

Australian Human Resources
Institute Limited
ABN 44 120 687 149
T (+613) 9918 9200
F (+613) 9918 9201
Level 10, 601 Bourke Street
Melbourne Victoria 3000
www.ahri.com.au

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NES Exposure Draft Submission
GC 31, Workplace Relations Policy Group
Department of Education, Employment and Workplace Relations
GPO Box 9879
CANBERRA ACT 2601

Re: National Employment Standards Discussion Paper

On behalf of its 13,000 HR practitioner members AHRI is pleased make a submission to DEEWR on the proposed National Employment Standards.

At a time of national labour and skill shortages that pose an increasing threat to many businesses, HR practitioners play a central role in finding solutions to the up-skilling and workforce retention challenges facing the nation. Accordingly, AHRI members have a vital stake in the implementation of government policy in areas such as workplace relations, occupational health and safety, workplace training, and the creation of a workforce environment that is sufficiently flexible to accommodate imperatives such as boosting the participation in employment of those who want to work but who remain outside the workforce.

As the professionals within business who execute HR and people management solutions in the workplace, AHRI members are at the pointy end of business decision making and their involvement is mission-critical to the competitiveness of Australian business. The field of human resources has been undergoing a rapid evolution in recent years as it strives to meet the expectations of business.

The survey

In order to provide an evidence-based submission to the Government's National Employment Standards Discussion Paper, AHRI conducted a survey of its stakeholder database during the month of March 2008. In the time available, 405 members responded to the survey questions and this submission is largely informed by those responses.

The survey took the form of three general statements followed by questions put in the form of statements relating to each of the 10 proposed National Employment Standards, to which respondents were asked to agree or disagree.

In addition, respondents were invited to set out in writing their responses to two questions: (1) What would you like to see in the National Employment Standards? and (2) What concerns do you have about the National Employment Standards?

GENERAL QUESTIONS ABOUT THE NES

General question 1

The first general question was as follows: The National Employment Standards (NES) propose not to define the phrase “reasonable business grounds” but to provide guidance.

“Given that many of the matters to be decided under the provisions of the NES require an application of that phrase, it should be defined. Agree or disagree?”

80 per cent of respondents agreed with that proposition and 20 per cent disagreed.

Related written comments

Comments called for clear definitions and clarification of potentially contentious terminology but also for the need to allow employers and employees some flexibility. Many were mindful of a movement towards a 24/7 society and said the new standards need to take that into account rather than remain locked into a Monday to Friday mindset. The point was also made that the more tightly defined terms are, the easier it is to exclude things inadvertently or to enable avoidance strategies.

A common refrain was that the standards should be simple and definitive but leave room for flexibility, with the caution that if they are too open to interpretation they will be open to misinterpretation, and used and misused accordingly by both employers and employees. Respondents in general do not want to wait for matters to be settled by court decisions before certainty can be gained. A minority view was that the NES should not be too prescriptive but that details be worked out at the award or enterprise level.

General question 2

The second general question was as follows: The AIRC will create modern awards to commence on 1 January 2010 which, together with the NES, are intended to provide an employee safety net.

“This arrangement can be expected to work effectively. Agree or disagree?”

71 per cent of respondents agreed with that proposition and 29 per cent disagreed.

Related written comments

There was a near universal call for one national system expressed in plain English, including a call to narrow the scope of what is contained in the modern awards. A view was expressed that the NES be true minimums, that they reflect community standards and be updated annually. There was some concern that awards will become cumbersome and voluminous, including suggestions that 20 NES conditions would be preferred to the old awards modernised, and that awards be scrapped altogether because the NES together with collective and individual agreements would suffice. On the other hand, the view was also put that most matters be dealt with by awards and that the NES deal only with basic employee entitlements.

General question 3

The third general question was as follows: The NES does not deal with minimum wages and conditions which are to be protected by modern awards. It is proposed that senior and high income employees, and employees in emerging industries or occupations, will not be covered by a modern award.

“Senior and high income employees should be excluded from coverage by an award. Agree or disagree?”

78 per cent of respondents agreed with that proposition and 22 per cent disagreed.

Related written comments

Some respondents called for more clarification around the term “high income earner”. The point was made that in some cases staff negotiate higher salaries to take into account irregular hours. The view was also put that in some businesses it is not uncommon for people to work around 50 hours a week

unremunerated ... because of workload and performance expectations ... and that the issue of employees working additional hours of their 'own volition' is 'a very easy out' for some employers.

It was also suggested that employment contracts be written showing base rates plus additional payments for irregular and long hours worked by high income employees so that it can be agreed if reasonable compensation is offered.

Some respondents said it was difficult to make sensible judgements about the NES in the absence of information about modern awards and an unfair dismissal regime.

There was some concern that the focus is too much on the employee to the detriment of the employer and that the system needs to be fair to both.

PARTICULAR QUESTIONS ABOUT THE NES

1. Maximum weekly hours

The survey question relating directly to NES 1 was as follows: This NES is proposing to prevent an employee from being required to work more than 38 hours a week, other than where the additional hours are reasonable.

“The NES should include an express provision that an employer will not be in breach of the NES if additional hours are worked of the employee’s own volition. Agree or disagree?”

86 per cent of respondents agreed with that proposition and 14 per cent disagreed.

Related written comments

See the previous comment on high income earners.

Concerns expressed in the written comments include:

- removal of the capacity to average 38 hours over a 12 month period, especially in 24/7 contexts that use averaging to enable shift rosters to work effectively
- a view that one size does not fit all in a changing world of work patterns and requirements that include telecommuting and varying start/finish times
- the proposition that a 38 hour week is a confusing and artificial construct and shouldn't have been brought across from Work Choices, adding that its negative effects can be seen in 24/7 operations that may need a roster that averages more than 38 hours
- a call for more guidance to employers on what constitutes 'reasonable business grounds' when considering flexible working arrangements in order to inform and assist employers who resist employing working parents.

2. Requests by parents for flexible working arrangements

The survey question relating directly to NES 2 was as follows: The stated intention of this NES is to assist working families to balance work and family responsibilities and to assist businesses by encouraging greater workforce participation.

“To be taken seriously this NES needs to provide clear performance indicators that will enable its success to be measured. Agree or disagree?”

83 per cent of respondents agreed with that proposition and 17 per cent disagreed.

Related written comments

Matters raised include:

- the potential for reverse discrimination of employees without children or family commitments and whether the burden might be unreasonable on businesses that cannot financially or logistically provide the kind of arrangements desired
- a likelihood that the majority of small businesses will simply ignore this type of NES
- a concern that if there is no requirement for compliance or ability to enforce, it will allow third parties to criticise employers for non-compliance against a standard which is not enforceable.

Views on the ageing workforce were in stark contrast: Some called for ways to encourage older workers to remain in the workforce longer, while others called for easier ways to force the retirement of unproductive older workers.

3. Parental leave

The survey question relating directly to NES 3 was as follows: One of the proposals in this NES is that a female employee eligible for unpaid parental leave is entitled to be transferred to an appropriate “safe job” where evidence is provided that she is fit for work but not her usual work in her condition. If no safe job is available, the NES proposes that she be entitled to paid leave (unsafe leave) for the period specified.

“This NES is too open to misunderstanding where the period of ‘unsafe leave’ is unlimited and hazards connected to the employee’s existing job are not defined. Agree or disagree?”

87 per cent of respondents agreed with that proposition and 13 per cent disagreed.

Related written comments

There was considerable support for paid maternity leave with access to limited paid paternity leave. Whether employers should be required to pay “unsafe pay” to a pregnant employee was questioned on the basis that many employers may not be able to “create” a suitable position. The view was put that the onus should be on employees to use leave accruals if work is no longer possible in their position.

4. Annual leave

The survey question relating directly to NES 4 was as follows: Record-keeping rules in this NES do not require an employer to make available accrued leave entitlements to employees on call. An employer will simply be required to maintain records so as to enable the calculation of an employee’s annual leave entitlement if asked and to provide specific information on accrued leave from time to time.

“This NES should require employers to provide accurate information on accrued leave entitlements at regular intervals or by request within a reasonable time. Agree or disagree?”

87 per cent of respondents agreed with that proposition and 13 per cent disagreed.

Related written comments

There was a call for this NES to include an employer right to direct employees to take annual leave in certain circumstances, or to cash in annual leave particularly where a previous management had allowed unreasonably large amounts of annual leave to be accrued.

It was also suggested that penalty rates for employees on annual leave be abolished other than for bona fide shift workers. In the context of penalty rates, a definition of ‘shift worker’ was called for in the NES rather than within modern awards.

5a. Personal/carer's and compassionate leave

The first survey question relating directly to NES 5 was as follows: This NES proposes that personal/carer's leave not taken accrues from year to year, and also that the amount of accrued paid carer's leave taken within a year is not capped.

“These provisions should operate on a ‘use it or lose it’ basis. Agree or disagree?”

42 per cent of respondents agreed with that proposition and 58 per cent disagreed.

Related written comments

While some saw merit in a ‘use it or lose it’ concept, there was strong support for the retention of accrued sick leave until termination with the employer or for a reasonable number of years. Some responses suggested that this NES needs to protect employers from ‘institutionalised’ rotting by some employees, including protection from employees taking sick leave for stress or anxiety caused by performance discussions.

There was a call for a clearer definition of “support” and more clarity around where compassionate leave and bereavement leave apply, and whether the two can be taken successively (i.e. a period of compassionate leave followed by a period of bereavement leave).

5b. Personal/carer's and compassionate leave

The second survey question relating directly to NES 5 was as follows: This NES proposes that in cases of absence extending beyond a short period or repeated absences on particular days, it may be reasonable for an employer to request a medical certificate in support of the employee's request for leave but does not consider it reasonable for an employee to be required to provide a medical certificate for every single absence on account of personal illness. The government believes that the proposed NES contains sufficient checks and balances to ensure employees can access their leave while minimising the potential for abuse of the entitlement.

“This NES should define ‘a short period’ and ‘repeated absences on particular days’. Agree or disagree?”

87 per cent of respondents agreed with that proposition and 13 per cent disagreed.

Related written comments

A number of respondents were wary about the competence of non-medical personnel providing certification for sick leave.

6. Community care leave

The survey question relating directly to NES 6 was as follows: This NES does not contain special rules applying to the obligation of small business to pay jury service leave, particularly in the case of extended trials.

“Express provision should be included in the NES to take account of this matter. Agree or disagree?”

89 per cent of respondents agreed with that proposition and 11 per cent disagreed.

Related written comments

The view was put that the NES should require employers to give employees called for jury service the necessary time off without being disadvantaged in any way, but payment for the service should be made by the government, not the employer.

7. Long service leave

The survey question relating directly to NES 7 was as follows: This NES contains a government commitment to work towards a uniform minimum long service leave standard across jurisdictions. Until that is developed the NES will operate to ensure long service leave entitlements in pre-modernised awards will be preserved to ensure they cannot be taken away, but the NES will not apply to employees covered by bargained outcomes while they are in operation.

“When the uniform standard is introduced, the NES should state whether it will then override ‘bargained outcomes’. Agree or disagree?”

94 per cent of respondents agreed with that proposition and 6 per cent disagreed.

Related written comments

The 94 per cent response rate to question 7 was supported by a number of written comments looking for certainty about whether the NES would prevail over ‘bargained outcomes’ on 1 January 2010.

Other matters raised include calls to enable cashing out of leave at employees’ discretion as well as contrary calls to enable provision for long service leave (and annual leave) to be taken at variable pay rates, but not to allow cashing out, thus enabling employees to choose longer or shorter holidays for convenience or caring responsibilities, but still requiring an average of at least two weeks leave a year to be taken. A similar suggestion was put with respect to sacrificing leave accruals to superannuation.

Where there is entitlement to pro rata LSL, it was suggested that the applicable redundancy entitlement be varied accordingly. It was also suggested that LSL be taken within a reasonable time; for example, seven years after entitlement accrues. Another suggestion was for the introduction of portable LSL along the lines of superannuation.

8. Public holidays

The survey question relating directly to NES 8 was as follows: This NES includes a list of factors that must be considered when determining the reasonableness of both an employer’s request to work on a public holiday and an employee’s refusal to accede to that request. The list of factors concludes with ‘any other relevant matters’.

“The list should include additional express factors to ensure that all relevant matters can be reasonably considered (e.g. prior notice of requirement to work on a public holiday). Agree or disagree?”

88 per cent of respondents agreed with that proposition and 12 per cent disagreed.

Related written comments

The view was expressed that an open-ended list of factors is preferable because a longer list without a ‘other relevant matters’ proviso runs the risk of encouraging strict interpretations that would be likely to result in the exclusion of meritorious but unforeseen factors.

9. Notice of termination and redundancy

The survey question relating directly to NES 9 was as follows: An employee in a small business with fewer than 15 employees is not entitled to redundancy pay under this NES.

“In determining the redundancy exemption entitlement of a small business, the method for calculation of number of employees needs to be expressly defined, and should include other employees terminated or made redundant within a specified period. Agree or disagree?”

84 per cent of respondents agreed with that proposition and 12 per cent disagreed.

Related written comments

The view was expressed that this NES should include a provision that absolves employers from paying severance without application to Fair Work Australia where employees have been offered suitable alternative employment.

10. Fair work information statement

The survey question relating directly to NES 10 was as follows: This NES requires Fair Work Australia to publish a comprehensive statement providing information about the NES, modern awards, agreement making, the right to freedom of association and the role of Fair Work Australia. Employers must give new employees a copy of the Information Statement as soon as practicable after they commence work.

“Employees should be provided with the Information Statement before they commence employment (e.g. with a letter of offer). Agree or disagree?”

76 per cent of respondents agreed with that proposition and 24 percent disagreed.

Related written comments

While there was general support for this NES the view was also put that the timing of the distribution of the Information Statement to be left to employer discretion.

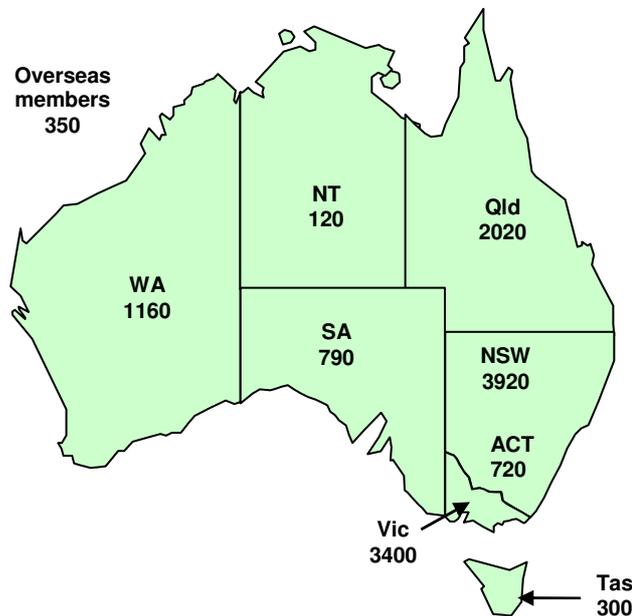
ABOUT AHRI

The Australian Human Resources Institute (AHRI) is the only association dedicated to the representation of human resource and people management professionals in Australia. AHRI has a financial membership of approximately 13,000 and a broader stakeholder base in the order of 25,000.

More than 10,000 AHRI members and professionals across the nation attend seminars and other events conducted by the Institute each year. Topics covered at AHRI events include workplace relations, occupational health & safety, training and development, recruitment and retention, remuneration and benefits, HR information systems, job design and international people management.

AHRI has a presence in each state and territory as shown below -

AHRI members by state and territory (as at February 2008)



Institute members occupy positions as HR and people managers within the top 100 companies and within small-to-medium enterprises. AHRI members also include small and single-person consultancies as well as practitioners from large consulting and law firms, in addition to academics from a range of institutions and related disciplines. AHRI's governance structure is that of a not-for-profit entity owned by a consortium of members. It is an independent organisation overseen by a board with representation from business, government and the elected membership in the states and territories.

AHRI has a strong international presence, being the only Australian organisation recognised by the World Federation of Personnel Management Associations. The AHRI National President sits on the board of the World Federation as an Asia Pacific member. The board includes representatives from our counterparts in the USA and the UK, the two largest HR institutes in the world, in addition to countries such as Singapore, Canada and the Philippines. AHRI has also been successful in winning a major tender for the Dubai government and is currently training 400 of their employees using Australian HR best practice frameworks.

The annual AHRI Convention is the peak HR and people management event in Australia. It attracts first-rate international speakers of the order of Jim Collins, Gary Hamel and Kjell Nordstrom, in addition to eminent Australians such as Paul Keating, Geoffrey Blainey, Janet Holmes a Court, Ian Harper and Ita Buttrose. Keynote overseas speakers at the 2008 AHRI National Convention include Lynda Gratton, Lyn

Heward, Daniel Pink and Allan Pease, as well as Mick Keelty, Ian Kiernan, Christine Nixon and Tim Costello from Australia. The AHRI Convention attracts in the order of 2500 attendees annually. AHRI also conducts annual awards for excellence in people management which in 2006 and 2007 included an Innovation Award co-sponsored by the Australian Government.

AHRI conducts formal education and, since the establishment of a national HR accreditation system in 2004, AHRI accredits HR-related courses in Australian universities. The institute also runs specialist professional development seminar events in all states and territories that attract in the order of 4000 attendees during the course of a year.

AHRI disseminates information to members through its highly regarded *hrmonthly* magazine, the refereed *Asia Pacific Journal of Human Resources*, and a fortnightly *ENews*.

In recent times, AHRI has conducted research either independently or jointly in a number of areas. In 2007 AHRI commissioned Deakin University to conduct longitudinal research using the AHRI database to better inform members and the general public about the impact of the then Work Choices legislation within Australian workplaces. Despite some resistance within Government to the commissioning of that research project, we persisted and a report of the first findings of the study was released in August 2007 and received considerable nationwide media attention.

AHRI also participated in an international HR competency study with the University of Michigan in 2007. Approximately 1200 AHRI members contributed to that research conducted by Professors Dave Ulrich and Wayne Brockbank, which resulted in AHRI's model of professional excellence which now guides the development of the institute's education offerings and other intellectual property.

Through undertaking other research, notably AHRI's quarterly *HRpulse* surveys, the Institute is fully conscious that the business expectations being placed on HR practitioners are increasingly demanding. Accordingly AHRI is continuing its efforts to lift the skill level of the profession and, where gaps emerge, provides seminars and professional development activities to improve the knowledge base and the standing of the profession in business.

As one of the professions central in the delivery of solutions to the economic and workplace relations agenda of the Federal Government, AHRI is pleased to make this submission on the National Employment Standards in the public interest.

AHRI looks forward to the opportunity to further discuss with the Government the Standards as well as other related parts of the legislative program leading towards the implementation of Fair Work Australia.

Please contact in the first instance Paul Begley, the National Manager of Government and Media Relations, Level 10, 601 Bourke Street, Melbourne 3000 by mail, 03 9918 9232 by telephone or email paul.begley@ahri.com.au



Peter Wilson AM
National President