Submission

to

Department of Education, Employment and Workplace Relations

Draft National Employment Standards

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Introduction

The National Employment Standards provide an opportunity for certain employment rights to be enshrined as minimum standards of employment applicable to all workers in Australia. Together with modern awards and collective agreements the Standards are a foundation-stone of the post-Work Choices industrial relations system to be introduced by the Government's substantive Reform Act.

These Standards will form a basic part of the 'safety net' in the new national industrial relations system. A modern award will not be able to exclude a term of the NES nor operate inconsistently with a term of the Standards.

It is clear, however, from a comparison of the provisions of the proposed Standards with those in Awards that in many cases the Standards are inferior to award provisions. It is essential, therefore, that the Standards not operate to undermine Award entitlements and that award provisions designed specifically to meet the needs of employees and employers in specific occupations and industries be maintained and guaranteed.

Failure to do so will result in employees being disadvantaged in this process. Existing award provisions have been inserted by independent tribunals on the basis of the merit of cases presented, evidence brought in support and the submissions of interested parties. It would be manifestly unjust to allow these provisions to be diluted or set aside.

Given the fundamental nature of the work of these proposed Standards as a foundation part of the system, the consultation process in relation to them that has been provided is inadequate, in the submission of the ASU.

Instead of providing the opportunity for stakeholders to submit views and be heard, as does a Senate Committee of Inquiry, for example, the final set of Standards will be provided by the Minister to the Australian Industrial Relations Commission by 30 June 2008 following consultation on the Exposure Draft conducted by a Policy Group within the Department of Education, Employment and Workplace Relations.

The AIRC will proceed on that basis with the task of Award Modernisation in accordance with the Direction of the Minister. While submissions on the draft NES will be included on the department's website, this is not an adequate process for consultation on such an important set of provisions potentially affecting all Australian workers.

Effective Collective Bargaining

An enforceable safety net of rights contained in the provisions of the substantive Act, Modern Awards and the NES can offer a sound underpinning for effective collective bargaining in the interests of improving employment terms and conditions and economic growth.

The rejection of 'Work Choices' by the Australian community and workforce was largely due to the insecurity which was created by the Howard Government's failure to provide an adequate, secure and enforceable safety net of wages and conditions above which collective agreements could be made and by the former Government limiting the powers and role of the AIRC as an independent arbitrator.

Instead of encouraging collective agreements which met the needs of both employers and employees, 'Work Choices' saw the ideological hand of the Coalition intervene in bargaining to prohibit issues being agreed by the parties, by removing recourse to arbitration and by undermining the capacity of unions to organise.

While many of these restrictions have been removed, the draft Standards do not adequately address the need for a secure safety net because the enforceability of the Standards is not evident, leaving employees without certainty about the entitlements it purports to create or a simple means to ensure that entitlements are given practical effect to.

Legislating Standards of Employment

The Government intends to continue the practice introduced by 'Work Choices' of establishing employment standards by legislation, for example, by replacing the three leave standards contained in the Australian Fair Pay and Conditions Standard with six leave provisions by adding community leave and long service leave, although the latter is deferred until a national minimum standards is developed.

Setting employment standards by legislation runs the serious risk of the politicisation of basic employment standards in future; they will necessarily run a gauntlet of political will and opportunity in the houses of the Federal Parliament.

In the submission of the ASU, this is not a good basis upon which to construct a system which must gain the respect if not the goodwill of the industrial parties and society as a whole.

A return to the establishment of key employment standards by Test Cases in awards by an independent commission mandated to resolve disputes by conciliation and arbitration provides a much better chance of such standards surviving the winds of political change and opportunism.

More over, such cases provide an opportunity to improve key employment standards over time based on the principles of the merit of the arguments and the evidence for change presented removed from day to day political imperatives.

Some key employment standards have been legislated in Australia and in particular through State and Territory parliaments. Many have emerged from the processes of industrial claim, counter claim, conciliation and arbitration in a system which has served the nation, employees and employers well over many years.

The ASU strongly recommends that the process of Test cases and industry wide cases for particular conditions of employment be maintained under any future Act

so that Standards now being established may be improved and adapted to meet developing community standards.

Issues for Reform

The draft National Employment Standards raise the importance of some employment issues in the architecture of the new system, notably flexible working arrangements for parents and carers, parental leave for childbirth or adoption, paid personal and carers leave for sickness and injury of the employee, their immediate family or household member. The elevation of the importance of these issues is welcome.

However, there are a number of aspects of these standards which fall short of the opportunities the NES provides. This is particularly true with regard to entitlements found in many ASU awards.

The NES purports to establish employment standards which create entitlements. However, in the case of the Fair Work Information Statement Standard its appears that the entitlement is for new employees to receive a description of the government's industrial relations legislation as published in the government *Gazette*.

It is not clear from the draft Standard whether this will result in employees being fully aware of any entitlements they may have under the National Employment Standards. This may have the effect of trivialising the NES and may play no useful role in practically establishing the employment standards of most employees. The Fair Work Information Statement Standard must specify that employees are entitled to receive a full statement of their entitlements under the Standards.

Enforceable Standards

Most importantly, it is not clear from the draft NES how the 'entitlements' the NES purport to establish are to be enforced. There is simply a note in the Exposure Draft that this matter is to be considered later.

An 'entitlement' is something which can be ensured by some legal process. If an 'entitlement' is removed or unreasonably denied there must be a practical and efficient, low cost means of restoring or enforcing it; anything less is a pious hope unworthy of being called a Standard.

Moreover, some of the Standards fall well short of the status of enforceable standards. For example, the Flexible Working Arrangement NES 'entitlement' gives employees no more than a right to request the flexible arrangements. The request may be refused 'only on reasonable business grounds' for which reasons must be given. 'Reasonable business grounds' is not defined but 'would be given its ordinary meaning' including 'costs to the employer, the employer's ability to reorganise workloads and the availability of replacement staff.'

A similar situation applies to a request for additional parental leave, which must be granted unless the employer has reasonable business reasons for refusing the leave.

In the case of requests for flexible working arrangements the Standard imposes an 'obligation' upon the employer to agree or otherwise in writing within 21 days, in which case reasons must be given.

How or where is an employee to take a refusal if they do not accept the reasons given? The NES does not provide an answer, leaving that to further consideration and the substantive Bill.

In some key respects, it is impossible to do other than speculate then on the value of some of the 'entitlements' in the porposed NES at this stage. This detracts substantially from the value of the present consultation on the Exposure Draft.

Currently a number of the Standards fail to provide adequate protections or certainty to employees because without providing a means to require compliance the proposed Standards cannot be described as an entitlement. This is further discussed below.

There are particular issues with a number Standards. This submission deals with a number of these, but the ASU is aware of submissions from peak employee organisations and supports the submissions of those bodies with regard to matters contained in the draft Standards.

Parental Leave

The ASU strongly submits that the proposed standard with regard to parental leave is deficient and discriminatory.

The proposed standard allows parents certain unpaid leave and describes the circumstances in which employees are entitled to take leave, that is:

> *An employee is entitled to 12 months of unpaid parental leave if:*
> *(a) the leave is associated with:*
> *(i) the birth of a child to the employee* ***or the employee's spouse****; or*
> *(ii) the placement of a child with the employee for adoption; and*
> *(b) the employee has or will have a responsibility for the care of the child.*

A spouse is defined as:

> ***spouse*** *includes the following:*
> *(a) a former spouse;*
> *(b) a de facto spouse;*
> *(c) a former de facto spouse.*

And further

> ***de facto spouse*** *of an employee means a person of the opposite sex to the employee who lives with the employee as the employee's husband or wife on a genuine domestic basis although not legally married to the employee.*

Spouse as defined clearly excludes a partner of the same sex as the employee and therefore discriminates against same sex couples by not providing access to the parental leave entitlement.

As well as being discriminatory, the proposed Standard is inferior to the provisions of many Awards that the ASU is party to.

The ASU strongly recommends that the parental leave standard be strengthened by the inclusion of parental leave entitlements for same sex couples.

Public Holidays

The 'entitlement' to public holidays under the Standards also calls into question whether an actual entitlement is established and is enforceable.

Under the current [WorkChoices] Act, public holidays are not part of the Fair Pay and Conditions Standard but rather were "Minimum Entitlements' of employees found elsewhere in the Act. Enforceability of these so called minimum entitlements was questionable.

Nor was a clear entitlement for employees to take and enjoy public holidays established. Employees were allegedly entitled to not work on the nominated public holidays but employers could ask employees to do so and employees could only refuse such requests if the employee had reasonable grounds for refusing to do so.

A list of factors that had to be taken into consideration to determine reasonableness was contained in the Act.

The proposed Standard re Public Holidays operates in a very similar, if not practically identical way. An employer may request an employee to work on a public holiday if the request is reasonable and the employee may refuse if the employer's request is unreasonable and the employee's refusal is reasonable.

A list of factors going to reasonableness is also included in the Standard although it is, for no apparent reason, not the same as the list in the current Act.

Moreover, in neither case does the Act or the proposed Standard entitle an employee to the benefit of the holiday simply for the purpose for which the holiday is a public holiday in the first place. For example, nowhere in the current Act or the proposed Standard does it say that an employee may have the benefit of the Melbourne Cup holiday for the purpose of watching or attending the Melbourne Cup carnival.

Employees wishing to refuse an employer request to work on a public holiday have had to rely on the list of factors in the Act – or in future in the Standard – as grounds for refusing the request. These included family 'responsibilities' which many employees had to rely on.

But in the case of significant religious holidays, eg Good Friday or Christmas Day, they could not, for example, cite religious reasons for wishing not to work on these

days nor in the case of Anzac Day could they simply cite wishing to attend the Anzac Day ceremonies. Again many employees were forced to cite family 'responsibilities' as a reason for refusing.

This is unreasonable and unfair – and discriminatory - on employees without demonstrable family responsibilities as this term is commonly understood. The ASU believes that employees should be entitled to the enjoyment of public holidays for no other reason than the one for which the holiday is granted.

Moreover, in 2007, the then Opposition moved a series of amendments to the Government's Fairness test legislation seeking to improve protection for workers wishing to take certain public holidays, notably Good Friday, Christmas Day and Anzac Day.

These amendments were in the following form:

Senator WONG (South Australia) (9.04 pm)—by leave—I move opposition amendments (31) and (32) together.

(31) Schedule 1, page 36 (after line 3), after item 22, insert:

22A At the end of section 613
Add:
(2) Notwithstanding the other factors set out in this section or a provision in a workplace agreement or an award, an employee who wishes to attend religious activities on Good Friday must be taken to have reasonable grounds for refusing a request to work on Good Friday.

(32) Schedule 1, page 36 (after line 3), after item 22, insert:
22B At the end of section 613
Add:

(3) Notwithstanding the other factors set out in this section or a provision in a workplace agreement or an award, an employee who wishes to attend religious activities on Christmas Day must be taken to have reasonable grounds for refusing a request to work on Christmas Day.

Senator WONG (South Australia) (9.22 pm)—I move opposition amendment (33) on sheet 5295 revised: (33) Schedule 1, page 36 (after line 3), after item 22, insert:

22C At the end of section 613
Add:
(4) Notwithstanding the other factors set out in this section or a provision in a workplace agreement or an award, an employee who wishes to attend commemorative events on Anzac Day, or to support the attendance of a member of the employee's family at commemorative events on Anzac Day, must be taken to have reasonable grounds for refusing a request to work on Anzac Day.

Reference: Senate Hansard 19 June 2007 at page 111-112 and 114-115

The ASU believes that the principles behind these amendments are correct and should be included in the proposed Standard regarding public holidays. The current Act lacks a dispute mechanism for establishing these rights. This should not be overlooked in the Standards as well.

Failure to Provide Entitlements

There is a general failure of the draft NES to create entitlements if the employer refuses to meet them, making them less than entitlements in fact.

The Discussion Paper makes this clear in relation to refusal of requests for flexible working arrangements which 'will not be subject to third party involvement'. (par. 61) This explicit rejection of any recourse to the tribunal or any court or mediator transforms the NES from a statement of statements creating entitlements to a set of guidelines for employers and employees which they may ignore at will.

In relation to the NES generally the Discussion Paper says that a compliance regime 'will be settled' with the reforms and the establishment of FWA, (par. 35). This leaves making a submission on a critical aspect of the NES difficult and open to assumptions.

This failure to outline compliance is linked to the legislative approach governing the NES. They are created by legislation as the first part of the government's 'safety net' not by an independent tribunal in settlement of a dispute. There is no reference in the Discussion Paper or elsewhere to review and maintenance of the NES for relevance or new issues.

Formerly an award of a tribunal could be enforced. However, the NES does not establish how compliance will be achieved, making submissions on the NES highly speculative. Unless the substantive legislation to commence in 2010 specifies how this part of the safety net is to be enforced, it is not a safety net at all.

Fair Work Australia as an independent tribunal must be empowered to hear and determine a denial of a Standard. This is essential for the integrity of the legislation as a whole. Where a Modern Award contains terms which relate to matters contained in the NES (para 26) it is essential that the dispute resolution processes in the Award are available to applicants denied NES entitlements. These processes must include binding arbitration.

The NES does not establish a minimum standard for wages, although the Discussion Paper envisages that modern awards should ensure that all employees have the benefit of a minimum wage. (par. 6) However, evidence before the Senate Inquiry into the Transition Bill from Mr Kovacic of DEEWR that up to 100,000 employees earning in excess of $100,000 could be outside the award system and need to rely on the NES.

The ASU represents many employees in the Water, Rail Local Government and Airline and other industries who earn in excess of $100,000 in salary, depending on how that is defined, and thus will be excluded from the protection of the award system. These employees are currently entitled to Award protections and should not lose rights. They should be entitled to the protection of a safety net either by award or by NES regulation. The draft NES and proposals for modern awards do not provide either.

In the event that a national system of industrial relations is created by referral and/or the consequences of the High Court decision in the 'Work Choices' case, the standards contained in the NES are inferior to those of ASU members in a number or respects. The principle contained in the Long Service Leave NES of not overriding state or territory Long Service Laws should apply across the board.

Moreover, the proposed Standards must allow superior award provisions to continue to operate and be enforced.