

WORK/FAMILY **balance**

the national employment standards and modern awards



By Steven Penning

With a mandate to abolish the Howard government's WorkChoices legislation, during the course of its first term, the Rudd government has gradually introduced major changes to workplace relations laws, which will be fully implemented by 1 January 2010.

The changes are not new or radical, but they are important, and they won't be too great an impost on business. The base upon which this new system is built is the ten National Employment Standards (NES), which were released in June 2008, and above this base the new laws are regulated by the Modern Award system.¹

The NES is a collection of clear and simple provisions that could collectively be described as having a direct impact on fairness in the workplace by balancing the often competing issues of work and family commitments. The government has intended that the NES be as simple as possible to ensure that all employees and employers can more easily understand and comply with their rights and obligations.

And this is important because, in the past, the legislation has been overly complicated. To understand what I mean, take a look at the clauses of the NSW Clerical and Administrative Employees award for casuals, who make a good example because they are more numerous in the new millennium than they were 60 years ago when the original legislation was created.²

Most people who work casually

understand that they get a 20 per cent loading for a minimum of four hours work per week. However, under the existing NSW Clerical and Administrative Employees Award,³ there are complications with the way casual overtime work is calculated, particularly if employees work unusual hours.

It's complicated because overtime can be calculated on a daily basis or on a weekly basis. If someone works only one day a week, which measure does an employer use to calculate this? And what happens to the additional dinner allowance loading of 17 per cent, required when someone works through the hours of 6pm to 7pm? What does an employer do when they only need to employ someone to work one day a week with a lunch-time start for a shift that goes through until the early evening? The rules become even more complicated when people work on Sundays and public holidays.

A SAFETY NET IN TWO PARTS: THE NEW MODERN AWARD SYSTEM AND NES

Much of this complexity is simplified by the government's Modern Awards system, which will come into force at the same time as the NES on 1 January 2010. The new system builds on the NES and provides facilitative provisions. Modern awards will contain up to a further ten minimum standards, tailored to the specific industries and occupations to which they apply.

The intention of the new award system and the NES is to provide a safety net in two parts that is economically sustainable, promotes flexible modern work practices and efficient and productive performance of work. They are intended to be consistent with a system that promotes collective bargaining, is non-discriminatory and is based on principles of equal remuneration for a week of work of equal or comparable value.

The *Fair Work Act* provides that modern awards will include terms such as minimum wages, a range of types of employment, arrangements for when work is performed, overtime rates, penalty rates, annualised wage arrangements, allowances, leave

and leave loading, superannuation, consultation, representation and dispute settlement.⁴

Award modernisation is not intended to extend award coverage to high-income employees, though they will still be covered by the NES. Nor will it extend award coverage to managerial employees, or other employees who, because of the seniority of their roles, have not traditionally been covered by awards. It is designed not to disadvantage employees or increase costs for employers. And it is designed so as not to result in the overriding or modification of enterprise awards or Notional Agreements Preserving State Awards (NAPSAs) derived from state enterprise agreements.

The NES does not deal with minimum wages, which are protected by modern awards, and it will not be possible to exclude, modify or contract out, either by a registered agreement or a common law contract, in a way that undermines it as the safety net. Nevertheless, it will be open to an employer to offer an employee, by way of contract or agreement entitlements, more generous terms and conditions than those contained in the NES.

The government has set out, as a major objective of the NES, the need to ensure that 38 hours per week remains the standard maximum for full-time employees.⁵ Long working hours can affect the health, safety and well-being of employees, and can also have a detrimental impact on their families and the community. And, while the government also recognises that business sometimes requires employees to work in excess of the standard 38 hours per week, it has required that these extra hours be defined as 'reasonable additional hours'. This is significant because many industries have excessive hours that have only been paid at the contract rate or not at all.

Any determination about whether or not additional hours are reasonable, must take into account any risk to an employee's health and safety from working the additional hours. It should look at the employee's personal circumstances, including family responsibilities, as well as the needs of

the workplace or enterprise in which the employee is employed and whether the employee is entitled to receive overtime payments, penalty rates or other compensation for working the additional hours.

Much of the machinery for the flexibility provisions in relation to application of the NES are matters for inclusion in modern awards. Each modern award will contain an award flexibility clause. The large majority of modern awards will utilise the published standard clause.

The Textile, Clothing and Footwear Award is the only priority modern award published to date that varies the flexibility clause (following submissions regarding the particular Non-English Speaking Background (NESB)⁶ workforce in that industry).

Features of note of the model flexibility clause include the terms that an employer and individual employee may agree to vary, which are limited to arrangements for when work is performed, overtime rates, penalty rates, allowances and leave loading. The employer and individual employee must have genuinely made the agreement without coercion or duress.⁷

The agreement must be in writing, state each term of the award that is varied, detail how the application of each term has been varied and how it does not disadvantage the employee, and state the date it commences. The employer must give the individual employee a copy of the agreement and keep a copy as a time and wages record.⁸

The agreement may be terminated by an employee giving four weeks' notice. The employer is required to ensure that any individual flexibility arrangement must result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed. The standard flexibility clause will be varied to take account of the amended request from the minister and to introduce the better-off overall test (referred to as the 'BOOT' test).⁹

Flexibility under the NES includes a request to the employer to change working arrangements for the purpose of assisting the employee in caring >>



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for a child. An employee, who has a minimum of 12 months' continuous service, and is a parent, or has responsibility for the care of a child under school age, may apply.

The employee will be required to make the request in writing and must set out details of the change sought and the reasons for the change, and the employer must give the employee a written response to the request within 21 days. If the request is being refused, this written response must provide reasons why and explain how on 'reasonable business grounds' the request is being knocked back.¹⁰

While exactly what 'reasonable business grounds' means is not defined in the proposed flexible working arrangements in the NES, the government intends that Fair Work Australia will provide general information and assistance to employers as to what may constitute reasonable business grounds. It may be relevant, for example, to include the cost of accommodating the employee's request and the employer's ability to reorganise work arrangements and the business needs of the employer.

It is also important to note that an employer does not have to grant or refuse a request in full and may propose an alternate flexible arrangement. Importantly, Fair Work Australia will not be able to impose a flexible working arrangement on an employer.

ANNUAL, PARENTAL AND CARERS LEAVE UNDER THE NES

To qualify for parental leave provisions under the NES, an employee must have completed at least 12 months' continuous service with their employer immediately before the date of birth or expected date of birth of the child, or expected date of placement of an adopted child. A casual employee is

not entitled to the NES, unless he or she has a sequence of periods of employment of at least 12 months. In order to access parental leave, an employee will be required to provide 10 weeks' notice of intention to take the leave (unless this is not reasonably practicable); and provide reasonable evidence of eligibility on the employer's request.¹¹

This is an improvement on parental leave entitlements, in that it provides each parent with a separate entitlement of up to 12 months' unpaid parental leave. This means, for example, that the mother of a child could take 12 months' leave at the time of the birth of her child and then return to work, at which point the father could take 12 months' leave.

Alternatively, where the family prefers one parent to take a longer period of leave, that parent will have the right to request up to 12 months' additional unpaid parental leave. However, the employer may refuse the request for additional leave on reasonable business grounds. The parental NES also entitles an employee returning from parental leave to return to the position they held prior to commencing leave. Where that position no longer exists, the employee will be entitled to return to a position that is comparable in status and pay to the former position.¹²

The annual leave aspect of the NES applies to all employees, other than casuals, and isn't particularly different from what was in place previously, other than removing the provision that allowed employees to cash in up to two weeks of their annual leave. An employee is entitled to four weeks' paid annual leave for each year of service, with an additional week for shift workers under a modern award.¹³

Curiously, there is no reference to

leave loading in the NES, and this is significant given the inclusion of a loading in many State awards (NAPSAs). If a workplace does not have modern award coverage, then employees are likely to be worse off when NAPSAs expire in December this year, if this issue is not addressed, leaving only award employees as entitled to the loading.

The NES does provide personal and carers leave for an employee, other than a casual employee, which is up to ten days' paid leave for each year of service and two days paid as compassionate leave when there is a death or serious illness of a family member or household member. The two days can also be used for genuine caring purposes, or family emergencies, if paid carers' leave is exhausted, and these two days also apply to casual employees as unpaid carers and compassionate leave.¹⁴

This leave accrues progressively under the NES. An employee may take paid personal/carers leave if the leave is taken because the employee is unfit for work because of a personal illness, or personal injury affecting the employee; or to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of a personal illness, or personal injury affecting the member; or an unexpected emergency affecting the member.¹⁵

The amount of accrued paid carers leave that can be taken each year is not capped. An employee must use any paid personal and carers leave entitlement before accessing unpaid carers leave.¹⁶

An employee is deemed not to be on paid personal and carers leave on a day that is a public holiday in the place where the employee is based. This means that an employee is entitled to be re-credited any paid personal/carers leave that would otherwise have been taken on the relevant public holiday.¹⁷

As a new provision, the community service leave NES provides an employee with a right to be absent from work, to engage in prescribed community service activities. Other than jury service, community service leave under the proposed NES will be unpaid.¹⁸

THE ISSUE OF STATE AWARDS AND PUBLIC HOLIDAYS

As part of its commitment to national workplace relations laws, the federal government has stated that it will work co-operatively with the states and territories to develop uniform minimum long service leave. Currently, long service leave entitlements are contained in state and territory laws and federal awards and agreements and often vary considerably in operation and level of entitlement. The government has stated its desire to unify long service leave entitlements across jurisdictions to minimise confusion and complexity.

Until a uniform long service leave NES is developed, long service leave entitlements in pre-modernised awards, NAPSAs or state or territory laws will be preserved to ensure that they are not bargained away.

When an existing workplace agreement, AWA or industrial instrument ceases to operate, an employee will be entitled to the long service leave entitlements in a pre-modernised award or NAPSA. If no underlying award or NAPSA applies, the employee will be entitled to long service leave under an applicable state or territory law. The provisions of existing agreements or AWAs will not be altered as they relate to long service leave.

The public holiday NES will protect public holidays declared by state and territory governments and is intended to protect an employee's right to reasonably refuse to work on a public holiday and will guarantee payment where an employee is absent from work because of the public holiday.

The NES will not include penalty rates for working on a public holiday, and an employer is entitled to request that an employee work on a public holiday, if the request is reasonable. An employee may refuse the request to work on the public holiday, either if the request is not reasonable or if the employee's refusal to work is reasonable.¹⁹

A range of factors is set out in the proposed public holidays NES, which must be considered in determining whether an employer's request or an employee's refusal is reasonable. These

are essentially the same factors that would be considered in determining whether a requirement to work overtime is or is not reasonable.

CHANGES TO TERMINATIONS AND REDUNDANCY

Notice-of-termination provisions in the NES essentially replicate the same provisions in the *Workplace Relations Act* and reflect provisions that have been in place for several years. An employer will continue to be able to either give actual notice or make a payment in lieu of notice.

An employer will, however, be required to provide notice of termination in writing. For purposes of calculating a payment in lieu of notice, an employee is entitled to be paid their full rate of pay, not just their base rate of pay. This is in contrast to the calculation for redundancy, where the payment is on the base rate of pay for an employee's ordinary hours of work.²⁰

The NES will introduce a redundancy pay entitlement that does not presently exist under the *Workplace Relations Act*. Under the redundancy pay NES, all employees who are made redundant and who are employed in workplaces with 15 or more employees will be entitled to redundancy pay in accordance with the scale determined by the Australian Industrial Relations Commission (AIRC) in the 2004 redundancy test case.

Redundancy pay is intended to partially compensate employees for the loss of non-transferable employee entitlements, such as sick leave and long service leave, and the inconvenience and hardship imposed by being made redundant.

The calculation of redundancy pay under the proposed NES is based on an employee's period of continuous service (as at the date of termination) in accordance with gradations on a table that ranges from four weeks' redundancy pay for at least one year, but less than two years' service, to 12 weeks for at least ten years' service.²¹

An employee would not be entitled to redundancy pay in circumstances where there has been a transmission of business, and an employee transfers to a new employer and the new employer

recognises the employee's prior service with the previous employer; or the business has been transferred and the employee rejects an offer of employment with a new employer on substantially similar terms and conditions and the new employer recognises the employee's prior service with a previous employer.²²

There will be provision for Fair Work Australia to reduce or remove redundancy payments where an employer obtains suitable alternate employment for an employee or an employer is unable to make a redundancy payment because of genuine financial difficulties.

After 1 January, the new changes to industrial and employment laws will be substantial and far reaching. They have been introduced in a staged and reasonable manner and have followed substantial advanced discussion and notification of transitional arrangements. Between now and when they come into force fully, the most effective key to assist employees and employers with how to deal with them will be the provision of information, knowledge and education. ■

Notes: **1** *Fair Work Act 2009* (Cth). **2** Compare *Industrial Relations Act 1996* (NSW) s57(3) and original legislation under *Industrial Arbitration Act 1940* (NSW). **3** See *Clerical and Administrative Employees (State Award Part A: Section 5 ('Casual Employees'))*. Accessed from Department of Commerce online at <http://www.industrialrelations.nsw.gov.au/awards/controller.jsp?awardCode=135&view=document>. **4** *Fair Work Act 2009* (Cth) ss139 – 155. **5** *Ibid*, s62(1). **6** For example of these arguments, see submission by Fairwear Australia dated 9 February 2006 entitled 'Submission to the Award Review Taskforce From Fairwear'. **7** *Fair Work Act 2009* (Cth) s202. **8** *Ibid*, s203(7). **9** *Ibid*, s193. **10** *Ibid*, s76. **11** *Ibid*, s74. **12** *Ibid*, s84. **13** *Ibid*, s87. **14** *Ibid*, s96. **15** *Ibid*, s97. **16** *Ibid*, s103. **17** *Ibid*, s98. **18** *Ibid*, s108. **19** *Ibid*, s114(3). **20** *Ibid*, s119. **21** *Ibid*, s119(2). **22** *Ibid*, s122.

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