is not clear what the impact on aggregate hours worked would be from any changes to working arrangements which allow a better matching of desired and actual working hours.

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Wages growing at inflation rate or higher

The increase in the seasonally adjusted labour price index through the year to March 2008 for all employee jobs in Australia was 4.1%.

Increases in the original indexes through the year to March 2008 at the industry level ranged from 2.4% for Accommodation, cafes and restaurants to 5.8% for Mining, compared with 4.1% for all industries.

The Labour Price Index measures changes in the price of labour services resulting from market pressures, and is unaffected by changes in the quality or quantity of work performed. It measures wages increases occurring from enterprise bargaining and award pay scale adjustments.

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TIP OF THE MONTH: Understanding the difference between a preserved award term and an entitlement under the Standard

The changes introduced to the regulation of Australian employment under Work Choices are many, varied and complex. One of the more perplexing is the relationship between preserved award terms such as annual leave, personal leave, long service and parental leave, and the corresponding entitlement under the Australian Fair Pay and Conditions Standard ('the Standard').

Understanding the relationship is important because the choice between the preserved award term and the Standard will result in an employer either complying with, or breaching the law. The wrong choice may cost you up to \$33,000 in penalties.

What is a preserved award term?

A preserved award term is a term or terms of an award (that operated before 27 March 2006) that is about annual leave, personal/carers leave, parental leave, and long service leave, notice of termination, jury service or superannuation.

Annual leave, personal/carer's leave, long service leave, notice of termination, jury service, superannuation and parental leave provisions in awards were no longer allowable matters from 27 March 2006 and cannot be included in awards or varied. This is because the Australian Fair Pay and Conditions Standard and Part 12 of the Workplace Relations Act now set these minimum conditions of employment. However, award provisions about these matters are preserved for employers and employees that were bound under the awards prior to 27 March 2006.

The reason for this apparent anomaly is political. The commitment of the Commonwealth Government at the time the legislation was introduced was that no employee would be worse off under the changes introduced under Work Choices. Therefore, any employee engaged under an award applicable at that time that provided more generous terms than the Standard would be able to retain the award entitlements.

When does a preserved award term apply to an employee's conditions of employment?

Where an employee's entitlement under a preserved term is more generous than the Standard, the preserved award term will apply and the corresponding entitlement under the Standard is excluded.

Preserved award terms will not bind employers who become covered by an award on or after 27 March 2006 and will not form part of the Standard for agreement making.

Just to make things a little more complex, unpaid carers leave and compassionate leave are excluded from the definition of preserved personal/carers leave. Consequently, the Standard entitlements apply in respect of those matters.

When is the preserved award term more generous than the Standard?

The Workplace Relations Regulations explain how to determine whether an employee's entitlement under a preserved award term is more generous than the corresponding entitlement under the Standard.

Firstly, the entitlements must be compared on the basis of their effect on the employee alone, rather than on the basis of their effect on employees generally. The answer for a casual employee or a shift worker may be different to a full-time employee working only weekdays.

Secondly, the question of what may be '*more generous*' is determined as follows:

- A. If the total annual quantum of a form of leave permitted under the preserved award term for that individual employee is greater than the total annual quantum permitted under the Standard, then the preserved award term is taken to be more generous, and
- B. If the total quantum of a form of leave permitted under the preserved award term for that individual employee is less than or equal to the total annual quantum permitted under the Standard, then the entitlement under the Standard prevails.

Thirdly, if an entitlement to leave under either the Standard or a preserved award term is taken to be more generous then the entitlement will be applied in accordance with the administrative provisions and other arrangements (if any) that relate to that entitlement.

Some examples

The total annual quantum of annual leave permitted under the Community Employment Training and Support Services Award 1999 (CETSS) for a full-time or part-time employee is four weeks paid leave. There is not an entitlement to additional leave for shift work because there is not provision for shift work hours in the award. Annual leave loading is not relevant.

The entitlement under the Standard is also 4 weeks each year for full and part-time employees. The preserved CETTS award term is not more generous than the Standard and therefore the entitlement to annual leave under the Standard will apply including the administrative arrangements for accruing, taking and cashing out annual leave. The preserved award term will not have any effect.

A full-time or part-time employee engaged in community services in Victoria is entitled to between 12 and 21 days paid leave accumulative for each year of service for use in respect of personal sickness or care and support of immediate family members who are ill or injured. This is clearly more generous than the Standard and therefore personal/carers leave under the Standard is excluded. The preserved award term applies.

Casual employees working in NSW under a notional agreement preserving a State award (NAPSA) and casual clerical employees in Victoria may be entitled to annual leave or a payment in lieu of annual leave. The Standard does not provide annual leave to casual employees. Therefore the preserved award term will apply.

Conclusion

This situation will continue, at least until 1 January 2010 when the new National Employment Standards and the modernised awards commence operation. As the formula to determine which entitlement prevails is one that is applied to the individual employee, employers should conduct a random audit of their payroll to assess employee entitlements. The audit need only be conducted on a small representative sample of employees. If there are anomalies or errors then they should be rectified and a broader audit may then be warranted. If in doubt seek advice.

AROUND THE STATES - What's making news in State jurisdictions?

New South Wales

NSW State Wage Case 2008

The state's lowest paid workers may get a boost if the New South Wales government is successful in its bid for a \$20 rise in weekly pay. The Minister for Industrial Relations, John Della Bosca, made the recommendation as part of its submission for the 2008 State Wage Case. Unions NSW are seeking a 4.5 per cent increase in NSW award rates of pay. Hearings by the NSW Industrial Relations Commission are scheduled to begin from May 13 with a decision expected to be handed down in the near future

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World Youth Day

The World Youth Day 2008 (WYD08) events take place in the Sydney central business district and at Randwick Racecourse and Centennial Park between Tuesday 15 and Sunday 20 July 2008.

There is no public holiday associated with World Youth Day but the influx of visitors to the Sydney central business district may mean that some employers might wish to consider alternative business arrangements over this period, such as allowing people to work from home or taking leave.

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Victoria

OHS Administrative Review

In 2007, the Minister for Finance, WorkCover and TAC, Mr Tim Holding MP, commissioned Mr Bob Stensholt MP to chair an administrative review of the OHS Act 2004. Mr Stensholt completed his review and presented his report to Minister Holding in December 2007. The Government released its response to the review recommendations on 17 June 2008. Copies of the review report and the Government response can be downloaded below.

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South Australia

Changes to Workcover

The State Government will begin implementing a number of its WorkCover changes after the amending legislation was finalised in the House of Assembly. The amendments to commence from 1 July include:

- Changes to weekly payments;
- The establishment of a WorkCover ombudsman;
- The creation of a \$15 million Return to Work Fund
- Allowing the Auditor General to audit WorkCover statements; and
- An increase in Death Benefits to \$400,000

It is anticipated that the remaining changes to the WorkCover legislation will be phased in over the next twelve months

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Western Australia

Lowest unemployment in Australia

Western Australia is still one of the easiest places in the country to get a job. The Australian Bureau of Statistics put W.A.'s unemployment rate in March at 3.3 percent, compared to a national average of 4.1 percent.

The Director of Labour Relations Policy with the Department of Consumer and Employment Protection, Mr. Bob Horstman, was particularly satisfied with the number of young people in jobs, with a youth unemployment rate of 10.8 percent, much lower than the national rate of 15.5 percent,

There are now 1.13 million people at work in W.A.