



National Employment Standards Exposure Draft

 AUSTRALIAN INDUSTRY GROUP

Ai GROUP SUBMISSION

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National Employment Standards Exposure Draft

Submission by Ai Group

Executive Summary

1. The National Employment Standards (NES) need careful consideration. Road-testing the Standards through the release of the Exposure Draft is the right move. This approach enables problems to be identified and dealt with before the legislation is introduced into Parliament and well before the operative date of 1 January 2010.
2. In preparing this submission, it is not Ai Group's intention to comment on all aspects of the exposure draft of the NES nor every issue dealt with in the associated discussion paper, but rather to outline Ai Group's position on the most significant issues.
3. Ai Group's broad position on the key issues dealt with in the NES is as follows:

- ***General principles***

Legislated employment standards apply to all industries and to everyone who works in them. The Standards, therefore, need to be flexible and cater for the extremely wide variety of working arrangements within businesses across the Australian economy. The Standards need to contain the necessary flexibilities and rules to enable them to operate fairly and effectively for all employees covered by them, including award-covered and award-free employees. Ai Group is strongly opposed to the concept of an award being created to set out additional rules relating to NES entitlements for "award-free" employees. Any additional rules which are necessary should be contained within the NES. It is vital that the implementation of the NES reduce the regulatory burden upon industry, not increase it.

- ***Relationship between the NES and other instruments***

The interaction between the NES and awards, workplace agreements and common law contracts needs careful consideration. In general, Ai Group regards the proposed rules relating to the interaction between awards and the NES as workable, subject to the qualifications outlined in this submission. Ai Group is very concerned about the proposed interaction rules relating to the NES and workplace agreements. As presently drafted, each and every specific provision within the NES must be complied with and cannot be varied by a workplace agreement other than by the employer offering a more generous provision. Such an approach is excessively inflexible and problematic given the nature of the entitlements in the NES. Also, It is unclear to Ai Group how workplace agreements are intended to interact with awards in respect of those award provisions which are expressly permitted to deal with a matter which could otherwise be seen as modifying or excluding NES entitlements (eg. hours of work averaging arrangements and annual leave cashing-out provisions). Ai Group has proposed an approach to dealing with these issues in its submission.

- ***Division 1 – Preliminary***

The definition of “*base rate of pay*”, and the term “*ordinary hours of work*” used within that definition, are critical in interpreting NES entitlements. It appears to be clear from the discussion paper, and the draft legislation, that the term “*ordinary hours of work*”, as used in the NES, is not intended to include any overtime hours (including regularly worked overtime and additional hours built into shift rosters). If there is any doubt about the interpretation, a definition of “*ordinary hours of work*” should be included in the NES. The definition should make it abundantly clear that overtime is excluded. Otherwise the problems which resulted from the original WorkChoices provisions could re-appear.

- ***Division 2 – Maximum weekly hours***

The maximum hours entitlement in Division 2 is worded in terms of a bold prohibition on an employee working more than 38 hours per week. A more appropriate approach would be to frame the entitlement in terms of an employee being “*required or requested by an employer to work*”, in line with the current provision in the *Workplace Relations Act*. The proposed NES restricts the ability to average hours to modern awards. This places unnecessary and unreasonable restrictions on hours of work. The NES should be redrafted to permit an employer and an employee to reach agreement in writing that the 38 hour week can be averaged over a specified period of up to 12 months. The “reasonable hours” criteria in the NES are appropriate.

- ***Division 3 – Requests for flexible working arrangements***

The right to request enshrined within Division 3 is too broad. Eligibility criteria need to be included to provide a more balanced approach. The right should only apply once an employee has a period of 12 months’ continuous service, it should not apply to casuals, and it should only apply to the mother, father, step mother, step father, grandfather, grandmother or legal guardian of the child. Also, if an employee has requested a particular change in working arrangements and such change has been reasonably refused by the employer, the employee should not have the right to make a similar request for a reasonable period, say 6 months. It is noteworthy that the UK “right to request” legislation contains eligibility criteria dealing with similar issues to those set out above. Ai Group supports the educative approach enshrined within the draft NES whereby Fair Work Australia would not have the power to impose any requested work arrangements upon employers. Such an approach is more likely to achieve positive outcomes than a heavy-handed prescriptive approach.

- ***Division 4 – Parental leave and related entitlements***

The longstanding “*primary caregiver*” concept should be retained in the parental leave provisions of the NES. The Standards should deal with the issue of requests to extend and shorten the period of parental leave, to ensure the entitlements and obligations of both parties are clear. Parental leave provisions in Australia have always required that evidence of pregnancy and of incapacity to work due to a pregnancy-related illness take the form of a medical certificate from a medical practitioner and this should be retained given the extent of the rights associated with parental leave (eg. 12 months’ unpaid leave with an ability to extend, and paid leave for up to nine months if a safe job is not able to be provided). The “no safe job leave” provisions, as drafted, would operate unfairly for employers and Ai Group has proposed a number of important changes. During the conciliation stage in the AIRC’s *Family Provisions Case*, Ai Group reached agreement with the ACTU on the introduction of consultation provisions during periods of parental leave creating obligations for both employers and employees. These balanced provisions should be adopted in lieu of the one-sided consultation requirements in the NES. Also, employees should be required to provide 4 weeks’ notice of return to work in order to take advantage of the return to work guarantee.

- ***Division 5 – Annual leave***

The existing provisions of the *Workplace Relations Act* relating to the cashing-out of annual leave are working effectively and should be retained. The NES should provide flexible options for taking leave in the same way as is currently available. The NES should enable employers to direct award-covered, agreement-covered and award-free employees to take leave in particular circumstances, including: when an employee has accumulated excessive leave; and when an employer elects to shut-down its operations for the purposes of providing annual leave to employees. Also, Ai Group has concerns about the proposed interaction between

annual leave and personal / carer's leave. Ai Group has proposed alternative approaches to drafting various provisions to address potential problems relating to part-time workers and shift workers.

- ***Division 6 – Personal / carer's leave and compassionate leave***

The NES refers to personal / carer's leave entitlements in terms of days, rather than hours. This is problematic. It will substantially disadvantage employers where employees work 12 hour shifts or other patterns of work with extended work days and it will substantially disadvantage part-timers. The entitlement should be expressed as *"76 hours, or a proportionate amount for an employee who has worked less than 38 hours per week during the year of service"*. During the *Family Provisions Case*, Ai Group reached agreement with the ACTU to double the amount of personal/carer's leave that could be accessed as carer's leave each year from five days to 10 days. This agreement was reflected in the test case award clause and was ultimately incorporated within the AFPC Standard. The draft NES deletes the 10 day agreed annual limit and Ai Group submits that it should be retained. Also, there are many workplace agreements which allow partial cashing-out of personal / carer's leave and many of these arrangements are longstanding and strongly supported by employees. The NES should be amended to ensure that these arrangements are not disturbed. The extension of an unpaid compassionate leave entitlement to casuals is reasonable, and is consistent with the agreement reached between Ai Group and the ACTU during the *Family Provisions Case*.

- ***Division 7 – Community service leave***

The right of any employee to be absent on jury leave and to have appropriate employment protections in place is longstanding and is dealt with in all Australian jurisdictions under State and Territory jury legislation. Ai Group's concern with respect to the jury service provisions in Division 7

is the proposal to introduce a national entitlement of all employees (other than casuals) to paid jury service leave. Make-up pay for jury service is commonly dealt with in awards and workplace agreements. Currently, Victoria is the only state in which non-award employees are entitled to make up pay for jury service leave. In other jurisdictions, if an employee is not entitled to jury service pay under an industrial instrument, the issue is left to be determined between the employer and employee concerned. In Ai Group's experience relatively few disagreements arise in respect of this issue. Ai Group submits that the NES should be redrafted to provide that make up pay for jury service is a matter to be dealt with in modern awards. It should also be able to be dealt with in workplace agreements and contracts of employment. Ai Group is pleased that the important definitions in section 659 of the Act relating to leave to carry out voluntary emergency management activity have been retained in the NES.

- ***Division 8 – Long service leave***

Ai Group supports the development of a national long service leave standard, consistent with the common federal award long service leave provisions. It is essential that employers retain the ability to vary the long service entitlements in the NES through a workplace agreement. This includes both the initial provisions of Division 8 and the proposed national long service leave standard when it is developed. The new national workplace relations system must not prevent federal workplace agreements overriding State long service leave legislation – including the portable long service leave legislation which operates in the construction industry. For years various unions have been endeavouring to expand the coverage of the construction industry schemes into other industries and employers in these industries need to be able to use workplace agreements to ensure that they can continue to provide long service to their employees in the traditional way.

- ***Division 9 – Public holidays***

The Federal and State Governments should form a common policy on public holidays so that the operation of the minimum standards becomes clear in every State. The NES needs to be amended to clarify that employees are not entitled to a day substituted for a public holiday as well as the original public holiday. The NES sets out the criteria for a reasonable request to work on a public holiday and reasonable refusal of such a request. The criteria are obviously based upon those in the *Workplace Relations Act*. However, some essential elements have been removed and these should be reinstated. It is essential that the NES be amended to clarify that casual employees are not entitled to be paid on a public holiday. Casuals are paid a casual loading in lieu of being paid for public holidays.

- ***Division 10 – Notice of termination and redundancy pay***

Under the draft NES payment in lieu of notice is to be paid at the “full rate of pay” for the hours the employee would have worked during the notice period. Ai Group opposes this payment rule, in favour of the existing rule in the *Workplace Relations Act*. Also, the NES should include minimum notice periods to be given by employees and the ability for an employer to deduct pay in lieu from other amounts to be paid to the employee on termination when an employee fails to give notice. With regard to redundancy, the definition should exclude termination of employment resulting from the “*ordinary and customary turnover of labour*”. Further, the NES should specify that awards cannot contain redundancy pay provisions for businesses with fewer than 15 employees (This is a very important issue to small businesses and clarifying the issue will prevent union claims for modern awards to contain such provisions). Ai Group is pleased that the NES includes a transmission of business provision similar to the one agreed upon between Ai Group and the ACTU in the *Redundancy Case* and endorsed by the Full Bench. The award provision is a practical one

which has resolved numerous problems which were arising in respect of redundancy payments in circumstances where a business is transmitted.

- ***Division 11 – Fair Work Information Statement***

Ai Group regards the requirement for employers to issue a Fair Work Information Statement to new employees as further unnecessary “red tape” upon employers. If the Government proceeds with the requirement, the Statement should be developed in consultation with major industry representative bodies, including Ai Group. Also, it is important that flexibility be provided for employers to issue the Statement in a variety of ways in keeping with contemporary business practices.

- ***Minimum wages***

The draft Standards do not deal with wages. It is appropriate that a Federal Minimum Wage and Special Federal Minimum Wages for employees with a disability be included in the NES to ensure that non-award covered employees are entitled to a minimum wage rate. Ai Group is very strongly opposed to the concept of an award being made to deal with Minimum Wages and/or additional rules relating to NES entitlements for “award-free” employees. The proposed Federal Minimum Wage and proposed Special Federal Minimum Wages for employees with a disability should be adjusted annually after Fair Work Australia has conducted its annual minimum wage review, to maintain consistency with the relevant wage rates within the award system. The legislation should be drafted to enable this adjustment to be achieved via Regulations.

4. This submission does not deal with compliance / enforcement provisions as the Government has indicated that these matters will be dealt with in the development of its substantive industrial relations legislation.

5. This submission also does not deal with the processes associated with adjusting the NES over time. That said, Ai Group is of the view that adjustments to the NES should not occur unless Fair Work Australia has determined that a change is necessary. This will avoid changes being made for political reasons and lead to greater certainty and consistency over time.
6. Ai Group is one of the largest national industry bodies in Australia representing employers in manufacturing, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, airlines and other industries.
7. Ai Group has had a strong and continuous involvement in the workplace relations system at the national, state, industry and enterprise level for nearly 140 years.
8. This submission is made by Ai Group and on behalf of its affiliated organisation, the Engineering Employers' Association, South Australia (EEASA).



Heather Ridout

CHIEF EXECUTIVE

General principles

9. The National Employment Standards (NES) need careful consideration. Road-testing the Standards through the release of the Exposure Draft is the right move. This approach enables problems to be identified and dealt with before the legislation is introduced into Parliament and well before the operative date of 1 January 2010.
10. There is a big challenge with enshrining minimum employment standards in legislation because they are conceptually a “one size fits all” approach. Unlike awards and other industrial instruments which apply to particular industries or occupations, legislated employment standards apply to all industries and to everyone who works in them. Working arrangements, for example, which suit the Information and Communications Technology (ICT) sector may not suit the manufacturing or construction sectors, and plumbers and senior managers would similarly have very different workplace needs.
11. The Standards, therefore, need to be flexible and cater for the extremely wide variety of working arrangements within businesses across the Australian economy. The diversity of arrangements continues to change and broaden and thus the Standards need to have an eye to the future as well.
12. The need for flexibility requires that the Standards not contain unnecessary detail. However, the need for flexibility must not prevent provisions being included if they are necessary to maintain practicality and workability and to preserve important rights of employees and employers.
13. If the Standards are not appropriate there is the potential for unnecessary costs and regulations to be imposed on business and for numerous administrative and other difficulties to be created for employees and employers. As the Government has identified, Australian industry is already burdened with excessive regulation and this is impacting negatively upon

productivity and competitiveness, including in the workplace relations area. It is vital that the implementation of the NES reduce the regulatory burden upon industry, not increase it.

14. The Standards need to contain the necessary flexibilities and rules to enable them to operate fairly and effectively for all employees covered by them, including award-covered and award-free employees. Ai Group is very strongly opposed to an award being created to set out additional rules relating to NES entitlements for “award-free” employees. Any additional rules which are necessary should be contained within the NES.
15. The interaction between the Standards and awards, workplace agreements and common law contracts needs careful consideration. These issues are dealt with in the next section.

Relationship between the NES and other instruments

Relationship between the NES and awards

16. At present, the NES, when in read in conjunction with the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* and the Award Modernisation Request¹ is structured as follows:

- Awards operate in conjunction with the NES and together comprise the safety net of minimum conditions for employees;
- As set out in paragraph 30 of the Award Modernisation Request, “a modern award may build on entitlements in the proposed NES where the Commission considers it necessary to do so to ensure the maintenance of a fair minimum safety net for employees covered by the modern award, having regard to existing award entitlements for those employees” (Emphasis added);
- In certain areas the NES expressly permit awards to deal with certain matters pertaining to particular entitlements; and
- Except as outlined above, awards are not permitted to contain provisions which are inconsistent with the NES.

17. In general, Ai Group regards the proposed rules relating to the interaction between awards and the NES as workable, subject to the qualifications outlined below.

18. The workability and appropriateness of the interaction rules will be dependent upon the interpretation which the Australian Industrial Relations Commission (AIRC) places upon the wording in paragraph 30 of the Award Modernisation Request, as reproduced above. Ai Group is very concerned at the potential for unions to use the award modernisation process to pursue widespread improvements in existing minimum standards (given the ability for modern

¹ issued by the Deputy Prime Minister, The Hon Julia Gillard MP, on 28 March 2008.

awards to “build on” NES entitlements). This would increase inflationary pressures and decrease the competitiveness of Australian industry. The potential for such negative outcomes is highlighted by a front page article which appeared in the Australian Financial Review on 29 January 2008. The following extract is relevant:

“The ACTU has called a three-day forum of 200 union leaders in Canberra from tomorrow to work on the strategy.....A leaked draft report makes clear that employers can expect to be entangled in a broader campaign net in future, with a top political priority being to keep pressure on Labor for ‘decent IR legislation’ to replace the Work Choices system. Unions are urged to use the Labor government’s award modernisation process for ‘maximising the scope of awards and avoiding any reduction in workers rights’, and to raise minimum standards through reviews of awards in industrial tribunals.” (Emphasis added)

19. Further, as set out in the previous section of this submission, Ai Group is very strongly opposed to an award being created to set out additional rules relating to NES entitlements for “award-free” employees. Any additional rules which are necessary should be contained within the NES.
20. Ai Group intends to monitor developments relating to the interaction between the NES and awards closely. If the rules prove to be problematic we will bring our concerns to the attention of the Government and seek necessary legislative changes.

Relationship between the NES and workplace agreements

21. Ai Group is very concerned about the proposed interaction rules relating to the NES and workplace agreements.

22. Clause 3 of the NES states that:
- “(1) A term of a modern award, or an agreement or contract, has no effect to the extent to which it purports to exclude the National Employment Standards or any part of the National Employment Standards.*
- (2) Subsection (1) does not affect a term of a modern award that does something that modern awards are expressly permitted to do:*
- (a) by a provision of this Part; or*
- (b) by Regulations made for the purpose of paragraph 8(1)(a).”*
23. The NES does not define what is meant by “any part” of the NES. However, the effect of the above provision appears to be that each and every specific provision within the NES must be complied with and cannot be varied in any respect by a workplace agreement other than by the employer offering a more generous provision. Such an approach is excessively inflexible.
24. The existing rules relating to the interaction between the Australian Fair Pay and Conditions Standards (“AFPC Standard”) and workplace agreements are far from ideal for employers or employees, but are far more flexible than Section 3 of the NES.
25. Section 172 of the existing *Workplace Relations Act* provides that the AFPC Standard prevails over a workplace agreement or a contract of employment to the extent to which “in a particular respect” the AFPC Standard provides a “more favourable outcome” for the employee. The Regulations define what the terms “in a particular respect” and “more favourable outcome” mean.
26. Within defined constraints, the existing approach allows the provisions of the AFPC Standard to be modified through a workplace agreement provided that the alternative approach implemented is a more favourable one for the employee. Examples of alternative approaches which many employers and

employees have implemented and which are expressly referred to in the Regulations include:

- An amount of leave can be expressed in a different (but equivalent) form to the Standard (eg. personal leave can be expressed in days rather than hours); (**Note: It is critical that this flexibility be retained to deal with situations where employees work 12 hour shifts or other extended working days, otherwise the outcome will be extremely unfair upon employers and will result in massive cost increases**);
- An employee can forgo an equivalent amount of pay in return for an additional period of annual leave;
- An employee can access a greater amount of personal leave as carer's leave than the 10 days per annum provided for in the Standard;
- An employee can forgo an equivalent amount of pay in return for an additional period of personal/ carer's leave.

27. In preference to retaining the approach contained within s.172 of the *Workplace Relations Act*, Ai Group proposes that the following rules relating to the interaction between the NES and workplace agreements apply:

Preferred option: A workplace agreement can contain different provisions to those set out in a particular Division of the NES, subject to a “no disadvantage test” against the provisions of the NES for that Division;

Second option: Retain an approach similar to that enshrined within s.172 of the *Workplace Relations Act* whereby the NES would prevail over a workplace agreement or a contract of employment to the extent to which “in a particular respect” the Standards provide a “more favourable outcome” for the employee.

28. In summary, Ai Group regards the proposed rules within the NES relating to the interaction between the Standards and workplace agreements as excessively inflexible and problematic.

Relationship between the NES and contracts of employment

29. Section 172 of the *Workplace Relations Act* applies equally to workplace agreements and contracts of employment. Therefore, the comments made in the section above relating to workplace agreements are relevant, as are the proposed interaction rules.
30. It is vital that employers not lose important existing flexibilities provided under s.172 - including the ability to express an amount of leave or other entitlement in a different (but equivalent) form to the NES (eg. personal leave expressed in days rather than hours).

Relationship between awards and workplace agreements, in the context of NES entitlements

31. It is unclear to Ai Group how workplace agreements are intended to interact with awards in respect of those award provisions which are expressly permitted to deal with a matter which could otherwise be seen as modifying or excluding NES entitlements.
32. For example, the draft NES permits modern awards to deal with hours of work averaging arrangements and provisions permitting cashing-out of annual leave. The following questions arise:
- Can a workplace agreement import by reference the terms of the award in the above areas, or would this breach s.3 of the NES?
 - Can a workplace agreement modify the terms of the award provisions in the above areas, for example by providing for different hours of work

averaging arrangements or different cashing-out arrangements? Would such an approach breach s.3 of the NES?

33. Ai Group submits that an interaction rule needs to be included in the NES to deal with this issue and that such interaction rule needs to clarify that a workplace agreement is able to modify the terms of awards - including in respect of those award provisions which are expressly permitted to deal with an NES matter which could otherwise be seen as modifying or excluding NES entitlements.

Division 1 – Preliminary

Section 3 – Exclusion of the NES

34. As set out in the previous section, Ai Group is concerned about s.3 of Division 1, which provides that workplace agreements cannot exclude any part of the NES. An alternative, more suitable approach is set out above.

Definition of “base rate of pay”

35. The definition of “base rate of pay”, and the term “ordinary hours of work” used within that definition as well as separately, are critical in interpreting NES entitlements.

36. In addition to its use in the definition of “base rate of pay”, the term “ordinary hours of work” is used in:

- The “transfer to a safe job” provisions in s.24 of Division 4;
- The accrual provisions for annual leave in s.26 of Division 5;
- The payment rule for annual leave in s.29 of Division 5;
- The accrual provisions for personal/carer’s leave in s.32 of Division 6;
- The payment rule for personal carer’s leave in s.32 of Division 6;
- The payment rule for compassionate leave in s.40 of Division 6;
- The payment rule for jury service in s.45 of Division 7;
- The payment rule for public holidays in s.49 of Division 9; and
- The payment rule for redundancy pay in s.52 of Division 10.

37. It appears to be clear from the discussion paper, and the draft legislation, that the term “ordinary hours of work”, as used in the NES, is not intended to include any overtime hours (including regularly worked overtime and additional hours built into shift rosters). If there is any doubt about the interpretation, a definition of “ordinary hours of work” should be included in the NES. The

definition should make it abundantly clear that overtime is excluded. Otherwise the problems which resulted from the original WorkChoices provisions could re-appear.

38. The amendments to the *Workplace Relations Act* in late-2006 placed a cap of 38 on hours of work for leave accrual purposes to address the substantial problems that had resulted from the original provisions. It is noteworthy that, based upon media comments at the time, both the Labor Party and the Coalition accepted that the problems were very real and needed to be addressed.
39. Within industries such as construction, manufacturing and mining, a very large number of workplace agreements specify the number of ordinary hours of work for full-time employees and specify the amount of overtime which employees are required to work. This often (but not always) takes the form of a shift roster which incorporates both ordinary hours and overtime hours. For example, in the construction industry it is common for employees to work a 56 or 60 hour week, of which 36 or 38 hours is ordinary time, with the remainder being overtime. Sometimes workplace agreements incorporate annualised salary arrangements, whereby the overtime penalties which would otherwise be payable, are absorbed into a higher rate of pay.
40. It is unfair for employers to be required to provide additional annual leave, personal/carer's leave etc to employees simply because they have been rostered to work more than 38 hours per week. The employees are compensated for the overtime through the additional payments which the employer is required to make under the terms of the relevant award, workplace agreement or contract of employment.
41. Under the current AFPC Standard, employees can be required to work a reasonable number of additional hours beyond the 38 ordinary hours in the legislation. However, regardless of how many additional hours are worked beyond 38 and how regularly such hours are worked, only 152 hours of annual

leave (4 weeks x 38 hours) and 76 hours of personal/carer's leave (2 weeks x 38 hours) can accrue in a 12 month period. The NES provisions need to be equally clear in this respect.

42. In the *Reasonable Hours Test Case*² the ACTU endeavoured to establish the principle that the term "ordinary time hours of work", as used in the *Workplace Relations Act*, should be interpreted to mean the actual hours worked, including regularly worked overtime. This was rejected by the Commission. In the July 2002 decision of a five member Full Bench of the AIRC (including President Giudice and the two Vice Presidents) the Commission said:

"[49] The expression "ordinary time hours of work" in s.89A(2)(b) is a conflation of two well-established expressions in the industrial relations vocabulary - "ordinary hours of work" and "ordinary time." It is to be inferred that the composite term refers to hours which may be worked without the payment of overtime and to the regulation of those hours. The ACTU submitted that the expression should be construed to mean "regular, normal, customary or usual hours". We doubt that this is so. The distinction between ordinary hours and overtime is one which is deeply embedded in the Commission's awards and agreements.
(Emphasis added)

² PR072002

Division 2 – Maximum weekly hours

43. The maximum hours entitlement in Division 2 is worded in terms of a bold prohibition on an employee working more than 38 hours per week. A more appropriate approach would be to frame the entitlement in terms of an employee being “*required or requested by an employer to work*”, in line with the current provision in the *Workplace Relations Act*. This would more accurately reflect the nature and purpose of the entitlement. Many employees, particularly high-income employees and those in management positions, work additional hours even though they are not required to do so in any formal sense, and often do so without their employer’s awareness.

Averaging of hours

44. The proposed NES restricts the ability to average hours to modern awards. This places unnecessary and unreasonable restrictions on hours of work.
45. The discussion paper (at paragraph 49) states that the NES does not include rules about averaging of hours because the Government considers that averaging arrangements are best dealt with in modern awards, tailored to particular industries and occupations. It is imperative that averaging of hours be available for all employees and not merely through modern awards.
46. There can be no doubt that flexible work arrangements are widespread. There are numerous shift rosters and work patterns within which hours of work are averaged over periods of more than one week and involve an employee working more than 38 hours in a week. For example, the standard Rostered Day Off system involves employees working 40 hours for the first three weeks and 32 hours in the fourth week. Also, the common “four shift on, four shift off” 12 hour continuous roster involves employees working 48 hours (4 shifts) in some weeks and 36 hours (3 shifts) in other weeks.

47. There are a very large number of workplace agreements which contain flexible hours of work arrangements and shift patterns which would breach the proposed Standard as currently drafted.
48. Under the current provisions of the *Workplace Relations Act*, an employer and an employee may agree to average hours of work over a specified period via a written agreement, or through a provision in a workplace agreement or award.
49. The discussion paper (at paragraph 51) states that an averaging arrangement in a modern award would be a relevant factor in determining whether additional hours were reasonable or unreasonable. Although this is likely to be the case, there is no guarantee that the existence of the averaging arrangement will be a decisive or even weighty factor. This gives rise to considerable uncertainty for employers whether they are in compliance with the NES in such cases.
50. Ai Group submits that where an employee works an average of 38 hours over an agreed averaging period, the hours worked in any week in excess of 38 should not generally be regarded as “additional hours” for the purpose of s 9(4). Instead, the employee should only be regarded as working “additional hours” where he or she works more than an average of 38 hours a week over the averaging period. This is consistent with the current guarantee under s.226 of the *Workplace Relations Act*.
51. Ai Group submits that the NES should be redrafted as follows:
- Employers and employees should be permitted to reach agreement in writing that the 38 hour week can be averaged over a specified period of up to 12 months;
 - Consistent with s.225 of the *Workplace Relations Act*, a relevant provision in an award or workplace agreement should be deemed to represent agreement being reached between the employer and the employee.

“Reasonable additional hours”

52. The “reasonable hours” criteria in the NES are appropriate and preferable to the current provisions of the *Workplace Relations Act*.

53. Since first sighting the WorkChoices legislation, Ai Group has argued that the following additional reasonable hours criterion needs to be added:

“the employee’s compensation”.

54. The addition of the above factor is consistent with the *Reasonable Hours Decision* of the AIRC. Following the handing down of the Full Bench decision, Ai Group entered into negotiations with the ACTU and the Association of Professional Engineers, Scientists and Managers Australia (APESMA) and agreement was reached on the addition of the above factor in reasonable hours clauses in awards applying to professional staff, to reflect the fact that it is common for professionals and senior staff to be required to work long hours but to receive compensation for such hours in their salary package.

55. The agreement reached between Ai Group and the unions has been endorsed by the AIRC and incorporated within numerous award variations. For example, see sub-clause 21.5 in the *Information Technology Industry (Professional Employees) Award 2001*.

56. It is not reasonable for an employee to refuse to work additional hours if the employee has been paid a salary which takes into account the requirement to work those additional hours. The other factors set out in s.226(4) of the *Workplace Relations Act* fail to adequately deal with this issue. The addition of a further factor addressing the salary issue is essential to address common working hours and salary arrangements for managers and professionals but its addition will not disadvantage other employees.

57. Ai Group's submissions appear to have been addressed in the draft NES (albeit in a slightly different form) through the addition of the following criterion:

“whether the employee is entitled to receive overtime payments, penalty rates or other compensation for working the additional hours. (Emphasis added).

58. In Ai Group's view, the reference to “*other compensation*” in the above criterion would cover situations where an employee is paid a higher salary which takes into account a requirement to work additional hours.
59. The definition set out in paragraph 9(4) allows “*any other relevant matter*” to be taken into account, thus ensuring that the definition is a flexible one and that any other relevant matters could be considered.

Division 3 – Requests for flexible working arrangements

60. Division 3 of the NES contains a new and very broad entitlement. It would enable an employee who has responsibility for the care of a child under school age at any time during his or her employment to request any change in working arrangements. This would include but not be limited to changes to the hours of work, the pattern of work and the location of work. The entitlement would apply regardless of the employee's relationship with the child or level of responsibility for the child.
61. The entitlement is far broader than the right to request which the AIRC adopted in the *Family Provisions Case*. After conferences and hearings which continued over a two year period, the AIRC adopted an award clause giving employees the right to request that their employer allow them to:
- extend the existing one year period of unpaid parental leave by a further period not exceeding one year;
 - return to work on a part-time basis following parental leave; or
 - extend the existing period of unpaid parental leave which both parents can take simultaneously (one week in most awards) up to a maximum of eight weeks.

Under the test case clause, an employer was given the right to refuse an employee's request if reasonable in the circumstances. The grounds for reasonable refusal include cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service.

62. In the test case proceedings, the ACTU pursued a broader right to request changes in work arrangements, including the number of hours worked as well as the times at which work could be performed. An initial union claim for the right to request changes to the location of work was ultimately not pursued.

63. Ai Group submits that the provisions of Division 3 of the NES are too broad. The right to request should be limited in the following way to provide a more balanced approach:

- The right should only apply once an employee has a period of 12 months' continuous service (similar to the right granted to employees in the *Family Provisions Case*);
- The right should not apply to casuals, or if this is not acceptable then it should only apply to casuals who have worked regularly and systematically over a period of at least 12 months and who have a reasonable expectation of ongoing employment (similar to the right granted to employees in the *Family Provisions Case*);
- The right to request should only apply to the mother, father, step mother, step father, grandfather, grandmother or legal guardian of the child;
- If an employee has requested a particular change in working arrangements and such change has been reasonably refused by the employer, the employee should not have the right to make a similar request for a reasonable period, say 6 months;
- The example in the draft NES relating to a change in the location of work should be removed, because most employers would not have the ability to accommodate this.

64. It is logical that the 12 months' service requirement for the right to request an extension in the period of parental leave under Division 4 of the NES apply equally to the right to request a change in work arrangements under Division 3.

65. Of course, the fact that an employee is not eligible to make a formal request would not prevent the employee seeking a change in work arrangements from his or her employer. Such informal requests are made and accommodated every day in numerous workplaces.

66. It is noteworthy that under the UK “right to request” legislation eligibility requirements apply, as set out in the following information reproduced from the website of the UK Department of Business, Enterprise and Regulatory Reform (www.berr.gov.uk):

Which parents can make requests under the right?

Both mothers and fathers, whether they are the biological parents or legal guardians, can make applications, as can those adopting a child and foster parents and private foster carers and people who have been granted a residence order in respect of a child. Spouses or partners of these individuals are also eligible, including partners of the same sex as long as they have or expect to have responsibility for the upbringing of the child.

What are the age limits of the child?

The employee’s child must be under six, or under eighteen where the child is disabled, for the employee to be eligible to make an application.

Which carers of adults can make requests under the right?

Carers who care, or expect to be caring, for a spouse, partner, civil partner or relative or who live at the same address as the person being cared for can make applications. A relative for this purpose is a mother, father, adopter, guardian, special guardian, parent-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister, sister-in-law, uncle, aunt or grandparent. Step-relatives and half-blood relatives are also included (see “Definitions” below).

In relation to all the relatives mentioned, this includes adoptive relationships and relationships which would have existed but for an adoption i.e. the employee’s natural relatives.

NB an error has occurred in the regulations omitting daughter-in-law and son-in-law from the definition of relative. This will be rectified as soon as possible.

Bear in mind that the adult concerned will have to be in need of care for the employee to be eligible to make a request for flexible working. Under the legislation, there is no particular level of care required in order to show the person is in need of care, but an illustrative list of types of care that might be envisaged is included in [Making an application](#).

Which staff are covered?

The parent or carer will have to be an employee and have worked for their employer continuously for 26 weeks at the date the application is made. Continuous employment generally means working for the same employer without a break, but this is not always the case: further information is available at <http://www.dti.gov.uk/employment/pay/continuous-pay/index.html>.

Agency workers are not eligible. Neither are members of the armed forces. (However, whether an employee is eligible or not, many employers offer flexible working opportunities and the employee can still approach their employer to find out what opportunities exist.)

How often can an application be made?

One application every 12 months can be made under the right. This is regardless of whether a previous application was made in respect of a different caring responsibility i.e. an employee wishing to make a request to care for an adult would still have to wait a year even if their previous request had been to enable them to care for a child. Each year runs from the date when the application was made. Before making a subsequent application under the flexible working legislation, employees should bear in mind that they would still need to meet the eligibility criteria at the time of their subsequent application, i.e. be caring for a child under 6 (or 18 if the child is disabled) or for an adult covered under the legislation.

67. Ai Group supports the approach set out on page 12 of the NES discussion paper, whereby:

- The provisions of Division 3 of the NES are intended to encourage discussion between employers and employees;
- Fair Work Australia would not have the power to impose any requested work arrangements upon employers.

Such an approach is educative and is more likely to achieve positive outcomes than a heavy-handed prescriptive approach.

68. The discussion paper asks the question of whether “*reasonable business grounds*” needs to be defined. Ai Group is not convinced that a definition is necessary but if one is to be included it should incorporate the issues referred to in the AIRC’s *Family Provisions Decision*, that is cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service.

Division 4 – Parental leave and related entitlements

An employee who has “any responsibility” for the child

69. The parental leave entitlements in the NES are linked to an employee having “*a responsibility*” for the care of a child, rather than the employee having to be the child’s “*primary care-giver*”, which is the concept which underpins the provisions in the *Workplace Relations Act* (see paragraph 13(b) of the NES).
70. Ai Group submits that something more than “*a responsibility*” for the care of the child should be required to ensure the purpose of the leave is not undermined. The longstanding “*primary caregiver*” concept should be retained.

Commencement of parental leave for male employees

71. The NES requires that a male employee commence a period of parental leave “*on the date of birth of the child*”. This is too restrictive. Ai Group proposes that the provision be reworded to require leave to commence “*on the date of birth of the child, or an alternative date agreed upon between the employee and the employer*”.

Right to request an additional 12 months’ leave

72. This entitlement is consistent with that adopted by the AIRC in the *Family Provisions Case* and Ai Group is not opposed to it.
73. The discussion paper asks the question of whether “*reasonable business grounds*” needs to be defined. Ai Group is not convinced that a definition is necessary but if one is to be included it should incorporate the issues referred to in the AIRC’s *Family Provisions Decision*, that is cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service.

Other variations to period of parental leave

74. The NES does not deal with requests by employees to vary the period of parental leave, other than where the request relates to an extension of the standard entitlement for up to an additional 12 months.
75. Requests by employees to vary the period of parental leave, either by shortening or extending the period of which the employee originally notified the employer, are common in practice and raise issues of fairness and balance. Under the current provisions of the *Workplace Relations Act*, an employee has a right to extend the period of parental leave once by giving 14 days' written notice. Other extensions are subject to mutual agreement. Requests by an employee to shorten the period of parental leave are by written agreement between the employee and employer and no specific period of notice is required (see s.278 of the Act). However, to take advantage of the return to work guarantee, 4 weeks' notice is required.
76. Ai Group submits that the NES should deal with the issue of requests to extend and shorten the period of parental leave, to ensure the entitlements and obligations of both parties are clear. It is important that reasonable limits are placed on the rights of employees to vary periods of parental leave to recognise the need for a fair degree of business certainty. The provisions of the *Workplace Relations Act* strike the appropriate balance in this respect.

Evidence requirements

77. Parental leave provisions in Australia (including the existing AFPC Standard) have always required that evidence of pregnancy and of incapacity to work due to a pregnancy-related illness take the form of a medical certificate from a medical practitioner. Given the extent of the rights associated with parental leave (eg. 12 months' unpaid leave with an ability to extend, and paid leave for

up to nine months if a safe job is not able to be provided), it is inappropriate that this requirement be watered down to “*evidence that a reasonable person would regard as acceptable*”.

78. In all cases of birth-related parental leave, it is reasonable to require the production of a medical certificate of a medical practitioner and that the NES should specify this. Of course employers could choose to waive the right to be given such evidence if they chose to do so. It is difficult to see how such an obligation could place any unfair burden on an employee, especially considering that it is not required to be produced until 10 weeks before the expected date of birth. Production of a medical certificate is a longstanding requirement for such entitlements and has been retained in the current provisions of the *Workplace Relations Act*.

Transfer to a safe job

79. Ai Group opposed the WorkChoices “transfer to a safe job” provisions during the Senate inquiry into the legislation, on the basis that they significantly altered the longstanding award provisions and were unfair upon employers. Ai Group is equally opposed to the NES provisions which are even more unfair upon employers. The award test case “transfer to a safe job” provisions should be adopted in lieu of the provisions in the draft NES.
80. The federal award test case standard for parental leave requires that where an employee is pregnant and where, in the opinion of a registered medical practitioner, illness or risks arising from the pregnancy or hazards connected with the work make it inadvisable for the employee to continue in her present job, the employee is to be transferred to a safe job if the employer deems it practicable. If transfer to a safe job is not deemed practicable by the employer, the standard award clause enables the employee to elect, or the employer to require, the employee to commence unpaid parental leave.

81. The WorkChoices legislation and the draft NES provide a far more generous entitlement by requiring that, if the employer does not deem it practicable to transfer a pregnant employee to a safe job then the employee is entitled to commence paid “no safe job leave” immediately. The employee is entitled to be absent on paid “no safe job leave” for up to nine months and then be absent for a further unpaid period of up to 12 months (with a right to request a further 12 months leave).
82. The “transfer to a safe job” provisions are very unfair upon employers in the lead, chemical, manufacturing, construction, mining and other industries where the nature of the work may not be safe for pregnant employees. Thousands of jobs involve work which may not be suitable for pregnant women, particularly those in later stages of pregnancy. It will often not be feasible to transfer a pregnant employee to a safe job due to the unavailability of meaningful, safe work which the employee could perform. For example, a female process worker with poor literacy skills engaged by a company in the manufacturing industry may not be able to be meaningfully employed in an office.
83. In general, employment in the industries cited above is male-dominated and many progressive employers in these industries are implementing programs to increase the number of females employed. The “transfer to a safe job” entitlements provide a significant disincentive for employers in hazardous industries to employ females of child-bearing age.
84. In the period prior to the birth of a child, women in all industries often reach a stage where they can no longer safely carry out their normal duties. Many jobs involve lifting, carrying, long periods spent standing etc. Also, many women experience high blood pressure and other pregnancy-related medical conditions which may prevent even light work being performed safely. The “paid no safe job leave” provisions are open to abuse because a significant incentive is created for a pregnant employee to obtain a medical certificate stating that she is unable to perform her normal duties for medical reasons.

Such medical certificate would most likely be readily obtainable in later stages of pregnancy if the employee works in a manual job, particularly given that the medical practitioner is not required to visit the workplace to investigate the nature of the employee's job.

85. Despite the unbalanced nature of the WorkChoices "transfer to a safe job" provisions, the NES extends the entitlements further, creating even more unfairness for employers, as follows:

- Under the WorkChoices provisions, the employee is required to provide a "medical certificate from a medical practitioner" stating that she is unfit for work due to illnesses, risks or hazards relating to the pregnancy, whereas under the draft NES, the employee is only required to provide "evidence that would satisfy a reasonable person";
- Under the WorkChoices provisions, if the employee is transferred to a safe job the employee is entitled to "no other change to the employee's terms and conditions", whereas under the draft NES the employee is entitled to be paid at the "full rate of pay".

86. "Full rate of pay" is defined in s.5 of the NES and includes overtime, shift penalties, weekend penalties and various other allowances and payments. Ai Group submits that it is unfair to require an employer to pay shift penalties if the employee does not work shifts, weekend penalties if the employee does not work on weekends, overtime penalties if the employee does not work additional hours, and disability allowances if the employee does not experience such disabilities, in the safe job.

87. Also, casual employees should not be entitled to paid "no safe job leave". The NES, as currently drafted, does not appear to exclude casuals.

Consultation during periods of parental leave

88. During the conciliation stage in the AIRC's *Family Provisions Case*, Ai Group reached agreement with the ACTU on the introduction of consultation provisions during periods of parental leave. It was agreed that consultation provisions should be introduced which:
- Require employers to communicate with employees on parental leave about significant changes in the workplace during the period of leave; and
 - Require employees to keep their employer informed about significant matters which will affect their decisions about the duration of leave and whether they intend to return to work.
89. The above, balanced approach was supported by the AIRC and now forms part of the award test case provisions.
90. The NES provision is one-sided and should be modified to include an obligation upon employees to keep their employer informed about significant matters which will affect their decisions about the duration of leave and whether they intend to return to work. The ACTU regarded this as reasonable during the *Family Provisions Case*.

Operation of the return to work guarantee

91. Employees should be required to provide 4 weeks' notice of return to work in order to take advantage of the return to work guarantee. In the absence of such a provision, the employer would be required to comply with the guarantee even where little or no notice has been given of the employee's return to work, including where the employee has cut short his or her previously advised period of leave. A provision of this nature is longstanding and is currently contained in the *Workplace Relations Act*. It is an appropriate and reasonable requirement to balance the employee's entitlement with practical and operational issues of the business.

Division 5 – Annual leave

Accrual of annual leave

92. As set out in the section above relating to Division 1, the definition of “base rate of pay”, and the term “ordinary hours of work” used within that definition, are critical in interpreting NES entitlements. It appears from the discussion paper, and the draft legislation, that the term “ordinary hours of work”, as used in the NES, is not intended to include any overtime hours (including regularly worked overtime and additional hours built into shift rosters). If there is any doubt about the interpretation, a definition of “ordinary hours of work” should be included in the NES. The definition should make it abundantly clear that overtime is excluded. Otherwise the problems which resulted from the original WorkChoices provisions relating to annual leave accruals and payments could re-appear.

93. Under the current AFPC Standard, employees can be required to work a reasonable number of additional hours beyond the 38 ordinary hours in the legislation. However, regardless of how many additional hours are worked beyond 38 and how regularly such hours are worked, only 152 hours of annual leave (4 weeks x 38 hours) can accrue in a 12 month period. The NES provisions need to be equally clear in this respect.

94. The NES refers to annual leave entitlements in terms of weeks. Consistent with the AFPC Standard, flexibility needs to be included for annual leave to be expressed in a different (but equivalent) form to the NES (eg. in days or hours rather than weeks). This flexibility is necessary given the very diverse work patterns of employees in various industries.

Part-time employees

95. Ai Group submits that the annual leave accrual arrangements could be clearer in respect of the entitlements of part-time employees.
96. Under paragraph 26(1)(a) of the NES, an employee is entitled to “4 weeks of paid annual leave”. Ai Group proposes that the words “including non-working days” be added to clarify that an employee is not necessarily entitled to be paid for each day of the four weeks, and that a similar reference be added in paragraph (b).
97. This is consistent with the approach taken in many awards. For example, the relevant provision in the *Metal, Engineering and Associated Industries Award* states:

“A full time or part time employee under this award is entitled to a period of 28 consecutive days leave, including non-working days (ie. 4 weeks) after each 12 months service (less the period of annual leave) with the employer.”

Cashing out

98. Under the draft NES, cashing out of annual leave would only be possible if a provision permitting cashing-out is included in a modern award. Ai Group is unaware of any existing award which permits cashing-out of annual leave, other than on termination of employment. Cashing-out is not a concept that has to date been associated with the award system.
99. The current AFPC Standard permits cashing-out of annual leave only in the following circumstances:
- A formal workplace agreement which is binding on the employee and employer must provide for the cashing out of annual leave;
 - The employee must give the employer a written election to cash out leave;

- The amount paid in lieu must be at least equal to the employee's "basic periodic rate of pay";
 - The employer must authorise the cashing out;
 - During each 12 month period, an employee is not entitled to cash out more than half of their annual leave;
 - An employer must not require an employee to cash out annual leave nor exert undue influence or pressure on the employee to make an election to cash out;
 - A term of an agreement that provides for the cashing out of annual leave other than at the written election of the employee is prohibited content.
100. The above provisions are working effectively and contain substantial protections for employees. Similar provisions should be included in the NES with the exception that cashing-out should be available via written (unregistered) agreements. Australian Workplace Agreements (AWAs) have most commonly been used to address requests by an employee to cash-out annual leave. Given the abolition of statutory individual agreements the use of written agreements will provide a viable alternative.
101. It is noteworthy that under the legislation in place in some States employees are permitted to cash-out long service leave via a written agreement. The provisions appear to have worked effectively.
102. In addition, all employees should continue to be able to reach agreement with their employer to cash-out annual leave via the provisions of a formal workplace agreement. This is a mechanism which has been available since the inception of workplace bargaining around 15 years ago.
103. There are a large number of workplace agreements which permit cashing-out of annual leave. These include both collective and individual agreements, agreements applying to large national companies and to small organisations, and agreements with unions and directly with employees.

104. Indeed there are a large number of “single-issue” workplace agreements which have been entered into by employees and employers to address employee requests for the cashing-out of annual leave. Ai Group has drafted many such agreements.

Flexible options for taking leave

105. The discussion paper (at paragraph 156) states that a modern award could provide for flexible options for taking annual leave by agreement and that the AIRC is best placed to tailor such rules to meet industry-specific needs.

106. Simply providing the flexibility for this issue to be addressed in awards is inadequate. The NES should enable workplace agreements and contracts of employment for award-covered and award-free employees to provide flexible options for taking leave in the same way as is currently available. For example, the *Workplace Relations Regulations* specifically allow an employee to reach agreement with his or her employer that the employee will forgo an equivalent amount of pay for an additional period of annual leave.

Ability to direct employees to take leave

107. The draft NES allows awards to contain “provisions requiring an employee (or allowing an employee to be required) to take paid annual leave in particular circumstances”.

108. Again, simply providing the flexibility for this issue to be addressed in awards is inadequate. The NES should enable employers to direct award-covered, agreement-covered and award-free employees to take annual leave in particular circumstances.

109. The WorkChoices provisions removed many common employer rights relating to annual leave, including:

- The common federal award right of an employer to require an employee to take annual leave with four weeks' notice (refer to the *Metal, Engineering and Associated Industries Award*);
- The common State legislative right of an employer to require an employee to take leave with four weeks' or two weeks' notice (refer to the NSW *Annual Holidays Act* and the QLD *Industrial Relations Act*);
- The common federal award right of an employer to close down a business and stand down recently employed workers without pay if they do not have sufficient leave accrued (refer to the *Metal, Engineering and Associated Industries Award*).

110. The removal of the above rights has caused operational difficulties for some employers and, as presently drafted, the NES will create further problems.

111. The NES needs to be amended to include:

- *An ability for an employer to require an employee to take excessive leave*

Excessive annual leave accruals have substantial financial implications for employers;

- *An ability for an employer to shut-down its operations for the purposes of allowing employees to take leave*

It is vital that employers be able to shut-down their operations, for example, at Christmas and for periods where major maintenance work needs to be carried out.

These issues are equally important for award-covered, agreement-covered and award-free employees and hence cannot simply be dealt with in awards.

112. In the above areas, the existing provisions of the *Workplace Relations Act* are weighted heavily in favour of employees and Ai Group's preferred position is that the previous common rights of employers (as outlined above) be restored through appropriate amendments to the NES.

Interaction between annual leave and personal/carer's leave

113. It has been a very longstanding industrial principle that employees are not entitled to claim sick leave during periods of annual leave, unless an award or agreement provides otherwise. Apparently public sector awards often provided this entitlement but very few private sector awards did.

114. Ai Group is aware that the Department of Education, Employment and Workplace Relations interprets the AFPC Standard as already providing this benefit. Despite this, relatively few employers would be aware of this interpretation or would provide this benefit to employees - other than by agreement.

115. Section 29 of Division 5 of the NES should be amended to exclude personal/carer's leave from the categories of leave which take priority over annual leave. The provision as currently drafted will increase absenteeism costs for employers.

Shift workers

116. Under the NES, a "shift worker" is entitled to five weeks of annual leave *"if a modern award that applies to the employee's employment defines or describes the employee as a shift worker"* for the purposes of the NES.

117. Ai Group is concerned that the manner in which this entitlement is drafted will encourage unions to pursue claims for all or most shift workers to obtain an additional week of annual leave. This would result in major additional costs

and operational difficulties for employers.

118. At the present time only a small proportion of shift workers obtain an additional week of annual leave. That is, shift workers who work on continuous shifts across 24 hours per day and who regularly work on both Sundays and public holidays.

119. To address these issues, paragraph 26(1)(b) should be amended as follows:

“(b) if a modern award that applies to the employee’s employment defines or describes the employee as a shift worker for the purposes of this division and the employee:

- is employed in a business in which shifts are continually rostered 24 hours a day for 7 days a week; and*
- is regularly rostered to work those shifts; and*
- regularly works on Sundays and public holidays;*

the employee is entitled to five weeks of annual leave”.

120. The above proposed amendment adopts the definition of a “shift worker” in s.228 of the *Workplace Relations Act*, which appears to have been based upon the definition of a “continuous shift worker” in the *Metal, Engineering and Associated Industries Award* and many other awards.

Division 6 – Personal / carer’s leave and compassionate leave

Accrual of personal / carer’s leave

121. As set out in the section above relating to Division 1, the definition of “base rate of pay”, and the term “ordinary hours of work” used within that definition, are critical in interpreting NES entitlements. It appears to be clear from the discussion paper, and the draft legislation, that the term “ordinary hours of work”, as used in the NES, is not intended to include any overtime hours (including regularly worked overtime and additional hours built into shift rosters). If there is any doubt about the interpretation, a definition of “ordinary hours of work” should be included in the NES. The definition should make it abundantly clear that overtime is excluded. Otherwise the problems which resulted from the original WorkChoices provisions relating to personal / carer’s leave accruals and payments could re-appear.
122. Under the current AFPC Standard, employees can be required to work a reasonable number of additional hours beyond the 38 ordinary hours in the legislation. However, regardless of how many additional hours are worked beyond 38 and how regularly such hours are worked, only 76 hours of personal/carer’s leave (2 weeks x 38 hours) can accrue in a 12 month period. The NES provisions need to be equally clear in this respect.

The expression of the entitlement in days rather than hours

123. The NES refers to personal / carer’s leave entitlements in terms of days, rather than hours. This is problematic. It will substantially disadvantage employers whose employees work 12 hour shifts or other patterns of work with extended work days. Also, will disadvantage part-time employees.

124. Consider the example of an employee working the common “four shifts on, four shifts off”, 12 hour continuous shift roster. Under the *Workplace Relations Act* the employee would be entitled to 76 hours of personal/carer’s leave per year which equates to 6.3 shifts. The employee is not disadvantaged because he or she only works 3 or 4 days per week and consequently has far more days off than other employees. The approach adopted within the AFPC Standard is consistent with the approach commonly adopted in awards (eg. *Metal, Engineering and Associated Industries Award*).
125. In contrast, if the employee was entitled to 10 x 12 hour days off per year for personal / carer’s leave, the entitlement would increase from 76 hours to 120 hours. The employee would receive an increase in his or her personal / carer’s leave entitlement of more than 50 per cent.
126. With respect to part-time employees, these workers should receive a proportionate amount of days, not a proportionate amount of pay on each of 10 days. An employee working a 19 hour week should receive five days of personal / carer’s leave per year, not an entitlement to be paid for half a day’s pay on each of 10 days as the draft NES apparently provides for. This will disadvantage part-timers and cause administrative difficulties for employers.
127. Accordingly, the personal / carer’s leave entitlement in paragraph 32(1) of Division 6 needs to be expressed as “76 hours, or a proportionate amount for an employee who has worked less than 38 hours per week during the year of service” - not 10 days.
128. Consistent with the AFPC Standard, flexibility should also be included for personal / carer’s leave to be expressed in a different (but equivalent) form to the NES.

Annual limit on personal / carer's leave that can be taken as carer's leave

129. During the *Family Provisions Case*, Ai Group reached agreement with the ACTU to double the amount of personal/carer's leave that could be accessed annually as carer's leave from five days to 10 days. This agreement was reflected in the test case award clause and was ultimately incorporated within the AFPC Standard (see s.249 of the *Workplace Relations Act*).
130. The NES deletes the 10 day agreed annual limit and Ai Group submits that it should be retained. If the limit is deleted, absenteeism costs for employers are likely to increase.

Evidence requirements

131. Ai Group notes that the evidence requirement for personal / carer's leave under the NES obliges employees to provide evidence, where requested, that would satisfy a reasonable person. This would appear to enable employers to require the production of a medical certificate by a medical practitioner where it would be reasonable in the circumstances. The current evidence requirement in the Act which allow an employee to provide a medical certificate from a "health practitioner" is open to abuse.

Cashing out of personal / carer's leave

132. The NES does not provide for any ability for modern awards or other industrial instruments or contracts of employment to deal with the cashing out of personal / carer's leave. There are many workplace agreements which allow partial cashing-out of personal / carer's leave and many of these arrangements are longstanding and strongly supported by employees.

133. If Ai Group’s proposed interaction rule relating to workplace agreements and the NES is adopted (as outlined earlier in this submission), this issue will be addressed. Under Ai Group’s proposed approach, a workplace agreement would be able to contain provisions allowing for the cashing out of personal / carer’s leave, subject to a “no disadvantage test” against the provisions of the NES for that Division;

Entitlement of casuals to unpaid compassionate leave

134. Under the NES, casual employees would be entitled to take unpaid compassionate leave. Currently under the *Workplace Relations Act*, there is no entitlement of casuals to compassionate leave. The extension of the entitlement to casuals is reasonable, and would not significantly extend their entitlements to unpaid leave, given the circumstances in which unpaid carer’s leave is already available under the existing legislation.
135. Ai Group reached agreement with the ACTU on the extension of this entitlement to casual employees during the AIRC’s *Family Provisions Case*. The terms of the agreement were reflected in the test case award clause.

Division 7 – Community service leave

136. Division 7 entitles an employee engaged in an “eligible community service” activity to be absent from his or her employment. “Eligible community service activity” is defined to include:

- Jury service;
- Carrying out a voluntary emergency management activity within the meaning of section 659 of the Workplace Relations Act;
- An activity of a community service nature prescribed in regulations.

Jury service leave

137. The right of any employee to be absent on jury leave and to have appropriate employment protections in place is longstanding and is dealt with in all Australian jurisdictions under State and Territory jury legislation.

138. Ai Group’s concern with respect to the jury service provisions in Division 7 is the proposal to introduce a national entitlement of all employees (other than casuals) to *paid* jury service leave. Make-up pay for jury service is commonly dealt with in awards and workplace agreements. Currently, Victoria is the only state in which non-award employees are entitled to paid jury service leave (in the form of ‘top up’ pay). In other jurisdictions, if an employee is not entitled to jury service pay under an industrial instrument, the issue is left to be determined between the employer and employee concerned. In Ai Group’s experience relatively few disagreements arise in respect of this issue.

139. Although it varies across the jurisdictions, the level of publicly-funded jury service pay is very low and generally below the federal minimum wage. This means that for many employees, the entitlement to “top up” pay would involve significant portions of their base rate of pay being paid by their employer.

140. The requirement to accommodate an employee's absence and the ensuing cost and inconvenience in finding a replacement is in many ways unavoidable where a jury system operates. However, the proposed NES entitlements would compound the burden upon businesses, particularly small businesses.
141. The draft NES places no limit on the amount of leave that an employer can be required to pay. Some trials continue for very lengthy periods. The draft NES also places no limit on the remuneration level to be paid. Some employees performing jury service are very highly paid.
142. In a March 2008 submission to the NSW Law Reform Commission, Ai Group supported the need to increase the level of the publicly-funded jury attendance fee.
143. Ai Group submits that the NES should be redrafted to provide that make up pay for jury service is a matter to be dealt with in modern awards. It should also be able to be dealt with in workplace agreements and contracts of employment.

Emergency Management Activity

144. The provisions of the *Workplace Relations Act* dealing with emergency management activity were drafted in consultation with industry representative bodies. Following such consultation, and some amendments to the initial draft legislation to address industry's concerns, Ai Group supported the provisions. The provisions are balanced and take account of the legitimate interests of employees and employers. There are many important definitions in section 659 of the Act and Ai Group is pleased that such definitions have been retained in the NES.

Other community service activities

145. The NES enables the entitlement to community service leave to be expanded to other community service activities by Regulation. Ai Group does not support this approach. Given the substantive nature of the leave entitlement, any expansion of the entitlement should be subject to Parliamentary approval through legislative amendments.

Division 8 – Long service leave

A uniform national standard for long service leave

146. The Government has announced its intention to develop a uniform minimum long service leave standard, in consultation with State and Territory Governments, and in consultation with employee and employer representative bodies.
147. Ai Group supports the development of a national long service leave standard. The standard should be consistent with the federal long service leave awards which operate in the metals, graphic arts, automotive and food industries.
148. The federal award long service leave provisions are appropriately adopted within the proposed national long service leave standard because:
- The federal long service leave standard already applies to a large number of employees in each State;
 - The quantum of the federal long service leave standard is reflected in the redundancy scale which the AIRC awarded in its *Redundancy Case Decision* and which has been incorporated within Division 10 of the NES. In the scale, redundancy entitlements are reduced from 16 weeks, for those with 9 years of service, to 12 weeks, for those with 10 or more years of service, to reflect the fact that employees under the federal award long service leave standard are entitled to pro rata long service leave after 10 years of service based upon an accrual rate of 13 weeks of long service leave for 15 years of service;
 - The adoption of the federal award standard as the national long service leave standard would not increase employment costs, whereas the adoption of any of the State or Territory long service leave standards (other than the current Western Australian standard) would increase employment

costs and decrease the competitiveness of Australian industry. It should be noted that no other country in the world provides long service leave;

- The standard is intended to be a minimum safety net entitlement, not an excessively generous entitlement.

149. It should be noted that the majority of respondents to the federal long service leave awards are small businesses. There are many thousands of these businesses. Imposing a more generous long service leave standard upon such businesses would significantly increase their employment costs. For example, in South Australia the long service leave accrual rate is 50 per cent higher under the state legislative standard than the federal award standard and the pro rata entitlement applies three years earlier. Under the NSW standard, the pro rata entitlement applies five years earlier than under the federal award standard.

The provisions of Division 8

150. Division 8 of the NES, when read in conjunction with the Award Modernisation Request, appears to have the following effect:

- Employees covered by long service leave provisions in an award or Notional Agreement preserving State Awards (NAPSA) retain such entitlement as a provision of the NES;
- The NES does not disturb the operation of State or Territory long service leave laws;
- The AIRC does not have the power to include long service leave provisions in a modern award;
- Division 8 will not apply to employees covered under a workplace agreement made since the WorkChoices legislation came into effect, that is in operation prior to the commencement of the NES;
- Division 8 will not apply to employees covered under a pre-reform agreement if the agreement deals with long service leave, even if it provides that the employee is not entitled to long service leave.

151. There are some problems with the above approach. It is essential that employers retain the ability to vary the long service entitlements in Division 8 of the NES through a workplace agreement. This includes both the initial provisions of Division 8 and the proposed national long service leave standard when it is developed. It is very common for workplace agreements to be made containing long service leave provisions which differ from the federal award standard in matters of detail (even though employees are not disadvantaged) in industries such as metals, graphic arts, automotive and food where federal award long service leave provisions operate.

The importance of continuing to allow workplace agreements to override State long service leave legislation, including portable long service leave schemes

152. It is extremely important that the new national workplace relations system not prevent workplace agreements overriding State long service leave legislation – including general State long service leave legislation plus the portable long service leave legislation which operates in the construction industry.

153. For several years Ai Group and various companies in the manufacturing and telecommunications industry have been involved in opposing an attempt by CoINVEST – the construction industry portable long service leave scheme in Victoria – to force companies in parts of these industries to register their employees and pay contributions to the scheme.

154. CoINVEST operates in accordance with the *Construction Industry Long Service Leave Act (Victoria) 1997*. Entitlements are based around 13 weeks of long service leave for 10 years of service (ie. an accrual rate 50 per cent more generous than the federal award standard). Employers pay a levy of 2 percent of payroll. The CoINVEST Board has the power to increase the levy and it did so in 2006 – from 1.5 per cent to 2 percent.

155. For years, the CFMEU, ETU and AMWU (which are all represented on the CoINVEST Board) have pursued extended coverage of the CoINVEST scheme. As a result the coverage of the scheme is now so grey that it is almost impossible to determine which employers are covered and which are not. Many employers outside of the construction industry are being put to substantial expense and inconvenience when they provide long service leave to their employees in the traditional way. It is essential that these employers have the option of obtaining relief from the CoINVEST problems by making workplace agreements with employees.
156. Section 17 of the *Workplace Relations Act* provides that a State law relating to “long service leave” does not apply to the extent of any inconsistency with a workplace agreement. A similar provision existed in the pre-WorkChoices version of the Act. It is essential that this flexibility is not lost. The States have the power to increase long service leave entitlements and expand the coverage of portable long service leave schemes.
157. It is essential that the right of companies to manage their long service leave entitlements at the enterprise level be protected, by allowing them to enter into workplace agreements to provide long service leave benefits to their employees.
158. It is unreasonable for companies outside of the construction industry to be forced to contribute to construction industry portable long service leave schemes for employees who are not engaged in construction work. It is also unreasonable to take away the mechanism that many are currently using to gain relief - that is, by entering into a workplace agreement with their employees.

Division 9 – Public holidays

159. With regard to s.47 of the NES, Ai Group has the following concerns:

- Problems have been arising in NSW regarding the procedure used in that State under the *Banks and Bank Holidays Act* to proclaim public holidays. Consideration should be given to whether the reference to “procedure” in paragraph 47(b) and other elements of Division 9 provide clarity regarding which days are intended to be public holidays. The Federal and State Governments should form a common policy on public holidays so that the operation of the minimum standards becomes clear in every State;
- Paragraph (b) needs to be amended to clarify that employees are not entitled to both the substituted day and the original day, as specified in paragraph (a).

160. Subsection 48(4) sets out the criteria for a reasonable request to work on a public holiday and reasonable refusal of such a request. The provisions are obviously based upon s.613 of the *Workplace Relations Act*. However, inexplicably some essential elements have been removed. The following criteria from s.613 need to be reinstated in the NES:

“(g) whether a workplace agreement, award, other industrial instruments, contract of employment or written guideline or policy that regulates the employee’s employment contemplates that the employer might require work on public holidays or particular public holidays”

“(h) whether the employee has acknowledged or could reasonably expect that the employer might require work on public holidays, or particular public holidays”.

It is essential that the above two provisions be retained. In many industries (eg. hotels, airlines, aluminium smelters, public transport) it is

essential that work be carried out on public holidays and in many cases such days are peak times. Numerous enterprise agreements in such industries set out the public holidays which are rostered to be worked and it is necessary that employees work their rostered shifts where they fall on a public holiday. The addition of these requirements will not create an absolute right for employers to require employees to work on a public holiday where such an obligation is set out in a workplace agreement and/or the employee could reasonably expect that he or she will be required to work, but they will enable these factors to be taken into account when determining what is reasonable in the circumstances.

(k) whether an emergency or other unforeseen emergency is involved

The retention of the above provision will benefit both employers and employees. The provision is a balanced one which recognises that an employee may have an emergency which prevents work on a public holiday. Similarly, an employer may have an emergency which requires that employees work on the day.

161. As Ai Group interprets s.49, an employee would not be required to be paid on a public holiday if the employee's ordinary hours do not fall on the public holiday. This is appropriate.
162. As set out in the section of this submission relating to Division 1, it appears to be clear that the term "*ordinary hours of work*", as used in the NES (including in s.49), is not intended to include any overtime hours (including regularly worked overtime and additional hours built into shift rosters). If there is any doubt about the interpretation, a definition of "*ordinary hours of work*" should be included in the NES. The definition should make it abundantly clear that overtime is excluded.
163. It is essential that s.49 be amended to clarify that casual employees are not entitled to be paid on a public holiday. Such an amendment would be

consistent with the approach taken to entitlements for casual employees under:

- Division 4 (ie. most casuals are not entitled to parental leave),
- Section 25 (re. annual leave),
- Section 31 (re. paid personal/carer's leave),
- Section 40 (re. compassionate leave), and
- Section 56 (re. redundancy pay).

164. Casuals are paid a casual loading in lieu of being paid for public holidays.

Division 10 – Notice of termination and redundancy pay

Notice of termination

165. Under the draft NES payment in lieu of notice is to be paid at the “full rate of pay” for the hours the employee would have worked during the notice period. The full rate of pay is defined in s.5 and includes overtime and penalty rates among other things. Ai Group opposes this payment rule, in favour of the existing rule about payment as set out in paragraphs 661(4) and (5) of the *Workplace Relations Act*. Payment in lieu should not entitle employees to be paid at overtime rates for hours not worked.

166. The NES should also include:

- minimum notice periods to be given by employees; and
- the ability for an employer to deduct pay in lieu from other amounts to be paid to the employee on termination when an employee fails to give notice.

167. Provisions of this nature are commonly found in awards and workplace agreements and are part of the AIRC’s *Redundancy Case* award provisions.

Redundancy pay

168. The draft NES introduces a redundancy pay entitlement for employees, other than:

- Employees with less than 12 months service;
- Employees of employers with fewer than 15 employees;
- The categories of employees set out in s.56 (ie. casuals, fixed term employees etc)

169. Ai Group submits that the following amendments should be made to the provisions of Subdivision B:

- The definition of redundancy in paragraph 52(1) should exclude termination of employment resulting from the “*ordinary and customary turnover of labour*”. (This was part of the redundancy definition agreed upon between the employers and the ACTU in the AIRC’s *Redundancy Case* and endorsed by the Full Bench);
- The NES should specify that awards cannot contain redundancy pay provisions for businesses with fewer than 15 employees (This is a very important issue to small businesses and clarifying the issue will prevent union claims for modern awards to contain such provisions);

170. Ai Group is pleased that the NES includes a transmission of business provision similar to the one agreed upon between Ai Group and the ACTU in the *Redundancy Case* and endorsed by the Full Bench. The award provision is a practical one which has resolved numerous problems which were arising in respect of redundancy payments in circumstances where a business is transmitted.

171. The implementation of the minimum standard for redundancy pay will have a significant impact upon some employers, because for the first time redundancy entitlements will apply for all employees – including those who are award-free. Consequently, a transitional provision is needed along the lines of what was agreed between employers and unions in the Victorian Common Rule Award Test Case. When common rule awards were declared in Victoria from January 2005, for employers with less than 15 employees no service prior to 2005 was taken into account for redundancy purposes and for employers with 15 or more employees only service from January 2004 was taken into account.

Division 11 – Fair Work Information Statement

172. Ai Group regards the requirement for employers to issue a Fair Work Information Statement to new employees as further unnecessary “red tape” upon employers.

173. If the Government proceeds with the requirement, the Statement should be developed in consultation with major industry representative bodies, including Ai Group.

174. Also, it is important that flexibility be provided for employers to issue the Statement in a variety of ways in keeping with contemporary business practices. This could be achieved through a similar Regulation to the one which existed when employers were required to issue the former *Workplace Relations Fact Sheet*. Whilst not preventing an employer using another method of distribution, the Regulations stated that all of the following were appropriate ways in which to provide a copy of the *Workplace Relations Fact Sheet* to an employee:

- Giving the copy to the employee personally;
- Sending the copy by pre paid post to:
 - the employee's residential address; or
 - a postal address nominated by the employee;
- Sending the copy to:
 - the employee's email address at work; or
 - another email address nominated by the employee;
- Sending to the employee's email address at work (or another email address nominated by the employee):
 - an electronic link to the page of the Workplace Authority's website on which the *Workplace Relations Fact Sheet* is located; or
 - an electronic link that takes the employee directly to the copy of the *Workplace Relations Fact Sheet* on the employer's intranet;

- Sending the copy by facsimile to:
 - the employee's facsimile number at work; or
 - the employee's facsimile number at home; or
 - another facsimile number nominated by the employee.

175. The focus of any Fair Work Information Statement should be on education and therefore it is inappropriate for the legislation to impose a penalty upon employers for failure to issue the Statement. If, notwithstanding Ai Group's view, the Government decides to include a penalty it should be no more than the \$110 maximum penalty which existed for failure to distribute the *Workplace Relations Fact Sheet*.

Minimum wages

Federal Minimum Wage

176. The draft Standards do not deal with wages. It is appropriate that a Federal Minimum Wage be included in the NES to ensure that non-award covered employees are entitled to a minimum wage rate.

177. Paragraph 2(a) of the Award Modernisation Request issued by the Deputy Prime Minister, The Hon Julia Gillard MP, on 28 March 2008 states that:

“The creation of modern awards is not intended to.....extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free...”

178. Accordingly, there will continue to be employees who are not covered by an award. Ai Group is very strongly opposed to the concept of an award being made to deal with Minimum Wages and/or additional rules relating to NES entitlements for “award-free” employees. Such an outcome would be inconsistent with paragraph 2(a) of the Award Modernisation Request, as set out above, and would be damaging to industry. If such an award is permitted to be made there is significant risk that the unions would pursue award provisions which limit flexibility for “award-free” employees (either in the initial proceedings relating to the making of the award or through later award variations).

179. The proposed Federal Minimum Wage within the NES should be adjusted annually after Fair Work Australia has conducted its annual minimum wage review, to maintain consistency with the Federal Minimum Wage within the award system. The legislation should be drafted to enable this adjustment to be achieved via Regulations.

Special Federal Minimum Wages for employees with a disability

180. The Fair Pay Commission has established two Special Federal Minimum Wages for employees with a disability. The preservation of these within the NES is essential to ensure that non-award covered employees with a disability are entitled to a minimum wage rate.

181. The Special Federal Minimum Wages for employees with a disability, within the NES, should be adjusted annually to maintain consistency with the relevant minimum wage rates within the award system as determined by Fair Work Australia. The legislation should be drafted to enable this adjustment to be achieved via Regulations.