



1. OVERVIEW

The WorkChoices amendments to the Workplace Relations Act (**WR Act**) introduced, for the first time, a set of 5 minimum conditions (called the “Australian Fair Pay and Conditions Standard” or “**AFPCS**”) which applied to all employees of national system employers.

The Fair Work Act (**FW Act**) extends this concept further with 10 new conditions. These conditions will replace the existing AFPCS with a greatly expanded set of new minimum standards to apply to every employee employed by a national system employer.

These 10 minimum conditions are called the “National Employment Standards” (**NES**).

Whereas modern awards will only apply to workers earning less than \$100,000 (indexed)¹, the NES will apply to all employees of a national system employer, no matter how much an employee earns.

For employees earning over \$100,000, the NES represents their basic safety net of entitlements.

For employees earning under \$100,000 and covered by a modern award, the NES safety net will be supplemented by that modern award as it will also prescribe additional minimum conditions.

2. COMMENCEMENT OF NES

Notwithstanding the fact that many important provisions of the FW Act apply from 1 July 2009, the NES do not come into force until 1 January 2010.

In the period from 1 July 2009 to 1 January 2010, the AFPCS set out the in WR Act continues to apply.

3. WHAT ARE THE NES?

The types of matters that are covered by the NES are more comprehensive than those covered by the AFPCS.

The AFPCS covered only the following 5 matters:

- (a) basic rates of pay and casual loading;
- (b) maximum ordinary hours of work;

¹ For a discussion of modern awards and those employees who will be excluded from coverage of those awards, see our separate paper entitled “Modern Awards under the Fair Work Act”.

- (c) annual leave;
- (d) personal leave; and
- (e) parental leave and related entitlements.

The NES covers the following 10 matters:

- (a) maximum weekly hours (Division 3);
- (b) requests for flexible working arrangements (Division 4);
- (c) parental leave and related entitlements (Division 5);
- (d) annual leave (Division 6);
- (e) personal/carer's leave and compassionate leave (Division 7);
- (f) community service leave (Division 8);
- (g) long service leave (Division 9);
- (h) public holidays (Division 10);
- (i) notice of termination and redundancy pay (Division 11); and
- (j) provision of the Fair Work Information Statement (Division 12).

There is some overlap between the existing AFPCS and the new NES but there are also significant points of difference. The differences, similarities and new obligations are addressed below.

4. MAXIMUM WEEKLY HOURS OF WORK

In almost the same terms as the preceding WR Act, the NES provides for a maximum of 38 ordinary hours of work per week for full time employees.

Employers can request that their employees work additional hours, provided that such requests are reasonable.

Whereas the WR Act allowed for the averaging of hours over a 12 month period, the NES provides that:

- (a) if an employee is covered by a modern award or enterprise agreement, the hours worked may be averaged over a specified period. The length of this period is not prescribed in the FW Act; and
- (b) if an employee is not covered by a modern award or enterprise agreement, hours of work cannot be averaged over a period of more than 6 months.

5. REQUEST FOR FLEXIBLE WORKING ARRANGEMENTS

One of the most significant new provisions in the NES is the introduction of a right for employees who are parents or carers to request flexible working arrangements.

This right is available to parents or carers who:

- (a) care for children under school age; or
- (b) care a child (or children) with disabilities who are under 18 years.

The parent or carer cannot make the request unless he or she:

- (a) has at least 12 months of completed service with the employer; and
- (b) if he or she is employed on a casual basis, is a long term casual employee of the employer and has the reasonable expectation of continuing employment by the employer on a regular and systematic basis.

The employee's request must be made in writing and give details of the change sought and the reasons for the change.

The employer must give the employee a **written response** to the request which, if the request is refused, sets out reasons for the refusal.

Importantly, neither the NES nor the FW Act gives the employee a course of action by which to challenge a refusal. However, employers should be very cautious of failing to genuinely consider an employee's circumstances, because there may be other avenues available to an employee.

The right to request flexible working arrangements does not operate to the exclusion of other State or Territory laws. So, for example, the employee continues to have rights pursuant to State based anti-discrimination legislation. A poorly worded or ill-considered response to a flexibility request could form the basis for a discrimination complaint².

The development of similar legislation in the UK has resulted in an increase in flexible work arrangements. It has normalised different work practices (such as working from home, working part-time, leaving early or starting late).

The best approach for employers is to carefully consider requests for flexible working arrangements and provide clear and easy to understand reasons if such requests are to be refused.

6. PARENTAL LEAVE

Like the AFPCS in the WR Act, the NES continues the statutory right to unpaid maternity, paternity and adoption leave. It also includes special maternity leave (for maternity-related illness), pre-adoption leave (for attending interviews etc) and the right to transfer to a safe job whilst pregnant. These provisions largely mirror those previously contained in the WR Act.

The significant change in terms of parental leave is the right to request an extension of unpaid parental leave for a further period of 12 months. That is, a parent can request leave for up to

² For more detail, see our separate paper titled "Some Discrimination Issues Arising Under the Fair Work Act".

a total of 24 months. The employer can only refuse the request for an additional 12 months' leave on reasonable business grounds. Any refusal must be made in writing within 21 days of receipt of the request and must set out reasons for the refusal. The caution given above in relation to dealing with flexibility requests made in respect of carer's obligations applies equally here.

There is a further change in the NES, being the right of couples to split the period of parental leave between them so that each partner has a period of up to 12 months which runs consecutively.

Unlike the AFPCS, the NES permits same-sex de facto couples to take parental leave on the same terms as set out above.

7. ANNUAL LEAVE

Like the AFPCS, the NES entitles all employees (other than casuals) to:

- (a) 4 weeks of paid annual leave per annum; or
- (b) 5 weeks of paid annual leave per annum if they are shiftworkers

Under the AFPCS, annual leave accrued and was credited to the employee at the end of each 4 week period of continuous service. Under the NES, annual leave accrues progressively throughout the year based on the employee's ordinary hours of work.

Like the AFPCS, annual leave accumulates from year to year.

The NES includes a provision preventing an employer from unreasonably refusing to agree to an employee's request for leave. The NES also states that paid annual leave "*must be taken for a period agreed between an employee and his or her employer*".

However, there is no provision in the NES which allows an employer to require leave be taken at certain times (such as where an employee has excessive amounts of leave accrued to him or her). The AFPCS did include such a provision.

Absences on public holidays or for eligible community service cannot be counted as periods of annual leave.

Employees can cash out their accrued annual leave entitlements if they are covered by a modern award or enterprise agreement which provides for the cashing out of paid annual leave by an employee, provided that after the cash out, at least 4 weeks of accrued leave remains.

If an employee is not covered by an enterprise agreement or modern award, the employee can cash out annual leave by written agreement with the employer, provided that after the cash out, at least 4 weeks of accrued leave remains.

8. PERSONAL / CARER'S LEAVE & COMPASSIONATE LEAVE

The provisions for personal / carer's leave largely reflect those contained in the AFPCS.

That is, all employees (excluding casuals) are entitled to:

- (a) 10 days of paid personal / carer's leave per annum; and
- (b) 2 days of unpaid carer's leave for each occasion that they need to care for a member of their immediate family and have no paid personal / carer's leave left.

Unlike the AFPCS, personal / carer's leave:

- (a) accrues progressively throughout the year based on the employee's ordinary hours of work; and
- (b) there is no cap of the number of days of accrued personal/carer's leave that can be used by an employee as carer's leave each year (under the AFPCS, only 10 days of accrued leave could be used each year for carer's responsibilities).

Employees can cash out their accrued entitlements to personal / carer's leave if they are covered by a modern award or enterprise agreement which provides for the cashing out of paid personal / carer's leave by an employee, provided that after the cash out, at least 15 days of accrued personal / carer's leave remains.

Employees who are not covered by a modern award or enterprise agreement **cannot** cash out personal / carer's leave.

Like the AFPCS, the NES also includes an entitlement to 2 days of paid compassionate leave for each occasion when a member of the employee's immediate family or household:

- (a) contracts or develops a personal illness that poses a serious threat to his or her life; or
- (b) sustains a personal injury that poses a serious threat to his or her life; or
- (c) dies.

For personal / carer's leave and compassionate leave, employees are required to give notice of taking leave "as soon as practicable" and must advise the employer of the expected period of absence from work.

The employee must also provide the employer with "*evidence that would satisfy a reasonable person*" of the employee's personal illness or carer's responsibilities or the basis for compassionate leave.

Unlike the AFPCS, the NES does not specify the type of evidence required (for example, medical certificate or statutory declaration) although this requirement may be included in modern awards or enterprise agreements.

9. COMMUNITY SERVICE LEAVE

An employee is entitled to be absent from work for "*eligible community service*".

Eligible community service is defined as jury service, voluntary emergency management activities or an activity which may be prescribed by the regulations.

Employees are required to give notice of taking leave “as soon as practicable” and must advise the employer of the expected period of absence from work. The employee must also provide the employer with “evidence that would satisfy a reasonable person” of the employee’s involvement in ‘eligible community service’.

Employees on jury service (excluding casuals) are entitled to be paid at their ordinary base rate of pay by the employer for their period of jury service up to 10 days in duration. The amount to be paid to the employee is reduced by the amount of jury pay they receive from the government body for their jury service.

Like other provisions of the NES, the provisions relating to community service do not operate to the exclusion of State or Territory laws on the same subject.

10. LONG SERVICE LEAVE

It is the intention of the Federal Government to introduce a national standard for long service leave.

Until that time, the NES provides that any provisions regarding long service leave which currently apply will continue to apply.

11. PUBLIC HOLIDAYS

As with the AFPCS, employees are entitled to be absent on public holidays and paid for their ordinary hours of work which would have been rostered or required for that day.

An employer may request that an employee work on a public holiday. An employee may refuse that request if the request is unreasonable or if the employee’s refusal is reasonable.

There are a range of factors which are set out in section 114(4) of the FW Act relevant to determining what is reasonable in the relevant circumstances.

The public holidays are defined as:

1 January (New Years Day); 26 January (Australia Day); Good Friday; Easter Monday; 25 April (Anzac Day); the Queen’s Birthday as designated in each State or Territory; 25 December (Christmas Day); 26 December (Boxing Day) and any other day declared or prescribed by or under a law of a State or Territory to be observed generally within that State or Territory as a public holiday.

12. NOTICE OF TERMINATION & REDUNDANCY

The following new provisions **do not** apply to employees:

- (a) employed for a specified period of time for a specified task or the duration of a specified season;
- (b) terminated because of serious misconduct;

- (c) who are casuals;
- (d) (other than apprentices) to whom a training arrangement applies and whose employment is limited to that training arrangement; or
- (e) prescribed by the regulations as being someone to whom this NES does not apply.

There are other limitations for daily hire and weekly hire employees.

Notice of Termination

An employer MUST NOT terminate an employee unless the employer has given the employee WRITTEN NOTICE of the day of the termination.

The day of termination cannot be before the day the notice is given.

The amount of notice to be given to the employee is to be calculated as follows:

Period	Employee's period of continuous service with the employer at the end of the day the notice is given	Period
1	Not more than 1 year	1 week
2	More than 1 year but not more than 3 years	2 weeks
3	More than 3 years but not more than 5 years	3 weeks
4	More than 5 years	4 weeks

The amount of notice is to be increased by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.

The employer may make a payment in lieu of notice.

A modern award or enterprise agreement may also include terms specifying the period of notice an employee must give in order to terminate his or her employment.

Although the required period of notice is no different from the WR Act, the requirement for written notice is new and employers must ensure that they comply with this provision on or before the day of termination.

Redundancy Pay

Prior to the introduction of the NES on 1 January 2010, there has never been a compulsory redundancy scheme available to *all* employees in Australia.

Awards (including NAPSAs) have included redundancy provisions but the NES, with its broad application to non-award employees, extends that further for the first time.

The NES entitles employees to be paid redundancy pay by the employer if the employee's employment is terminated:

- (a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
- (b) because of the insolvency or bankruptcy of the employer.

The amount of redundancy pay to be given to the employee is to be calculated as follows using the employee's base rate of pay for the employee's ordinary hours of work:

Redundancy pay period		
	Employee's period of continuous service with the employer on termination	Redundancy pay period
1	At least 1 year but less than 2 years	4 weeks
2	At least 2 years but less than 3 years	6 weeks
3	At least 3 years but less than 4 years	7 weeks
4	At least 4 years but less than 5 years	8 weeks
5	At least 5 years but less than 6 years	10 weeks
6	At least 6 years but less than 7 years	11 weeks
7	At least 7 years but less than 8 years	13 weeks
8	At least 8 years but less than 9 years	14 weeks
9	At least 9 years but less than 10 years	16 weeks
10	At least 10 years	12 weeks

An employer can apply to Fair Work Australia (FWA) to vary this amount if the employer:

- (a) obtains other acceptable employment for the employee; or
- (b) cannot pay the amount.

In such circumstances, FWA may determine that the amount of redundancy pay be reduced to a specified amount (which may be nil) that FWA considers appropriate.

An employer is *excluded* from the obligation to make redundancy payments if immediately before the time of the termination, or at the time when the employee was given notice of the termination (whichever happened first):

- (a) the employee's period of continuous service with the employer is less than 12 months; or
- (b) the employer is a small business employer (for the definition of 'small business employer, please see our separate paper titled "Unfair Dismissal Under the Fair Work Act").

An employer is also excluded from having to make redundancy payments on the transfer of employment if:

- (a) the new employer recognises the prior service of the employee with the old

employer; or

(b) the new employer:

- (i) offers the employee a job on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than, the employee's terms and conditions of employment with the old employer immediately before termination; and
- (ii) recognises the employee's service with the old employer,

and had the employee accepted the job, there would have been a transfer of employment.

FWA has some ability to vary the above exclusions if the outcome would operate unfairly to the employee.

A modern award may also include a term specifying other situations where redundancy pay does not apply.

13. FAIR WORK INFORMATION STATEMENT

Employers must give all new employees a Fair Work Information Statement prepared by the Fair Work Ombudsman.

14. OTHER

Although not mentioned as part of the NES, the FW Act includes provision for FWA to conduct national wage reviews and make national wage orders for non-award employees. There are also additional 'safety net' provisions dealing with the method of payment to employees and specific provisions for vulnerable employees (such as outworkers).

15. TRANSITIONAL PROVISIONS – MOVING TO THE NES

As stated, the NES does not take effect until 1 January 2010, notwithstanding the fact that many other important provisions of the FW Act commence on 1 July 2009.

In the period from 1 July 2009 until 1 January 2010, the AFPCS in the WR Act will continue to apply.

As a general rule, from 1 January 2010, an employee's service with an employer before the NES provisions commence counts as service of the employee with the employer for the purposes of determining entitlements under the NES. This means that, for example, an employee is not required to serve a further period to qualify for community service leave or long service leave.

However, this general rule does not apply to the calculation of redundancy pay under the NES if an employee's terms and conditions of employment prior to the commencement of the NES **did not** provide for any entitlement to redundancy pay. The purpose of this exclusion is to prevent employers without any prior liability to make redundancy payments from instantly incurring significant liability.

An employee's period of service to be used for the purpose of calculating redundancy payments under the NES begins on 1 January 2010 for employees who have not previously been entitled to redundancy pay.

Annual leave and personal / carer's leave are also dealt with separately from the general rule. An employee who has accrued paid annual leave or paid personal / carer's leave prior to the commencement of the NES is treated as if it accrued under the NES, with the NES rules applying to that leave as a minimum.

If an employee is on a period of leave which is covered by the NES, the NES will apply to that leave from the period of time it comes into operation for the remainder of that leave.

The new requirements for termination apply only to terminations occurring on or after 1 January 2010. Prior to that time, the WR Act (section 661) continues to apply as the minimum requirements for employers.

Because the NES is a minimum standard, more favourable arrangements that were in place prior to the commencement of the NES will continue to apply.

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