

# *The Law of Work*

## **'National Employment Standards'**

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This is the second supplement that has been prepared to assist teachers and students who are using *The Law of Work* textbook in courses during the second half of 2008. It provides a general outline of the National Employment Standards (NES), which were released by the Rudd Labor Government in June 2008. The NES have not yet been enacted in legislation. However, it is expected that they will replace the Australian Fair Pay and Conditions Standards (AFPCS) from the beginning of 2010. This material has therefore been prepared as a supplement to the material in Chapter 7: Work Standards.

### **Chapter 7: Work Standards**

#### **The National Employment Standards (NES)—A new safety net of legislated standards**

In its 'Forward with Fairness' policy,<sup>1</sup> the Labor Party signalled that it was committed to a fair, flexible and productive workplace relations system for Australia. As part of that commitment, an enforceable safety net comprising a set of fair and effective minimum labour standards was clearly on the

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<sup>1</sup> See K Rudd and J Gillard *Forward with Fairness: Labor's Plan for Fairer and More Productive Australian Workplaces*, Canberra, April 2007; and *Forward with Fairness: Policy Implementation Plan*, Canberra, August 2007.

agenda. Following from this—and as part of its pledge to engage in broad consultation with stakeholders (business, industry, trade unions, etc) and with the Australian community generally on reforms to legislation regulating the workplace—the Rudd Labor Government issued a *Discussion Paper* accompanying the *National Employment Standards Exposure Draft* early in February 2008.<sup>2</sup> These documents outlined in some detail the rationale for, and the scope of, the Government's new National Employment Standards (NES), which it proposed would replace the Australian Fair Pay and Conditions Standards (AFPCS).

The 10 NES outlined in the draft deal with four of the matters covered by the AFPCS (wages being the one AFPCS matter that is not incorporated into the NES), and six other matters. The 10 NES matters were identified as follows:

1. Maximum weekly hours
2. Requests of flexible working arrangements
3. Parental leave and related entitlements
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
10. Fair Work Information Statement

The closing date for submissions to the Government following the release of the exposure draft in February 2008 was 4 April 2008. Not long afterwards, in June 2008, the Labor Government issued its National Employment Standards, which contained only a few minor alterations from the version set out in the exposure draft. The NES are now available at <[www.workplace.gov.au](http://www.workplace.gov.au)>.

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<sup>2</sup> See *Discussion Paper: National Employment Standards Exposure Draft* released by the Department of Education, Employment and Workplace Relations in February 2008.

The NES are set out in legislative form, and so references in the text below are to the section numbers in the NES as it has presently been released. However, the NES are not yet law. It is anticipated that the NES will be incorporated into the Labor Government's new substantive legislation, which will be made available towards the end of 2008. If, as expected, this legislation is passed by Parliament,<sup>3</sup> then according to the Government's timetable it will very likely become law from 1 January 2010.

Before setting out a brief commentary on each of the proposed NES, there are a couple of general points that are worthy of comment.

First, it is significant that the NES are encapsulated in a far simpler legislative form than that which sets out the AFPCS. Comprising a mere 50 pages of legislation, the statement of the NES has eliminated much of the convoluted detail that characterises the formulation of the AFPCS. This simplicity of expression in drafting is important, not the least because it is likely to assist in making the legislation far more comprehensible and therefore ultimately more effective.

Second, it may be noted that although there are 10 NES (compared with only five AFPCS), some of the matters that are 'new' can already be found in the existing *Workplace Relations Act*, albeit in a different form. Thus the 'newness' of the NES are in some cases largely a matter of form. In some instances the NES matters have been transformed from a mere procedural right to access a remedy under the existing legislation, into a substantive right for employees in the modern workplace. The NES are now articulated as part of a national set of core legislative standards to apply at work. The NES thus represent a clearer statement about their function as fundamental to the dignity of individuals in the workplace. There is a very important symbolic value in this.

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<sup>3</sup> However, as the Labor Government does not have a majority in the Senate, it is very possible that there will be amendments to the Bill in its passage through the Parliament.

Third, the omission of wages from the NES is perhaps at first sight somewhat curious, because a decent wage is surely one of the most fundamental rights for workers. The *Work Choices* legislation reposed the power to set wages, including the Federal minimum wage, in the Australian Fair Pay Commission (AFPC). Although the AFPC exercised its powers in relation to the setting of the minimum wage, it never addressed the other element of the pay system over which it had power: the Australian Pay and Classification Scales. The regulatory treatment of remuneration for work has been somewhat confused after the *Work Choices* amendments because certain loadings etc are still dealt with by awards. The Rudd Labor Government's reforms intend to return the regulation of all safety-net wage and wage-related matters to awards. There is regulatory coherence in this. As the process of 'modernising' awards becomes further advanced, the basic standards in relation to wages and remuneration will become clearer. It is also important to note that the Australian Industrial Relations Commission (AIRC) has already been asked to create a 'general' award to ensure that there are no 'award-free' employees who can fall through gaps in the system. This general award will in effect set the minimum rate of pay for Australian workers covered by the Federal system.

Finally, although the standards have now been presented in a 'final form', they will no doubt evolve further. For instance, at present the Productivity Commission is examining the issue of whether Australia should introduce an entitlement to paid maternity leave.<sup>4</sup> The response of the Rudd Government to the recommendations of the Productivity Commission may see further changes to the NES before their introduction to Parliament.

## **The National Employment Standards (NES)**

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<sup>4</sup> For information on the Enquiry into Paid Maternity Leave and access to submissions to the Productivity Commission, see <<http://www.pc.gov.au/inquiry/parentalsupport>>.

### 'Maximum weekly hours'

The working time standard set down in the NES is in many respects not very different from that in the AFPCS. The maximum working hours for a full-time employee 'must not exceed' 38 hours per week. For part-timers, the employee's hours will be their ordinary hours of work in a week, which must be no more than 38 hours (s 12(1)). Any leave (whether paid or unpaid) is included as hours worked where it is authorised by the employer, the employment contract, or under Commonwealth or State laws or instruments (s 12(5)).

However, as was the case previously, it is possible for employees to work beyond the 'maximum' hours. Thus an employer may request an employee to work 'reasonable' additional hours of work (s 12(2)). However, now the standard also states that the employee may refuse to work the additional hours if they are 'unreasonable' (s 12(3)). Thus it is quite explicit that the perspectives of the employee as well as of the employer are to be considered in the determination of reasonableness. The critical issue will be the determination of 'reasonableness' and the NES set out a number of factors that 'must be considered'. These are:

- OHS risks
- personal circumstances, including family responsibilities
- needs of the workplace or enterprise
- entitlement to overtime or penalty payments for additional work
- remuneration that reflects an expectation of additional hours
- length of notice by employer
- length of notice by employee
- usual patterns of work in industry
- employee's role and level of responsibility
- in accordance with averaging provisions in modern award
- any other relevant matter.

These factors are broadly similar to those incorporated in the existing legislation, although there are subtle differences in the wording that are indicative of a greater acknowledgement of the interests of employees.

Under the AFPCS perhaps the most controversial aspect of the working time standard is the capacity to average hours over the course of a year. The NES also provides that working time flexibility will be possible, but the regulatory mechanism for achieving it will be different. Here the NES will intersect with modern awards, which may provide for averaging, provided that the average weekly hours over the period do not exceed the standard hours (s 12(6)). This procedure will see a restoration of some role for the regulator in the determination of working time flexibility. This may deflect some of the criticisms, applicable to the AFPCS, that vulnerable workers were not protected.

Nonetheless there are a number of questions that remain unanswered in this area of working time:

- What will be the conditions/constraints governing arrangements to average?
- What is the likely outer limit period to be selected—six weeks, three months, six months, or one year?
- Will this differ from industry to industry?
- If so, what is the rationale for that difference?
- How will averaging arrangements relate to the new right to request flexible work arrangements for the care of a child?

#### Requests for flexible working time arrangements

One of the new legislative NES will be provisions that enable an employee to 'request ... a change in working arrangements for the purpose of assisting the employee to care for the child' (s 13(1)). According to the NES the scope of

this provision covers things like hours of work, patterns of work, or location of work.

This standard is clearly based upon similar legislation elsewhere, such as in the UK. However, the proposed NES is much more limited in scope than its UK equivalent. Under the proposed NES, eligibility is restricted to those who are either the parent or the person responsible for the care of the child under school age (s 13(1)), although it does encompass all those who are biological, adoptive or step-parents as well as those in same-sex relations where the child is a product of that relationship (s 5). After comments were submitted on the exposure draft, a new restriction in relation to eligibility was added in the final version. Now, to be eligible, the person making the request for a flexible work arrangement must also have completed 12 months of continuous service 'immediately before' the request is made (s 13(2)(a)). For casuals the equivalent eligibility requirement is expressed in a familiar form: casuals will have to have been engaged 'on a regular and systematic basis' for a sequence of periods of employment during the last 12 months 'immediately before' the request, and they must also have a 'reasonable expectation of continuing on a regular and systematic basis' (s 13(2)(b)).

The right to request a flexible work arrangement is most accurately described as a right to a process. The request of an eligible employee must be in writing and must set out the details of the change they are requesting (s 13(3)). Their employer is required to respond, also in writing, within 21 days indicating whether the request is granted or refused (s 13(4)). Where the employer refuses they must state the reasons for doing so (s 13(6)), and the refusal can only be on 'reasonable business grounds' (s 13(5)).

The provision of a right to request flexible working arrangements seems to be a positive development. It is certainly an antidote to some of the limitations of contract in regulating work relations (see Chapter 5). Flexible arrangements

have the potential to facilitate often needed flexibility for employees who are trying to balance work and care responsibilities. Such a mechanism as the right to request flexibility thus has the potential to promote social inclusion and participation.

And yet many questions remain. In the NES, there seems to be a very limited conception of workers' care responsibilities. Thus one might ask 'why has the right to request flexible work arrangements been restricted to the care only of young children?' Other jurisdictions, like the UK, are at this point in time widening the scope of similar entitlements.

Finally a most important question is obviously, 'will the right to request a flexible working arrangement make a difference?' Thus, for instance, we might ask whether cases such as that considered in the *Schou* litigation (discussed in Chapter 8) would have had a different outcome if this new NES had been in place at the time. Related to this, is a wider consideration as to how the relationship between the anti-discrimination jurisdiction and the NES right to request jurisdiction will develop. A critical part of answering such questions will depend on the process for challenging the 'reasonable business grounds', and at present this is unknown. What can be said with certainty is that if there is no way in which a decision by an employer to refuse a request for a flexible work arrangement can be challenged, then the new entitlement will be meaningless.

#### Parental leave and related entitlements

Although there is not a lot of difference in substance between the AFPCS and the NES on parental leave, the new standard is a model of simplicity and clarity when compared to the AFPCS dealing with these same matters. There is no longer any reference to short and long leave, each with its own convoluted and detailed set of eligibility, notice and evidence requirements. Apart from its expression in a straightforward and readily accessible form,

there is a minor but nonetheless important change in the rules on eligibility to access parental leave and related entitlements.

Under the NES, parental leave will be able to be accessed by parents in relation to birth and adoption, whether the parents are married or de facto, and this latter will include same-sex partners. The NES is thus an important part of a wider set of reforms aimed at eliminating discrimination against same-sex partners. In relation to adoption, the leave is available when the adopted child is placed with the employee for adoption, provided that the child is under school age, has not lived with the employee continuously for six months or more at the adoption date, and is not the child of the employee's spouse or de facto. As previously, employees must have 12 months continuous service with the employer immediately prior to the date, or expected date, of birth or placement for adoption (although there is an exception to the 12 month rule for unpaid pre-adoption leave) (s 14(1)). For casual employees the requirement of an equivalent of the 12 months continuous service is expressed in the usual way (s 14(2)).

Like the AFPCS, the NES provides for 12 months unpaid parental leave. The legislative formulation of the entitlement is spelled out separately for couples who both intend to take a period of leave and for others (ss 17–18). There are slight changes made by the NES to the existing rules governing parental leave. As before, the entitlement is for a maximum of 12 months of leave (even where other forms of leave are also accessed) and the leave must be taken in a continuous period. Concurrent leave may be taken during the first employee's leave period, now for a period of three weeks or less for either birth or adoption (in contrast to the AFPCS which allows only one week concurrent leave for births). This concurrent leave must commence from date of birth or day of placement, unless the employer agrees to different arrangements, and is an exception to continuity and commencement requirements. As is already the case, a pregnant employee may commence

leave six weeks prior to the birth, and if she wishes to continue to work during this period she may be required by her employer to provide a medical certificate of her fitness to do so.

The notice and evidence requirements are now expressed in a much more simplified way. Notice is still to be provided in writing 10 weeks prior to the commencement of the leave, or as soon as practicable specifying the start and end dates. Evidence need only be provided if the employer requires it, and only such as would satisfy a reasonable person. The employer, for instance, may require a medical certificate specifying the date, or expected date, of the birth or placement. As previously, the entitlement to parental leave continues to depend on compliance—but the legislation makes it much clearer as to what is required.

The period of parental leave can be extended where the period of unpaid parental leave originally notified is less than that which was available to the employee (s 21). The process for this is quite simple. The employee has a right to extend the original leave period if they provide written notice four weeks prior to the expiry of the original period and specify the new end date. However, after this any further extensions are a matter of agreement between the employer and employee.

One very important change however, is that under the NES the employee can also seek an extension of the period for a further 12 months (s 22). The employee's request to do so must be made in writing at least four weeks prior to the expiry of their available parental leave and it should provide information on leave taken by the other member of the couple. The additional 12 month extension is only available where the employer agrees to it. However, the employer must do so unless there are 'reasonable business grounds' for refusing. Although it seems clear that the circumstances that would amount to a 'reasonable business ground' for refusing such requests

will vary from business to business, it will be important for all parties to be provided with some guidance through precedents. In this area, as in others, the enforcement regime and dissemination about the way it operates will be a critical part of the success of the NES.

As well as extension, the period of parental leave can also be reduced, but this depends on the agreement of the employer (s 23). There are sound reasons for this as such a decision may impact on other arrangements made by the employer—including perhaps the arrangements in relation to a replacement employee. In cases where the employee ceases to have responsibility for the care of child, perhaps through the death of the child, the employer may require a return to work by providing a written notice to the employee specifying a day of return at least four weeks after the provision of notice, or if the female employee gave birth, at least six weeks after birth. In these circumstances the entitlement to unpaid parental leave ends immediately before the specified day (s 24).

The related entitlements—pre-adoption leave, unpaid special maternity leave (s 26), transfer to a safe job (s 27), the right to be consulted during parental leave, and the right to return to work—are all set out in the NES with admirable clarity.

### Annual leave

The basic entitlement to paid annual leave under the new NES remains at the equivalent of four weeks annual leave per year of service (s 32), with five weeks for those who are defined as ‘shiftworkers’. The definition of ‘shiftworker’ for this purpose will be found in the relevant award—and thus may differ from industry to industry. As has always been the case, casuals will not be eligible for annual leave.

When the NES comes into operation many of the convoluted provisions of the AFPCS, which presently are part of the entitlement to annual leave, will disappear. Under the NES, annual leave will simply accrue progressively according to the employee's ordinary hours of service. There is no convoluted expression of the rate of accrual in terms of hours, or nominal working time, and no stipulation that annual leave must be credited by the month. Under the NES, employees no longer have an entitlement to accrue the equivalent of eight weeks of annual leave. Nor are there rigid provisions in the NES enabling the taking of annual leave by the hour. Annual leave will be able to be taken simply for a period agreed between employer and employee, with the caveat that the employer 'must not unreasonably refuse' (s 33).

It is already clear that there may be provisions in awards that impact on the annual leave standard in relation to such matters as the timing of the taking of leave.

One of the controversial components of the AFPCS was the capacity to cash out some of an employee's annual leave. Whether this continues to be the case for any particular employee will also depend on the terms of the applicable award. The NES provides that annual leave provisions may be in modern awards and may allow for cashing out (s 36). The NES makes it clear that employers are prohibited from exercising undue influence or undue pressure in relation to cashing out, although without more there remains some scepticism as to the effectiveness of this prohibition. An important change in terms of the cashing out is that under the NES the full amount of remuneration must be paid to the employee (i.e. the employee must receive the equivalent to what they would have received had they taken their leave—thus, for example, loadings must be included).

#### Personal/carer's leave and compassionate leave

The NES provides for paid personal/carer's leave to employees, except for casual employees. Paid personal/carer's leave comprises 10 days of paid leave per year of service and accrues progressively according to the employee's ordinary hours of work (s 38). Such leave may be taken either when the employee is themselves unfit for work through personal illness or injury, or when they need to care for a member of their immediate family or household because of personal illness or injury or an unexpected emergency (s 39). The NES makes the important change that all such leave (no matter what its purpose) accrues from year to year and is fully available for use either as personal or carer's leave. It will be recalled that previously any unused personal/carer's leave could only be carried forward after a year to be used for personal leave. Thus under the NES for the first time there will be no restriction on employees carrying forward their unused leave and then accessing it all for care purposes. This is a significant benefit to many workers. The NES also makes it clear that an employee who cannot work on a public holiday for reasons of their own illness or injury or because they must care for another will not be considered to be on paid personal/carer's leave (s 40)—in other words they will not have to lose a day of personal/carer's leave on public holidays.

The rate of pay for employees on personal/carer's leave is the base rate of pay for ordinary hours of work (s 41). Cashing out of personal/carer's leave may be provided for in modern awards (s 42), but the NES states that there is to be no undue influence or undue pressure placed on employees to cash out their leave, and payment must be equal to the full amount that would have been payable if the leave was taken.

In addition to paid personal/carer's leave, the NES also provides that all employees are entitled to unpaid carer's leave 'per occasion' if other leave is exhausted. Two days are available for each occasion and may be taken as a continuous period of two days, or in separate periods as agreed by employer

and employee if a member of the employee's immediate family or household requires care or support (s 43).

Compassionate leave is also available to all employees for two days for a particular permissible occasion. Compassionate leave may be accessed as a continuous period of two days, or two separate one day periods, or separate periods as agreed by employer and employee (s 46(2)). Compassionate leave is also available in the case of personal illness or injury posing a serious threat to life, and at the time of death of an immediate family member of member of employee's household. For casual employees, compassionate leave is unpaid—and this is a new entitlement for these workers. For all other employees, compassionate leave is paid and the rate of pay is the base rate for ordinary hours.

As with some other leave (e.g. parental leave and community service leave), the entitlement to personal/carer's leave and compassionate leave depends on compliance with notice and evidence provisions. These are, however, relatively simple and straightforward. The employee must provide the employer with notice as soon as reasonably practicable, and must advise the period, or expected period, of leave. Employers may require evidence such as would satisfy a reasonable person, but in any event modern awards may govern the type of evidence that is required in more detail.

### Community service leave

The inclusion of an entitlement to community service leave in the minimum standards applicable to employees in the workplace is new, although employees have previously been protected against dismissal on the grounds that they were participating in a community service activity.

The leave entitlement is not available for all community service. Rather, the legislation defines 'eligible community service activity' (s 49) to include jury

service, including selection etc, as required by Commonwealth, State or Territory law and 'voluntary emergency management activity' as defined by the *Workplace Relations Act* in s 659 (which is part of the existing unlawful termination provisions). 'Voluntary emergency management activity' basically refers to activity in relation to an emergency or natural disaster. The activity must be voluntary (although this does not preclude the employee who has taken an honorarium, gratuity, or similar payment), and be where the employee is a member, or has a member-like association with, a recognised emergency management body (EMB) that requests them to undertake the activity or be where it would be reasonable to expect such a request if the circumstances permitted it. Examples of an EMB are those organisations which have a role in a designated disaster plan, fire fighting, civil defence, or a rescue body.

Under the NES the entitlement in relation to community service activity is one to be absent for a period covering the time of the activity plus reasonable travelling and rest time (s 50). As with some of the other leave provisions, the entitlement is dependent upon compliance with notice and evidence provisions: notice of the leave needs to be provided as soon as reasonably practicable and be accompanied by evidence such as would satisfy a 'reasonable person' (ss 51–52).

Only for community service in respect of jury service is there an entitlement to pay for employees (although not for casuals). The entitlement to jury service pay is limited to payment at the base rate of pay for the first 10 days of jury service. If the employer requires it, evidence must be provided that the employee has taken all necessary steps to get jury service pay from the government for those first 10 days, and the payment made by the employer may then be reduced by that amount. Again the standard of proof is that which would satisfy a reasonable person. In this sense, the NES is really an

entitlement to 10 days of 'make-up' pay for those who are called to serve on juries.

### Long Service Leave

Perhaps the strangest inclusions in the NES are the provisions relating to long service leave (LSL). This is because the NES does not set down a specific entitlement to LSL at all. Rather, the NES gives a commitment to establish a national system of LSL in the future. The NES entitlement to LSL merely replicates the existing law (s 53). In this one area the NES offers no simplification of the existing system. The same plethora of different entitlements and standards that currently exist will continue. Thus under the NES (at least until a national standard is established) employees and their employers will have to find the relevant standard already established and this may involve examining various instruments (workplace agreement, preserved State agreements, workplace determinations, pre-reform agreements, old s 170MX awards and old IR agreements).

Given the unchanged nature of the regulatory picture for LSL, a pertinent question becomes: 'why include LSL in the NES at all?' As we have noted previously, LSL is a peculiarly antipodean entitlement, and from the perspective of the global workplace it is an odd inclusion in a basic set of workplace standards. Its rationale and function these days is likely to be thought of in terms of a reward for loyalty to a single employer, or a well deserved rest after a long period at the workplace, or a financial cushion against possible retrenchment. But none of these are really compelling as the foundation of a fundamental right or standard for today's workplace. Today the rewards for work need to be more immediate or they are seen as illusory; there are other reasons for a period of paid leave from work (paid maternity leave, for example) that are far more compelling than a reward for long service; and masking the inadequacy of compensation for insecurity at work does little to really assist improving security for those who need it. Furthermore,

there is a deep seated inequity in the current forms of LSL. This is because many workers, such as agency workers or casual workers, can in reality never achieve the kind of continuity required to enable them to access the entitlement. At the very least this suggests that the portability of the entitlement needs to be examined. If the real purposes of standards at work are connected to the vulnerability of workers, and the importance of ensuing social inclusion, then this may suggest that LSL is not even a matter that should be incorporated in the NES.

### Public holidays

The legislative amendments introduced by *Work Choices* purported to protect public holidays for workers, although this was not a matter incorporated in the AFPCS. In the NES the right not to work on public holidays is now made stronger, though it is by no means absolute. Public holidays are defined by the NES (in s 54) as follows:

- New Year's Day
- Australia Day
- Good Friday
- Easter Monday
- Anzac Day
- Queen's Birthday [this is not listed as a public holiday under the *Work Choices* amendments]
- Christmas Day
- Boxing Day.

In addition, the definition of 'public holiday' includes the days or part-days that are declared under State or Territory law either as 'a day to be observed generally or in region as a public holiday unless excluded by regulation' or 'to be substituted for one of listed public holidays'. Finally the NES provides that modern awards may substitute days or part days for any of the above listed public holidays.

The entitlement provided by the NES to be absent from work on a public holiday (s 55(1)) is subject to the right of the employer to make a 'reasonable

request' (s 55(2)). In turn, the employee may refuse to work on the public holiday either because the request is not reasonable or their refusal is reasonable (s 55(3)). The NES thus places emphasis again on both the employer and the employee perspective—and in so doing is intended, no doubt, to correct the imbalance or 'one-sidedness' that was perceived to be part of the problem of the *Work Choices* legislation. While this is admirable, it may be doubted that it will produce much change in the way the NES operates when compared to the equivalent *Work Choices* provisions.

The factors that 'must be considered' in the determination of the reasonableness of the employer's request and the reasonableness of the employee's refusal are largely the same as introduced by the *Work Choices* amendments. These factors are:

- the nature of the employer's workplace or enterprise
  - including its operational requirements
- the nature of the work performed by the employee
- the employee's personal circumstances, including their family responsibilities
- whether the employee could reasonably expect that the employer might make such a request
- whether the employee is entitled to receive overtime, penalty payments, or compensation for, or has a level of remuneration reflecting an expectation of, work on public holiday
- the type of employment—whether it is full-time, part-time, casual, shift work
- the amount of notice in advance of request given by employer
- the amount of notice in advance of refusal given by employee
- any other relevant matter.

Some factors that were included by the *Work Choices* amendments—like the provision of the contract of employment—have been removed, making it clear that the basic standard cannot be overridden by a contractual arrangement.

For employees who must work on public holidays, the NES entitles them to the base rate of pay for the employee's ordinary hours (s 56), which is further

defined to include incentive payments and bonuses, loadings, allowances, overtime and penalty rates, and other identifiable amounts (see s 4(1)). For the pieceworker, the relevant rate of pay will be specified in modern award (s 4(4)).

Notice of termination and redundancy pay

The NES now incorporates a standard in relation to termination and redundancy pay.

First, where an employer intends to terminate an employee’s employment, they must provide the employee with written notice in advance. The NES sets out a minimum period of notice on termination as per the following table:

<b>Length of Employment</b>	<b>Required Notice</b>
Less than 1 year	1 week
1 year and not > 3 years	2 weeks
3 years and not > 5 years	3 weeks
5 years	4 weeks

Where an employee is more than 45 years of age and has two years of continuous service, an extra week of notice is also required. For the purposes of notice on termination where there was previously a transmission of business, the transferring employee’s continuity of service includes service with the old employer unless they were previously given notice or payment.

The above notice periods conform to the present provision in *Workplace Relations Act* in s 661. However, it should also be noted that the NES signals that modern awards may specify longer periods of notice in relation to

termination and with which employers will have to comply. Employers are able to elect to pay an employee in lieu of providing the above period of notice at the base rate of pay for hours the employee would have worked during the period.

There is also an entitlement to redundancy pay in situations where the termination of employment is at the employer’s initiative because they no longer require the job to be done by anyone (except where this is due to the ordinary and customary turnover of labour). The NES sets out the amount of redundancy pay in terms of the length of an employee’s service as per the following table:

<b>Length of Employment</b>	<b>Amount of Redundancy Pay</b>
At least 1 year and less than 2 years	4 weeks
At least 2 years and less than 3 years	6 weeks
At least 3 years and less than 4 years	7 weeks
At least 4 years and less than 5 years	8 weeks
At least 5 years and less than 6 years	10 weeks
At least 6 years and less than 7 years	11 weeks
At least 7 years and less than 8 years	13 weeks
At least 8 years and less than 9 years	14 weeks
At least 9 years and less than 10 years	16 weeks

years

At least 10 years

12 weeks

Employers are excluded from the obligations to pay redundancy pay if the period of employment is less than 12 months, or if the employer has fewer than 15 employees at the time of notice or termination. In determining the number of employees, those being terminated are included, as are casuals who have been employed on a regular and systematic basis for 12 months with an expectation of ongoing employment, and any employees who are employed by related bodies corporate.

In the case of a transmission of business there is no entitlement to redundancy pay, unless otherwise determined by Fair Work Australia (FWA), where service with the old employer is recognised and where the employee rejects an offer of employment with the new employer on terms substantially similar and no less favourable overall.

### Fair Work Information Statement

All employers are required under the NES to provide their employees with a Fair Work Information Statement (FWIS) that will be published by Fair Work Australia (FWA) (s 65(1)). The timing of this is spelled out as 'before, or as soon as practicable after, the employee commences' work (s 66(1)). The FWIS is intended to advise employees of their rights and entitlements at work. It is to contain information about the NES, modern awards, agreement making under the Act, and the right to freedom of association. In addition, the role of FWA is to be included in the FWIS ensuring that employees know about access to services for dispute resolution. The NES has left it open that further content may be prescribed by regulation, and further detail as to the manner in which the FWIS is to be provided.

In other jurisdictions the provision of such information has been seen as critically important in ensuring the effective working of the regulatory system governing work. In the UK such statements have incorporated additional information, such as whether the worker is an employee or independent contractor. This is important because the entitlement to many rights, especially rights under awards or legislation, is dependent upon the classification of the worker. It is a matter of some regret that the FWIS did not also incorporate a similar requirement to identify the status of the worker. Thus, much remains to be seen as to the effectiveness of the FWIS. Certainly it will need to be more informative than the preceding information statement that the previous Howard Government issued as part of the *Work Choices* changes.

### **The NES in the wider regulatory context**

As can be seen from the above summary of the NES, one of the major changes that will be a feature of the Rudd Labor Government's legislative reforms will be a greater intersection between the legislated minimum standards (the NES) and awards. Under *Work Choices* it was clear that the working out of the changes it introduced would ultimately reduce the regulatory system to the five legislated minimum standards, or AFPCS, overlaid by a system of agreements (with individual agreements more important than collective agreements). Implicit in the *Work Choices* system was that award regulation would not only be undermined but ultimately eradicated. The Rudd reforms are very different. It should be clear from the above that the interrelation of the NES and new modern awards will be very important. But this also carries some risks. For instance, will the simplicity that is offered by the NES be compromised?

To date, much of the criticism of the AFPCS has been on the basis that it never really set any 'standards' because in so many instances it was possible to move away from 'standards' and craft an individualised alternative. An

important question will be whether the flexibility clauses to be incorporated in modern awards will mean that the effectiveness of the NES is also compromised, or whether the oversight of the AIRC as regulator will protect against this.

Finally, the Rudd government has indicated that employees earning more than \$100 000 may be treated as outside the system and it is worth asking whether this too will reduce its effectiveness in securing decent work for the Australian workforce.