



**FIRST IR**

18 June 2008

This week the Federal Government released the draft legislation for the National Employment Standard (NES) and an updated Award Modernisation Request (AMR).

From the 1<sup>st</sup> of January 2010 the NES combined with the terms of modern awards will set the minimum terms and conditions employee's employment in Australia. That is the safety net for all employees will be set by the NES and the relevant modern award. The NES and the modern award matters are briefly summarised as follows:

National Employment Standard Conditions	Matters that may be contained in a Modern Award
<ol style="list-style-type: none"><li>1. Maximum Weekly Hours</li><li>2. Requests for Flexible Working Arrangements</li><li>3. Parental leave and related entitlements</li><li>4. Annual Leave</li><li>5. Personal/Carers leave and compassionate leave</li><li>6. Community Service Leave</li><li>7. Long Service Leave</li><li>8. Public Holidays</li><li>9. Notice of Termination and Severance (Redundancy) entitlements.</li><li>10. Fair Work Information Statement.</li></ol>	<ol style="list-style-type: none"><li>1. Minimum Wages</li><li>2. Type of Employment</li><li>3. Arrangements for when work is performed</li><li>4. Overtime Rates</li><li>5. Penalty Rates</li><li>6. Annualised wage and salary arrangements</li><li>7. Allowances</li><li>8. Leave, leave loading and arrangements for taking leave</li><li>9. Superannuation</li><li>10. Procedures for consultation, representation and dispute settlement.</li><li>11. Flexibility Clause</li></ol>

Understanding the way the NES and modern awards interact will be essential in providing employee's with an appropriate safety net of employment. This interaction has been given some clarification by the Minister's updated AMR.

The updated AMR provides general guidance on how an AMR will interact with the NES as well as specific instructions on how modern awards are to deal with:

- Redundancy
- The interaction between a term of a modern award and the NES
- Cashing out of Annual Leave
- Ordinary Hours of Work
- Disputes on the interaction between a term of a modern award and the NES

The AMR also provides instructions for modern awards on:

- the creation of a new 'Cover All' Award
- Long Service Leave
- Allowances

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### General Interaction between a modern award term and the NES:

The AMR states at paragraph 30 that:

*“A modern award cannot exclude the NES or any provision of the NES. However, a modern award can provide ancillary or incidental detail in relation to the operation of an entitlement under the NES but only if the effect is not detrimental to an employee in any respect, when compared to the NES.”*

This means that the Commission will be authorised to draft a term of a modern award that gives effect to a component of the NES so long as it does not provide for a detriment to the employee. Such a term of a modern award could potentially allow a provision of the NES to be expressed in a different way that is taken to equal the NES.

The only condition placed on the Award/NES interaction is that the Award condition must meet or exceed the standard.

### Specific Interaction between the NES and modern awards:

#### Redundancy:

For most employees the NES and the Modern Award will set the federal minimum redundancy entitlements. Award free employees will only be covered by the NES. The NES redundancy provisions are the current federal minimum standard. The NES redundancy provisions only apply to employers with more than 15 employees.

Redundancy entitlements may also be contained in a modern award. Where a modern award provides for a more generous entitlement to an employee, then the term of the modern award will apply. This is particularly relevant to small businesses as it is unlikely that the NES exemption for small business will be meaningful. We have come to this conclusion because it is clear that most awards and NAPSAs contain redundancy provisions that provide for severance entitlements for employees of small business.

If a modern award provides for an ‘industry specific redundancy scheme’, then that scheme will operate to the exclusion of the NES. An example of an ‘industry specific redundancy scheme’ is a portable redundancy scheme as has been suggested for the civil construction industry.

#### *Advice for employers:*

Redundancy entitlements in awards and NAPSAs can vary significantly. It is important for employers to be involved in the drafting of these entitlements in order to ensure that the redundancy terms of a modern award are in line with the current federal minimum standard and are not simply increased as a result of this process.

#### Cashing out of Leave:

The AMR illustrates how modern awards will allow the cashing out of leave. This represents a significant departure from the current system of only allowing the cashing out of accrued leave through the terms of a workplace agreement, such as an AWA or collective agreement.

The proposal contained in the AMR will allow a modern award to contain terms for allowing employers and employees to cash out accrued leave. There is no detail at this stage on how much leave will be available to be cashed out, nor is there any detail on record keeping requirements. There is an increased emphasis on the ‘quality of consent’ under this provision, which we think indicates that the provision in the substantive legislation in relation to coercion and coercive conduct are likely to be expanded and strengthened.

#### *Advice for employers:*

It is unlikely that a mandatory entitlement to cash out annual leave or sick leave will be part of a modern award. These entitlements covered by workplace agreements are often discretionary. It is important for employers to be involved in the drafting of these provisions to ensure that such entitlements are discretionary rather than mandatory entitlements.

### Ordinary Hours of Work:

The AMR states that:

“Many entitlements in the NES rely on modern awards to set out ordinary hours of work on a weekly or daily basis for an employee covered by the modern award”.

The NES provides for a maximum of 38 hours per week. The way these hours are arranged and the process for determining ordinary hours will be given effect by the terms of a modern award.

*Advice for employers:*

It is important that employers be involved in the modernisation process to ensure that the drafting of clauses that arrange ordinary hours provide as much flexibility as possible. In our opinion these provisions in awards have the potential to arrange hours of work on a daily and weekly basis as opposed to an hourly basis.

Disputes in relation to the NES:

The Commission is required to draft a clause that deals with how disputes over the interaction between the NES and the Award will be resolved. This clause gives a very wide discretion to the Commission in terms of the processes and forums within which disputes may be ventilated. In our opinion this is likely to contain mandatory conciliation provisions.

**Other issues**

New ‘cover all’ Award:

The Minister has requested that :

*“the Commission create a modern award that covers employees who are not covered by another modern award and who perform work of similar nature to that which has historically been regulated by awards (including state awards).”*

The creation of this new award will potentially extend coverage of award covered employees. In our opinion this will likely cover employees that may have slipped through the gaps in the creation of new ‘industry’ or ‘occupational’ modern awards, or are part of a frontier industry that does not currently have award coverage. The expanded coverage is not expected to extend to managerial employees.

Long Service Leave:

The minister has stated that modern awards will not contain provisions dealing with long service leave. The federal government will over the next 18 months negotiate with the states to create a national long service leave standard.

Allowances:

The AMR provides guidelines on how allowances should be drafted in modern awards, and methods on how allowances will be adjusted in accordance with minimum wage rate adjustments. Allowances should be clearly and separately identified in modern awards.

Final Comments:

The release of the updated AMR, answers many of the questions concerning the interaction between the NES and Modern Awards. The remaining details not covered in the updated AMR will be given further clarification when the substantive legislation is released later this year. Until then it important that employers remain vigilant in the award modernisation process to ensure favourable conditions of employment in their industry are maintained.

It is interesting to note that the NES refers to the taking of annual leave in terms of ‘weeks’ and the taking of personal leave in terms of ‘days’. This represents a significant departure from the WorkChoices system of accruing all entitlements in terms of ‘hours’.

One final thing to note is that even though the NES terms have been realised in their purported final form, they may be subject to further review as they are consolidated into the terms of the substantive legislation.