The National Employment Standards: An Assessment

Iain Campbell and Sara Charlesworth***

The National Employment Standards are 10 minimum standards of employment set out in Part 2-2 of the Fair Work Act 2009 (Cth). They are generally understood as part of a 'safety net' for employees in the multi-layered Australian system of employment regulation. This article discusses the origins of the National Employment Standards and reviews changes over the past 10 years as a result of litigation and substantive changes. The article points to four crucial weaknesses of the National Employment Standards: (i) narrow range; (ii) major gaps; (iii) a lack of substance; and (iv) omission of any mechanism for review and adjustment. Largely as a result of these weaknesses, the National Employment Standards have been limited in effectiveness. We argue, however, that the National Employment Standards are potentially important and should be strengthened and extended. We outline a modest proposal for kickstarting reform — replacement of the hollow entitlement to a Fair Work Information Statement with a new provision requiring employers to provide employees with a written Statement that outlines the actual terms and conditions of their job.

Introduction

The National Employment Standards (NES) are 10 minimum standards of employment set out in Part 2-2 of the Fair Work Act 2009 (FW Act). They encompass varied matters to do with working-time and employment security for employees as described below.

National Employment Standards[1]

1 Maximum working hours — 38 hours per week, plus reasonable additional hours;
2 Flexible working arrangements — right to request flexible working arrangements;
3 Parental leave and related entitlements — up to 12 months' unpaid leave (with a right to request a further 12 months), plus certain other forms of maternity, paternity and adoption-related leave;
4 Annual leave — four weeks' paid leave per year, plus an additional week for certain shiftworkers;
5 Personal/carer's leave, compassionate leave and family and domestic violence leave — 10 days' paid personal/carer's leave per year, two days' unpaid carer's leave as needed; two days' paid compassionate

* Research Fellow, University of Melbourne.
** Professor, RMIT University.

1 Adapted from A Stewart, *Stewart's Guide to Employment Law*, 5th edn, Federation Press, Sydney, 2015, p 116–17.

leave as needed, and five days' unpaid family and domestic violence leave (in a 12-month period);

6 Community service leave — unpaid leave for voluntary emergency management activities, and unpaid leave for jury service (with a limited right for make-up pay);

7 Long service leave — a transitional entitlement for those who were subject to pre-Fair Work award provisions;

8 Public holidays — a paid day off on a public holiday, except where reasonably requested to work;

9 Notice of termination and redundancy pay — up to five weeks' notice of termination and up to 16 weeks' severance pay on redundancy, depending on length of service;

10 Fair Work Information Statement — a right to receive a statement drafted by the Fair Work Ombudsman (FWO) on being employed.

The NES include most, though not all, of the minimum standards specified in legislation for employees who work for employers covered by the national system. They are generally defined, together with the national minimum wage, as forming part of a 'safety net'.[2] Alternatively expressed, they constitute a foundation layer of employee protection, which supports other layers, such as modern awards, collective agreements, individual arrangements, and indeed enterprise policy.[3] One important feature is that NES provisions cannot be excluded or overridden by less beneficial terms and conditions in modern awards, enterprise agreements or individual contracts of employment, except in a small number of cases expressly allowed in the FW Act.

The NES are neglected by researchers and policymakers, though some signs of increased interest have appeared in recent years. This article offers a case for closer attention and a case for action to strengthen and extend the NES. The first section discusses the origins of the NES. The second section summarises critical commentary on the weaknesses of the NES. The third section reviews minor changes to the provisions over the past 10 years as a result of litigation and altered entitlements. The fourth section comments on impact, suggesting that the NES have been of limited effectiveness in protecting the interests of employees. We argue that this limited effectiveness is largely due to the weakness of the provisions. Nevertheless, the NES remain potentially important and should be reformed rather than dismissed. The fifth section outlines a modest proposal for kickstarting reform — replacement of

2 Scholars often speak of a *two-tier safety net*, comprising statutory minimum standards such as the NES and the national minimum wage as the first tier and minimum standards in modern awards as the second tier. Award standards include a broader range of entitlements, but these are not necessarily present in all 122 modern awards and, even if present, the level of the standard may vary amongst awards. Moreover, award standards do not apply to higher income earners and, most important, they can be modified by enterprise agreements (subject to a better-off-overall test). As a result, award standards apply to a smaller number of employees than NES standards. See A Stewart, *Stewart's Guide to Employment Law*, 5th edn, Federation Press, Sydney, 2015, p 116.

3 The Australian regulatory system can be described as complex and multi-layered: M Bray and A Stewart, 'What Is Distinctive about the Fair Work Regime?' (2013) 26 *AJLL* 20; M Bray and P Waring, '"Complexity" and "Congruence" in Australian Labour Regulation' (2005) 47 *JIR* 1.

the empty requirement for a Fair Work Information Statement with a new provision requiring employers to provide employees with a written Statement that outlines the actual terms and conditions of their job.

Origins of the NES

Legislated or statutory minimum standards are a familiar and often prominent part of labour regulation systems in most advanced capitalist societies, where they constitute the conventional mechanism ('legal enactment') for establishing a floor of workplace rights and entitlements. This floor serves several purposes: to promote fair treatment; to support income and employment security; to assist individual employees to assert more control over their conditions of work; to protect workers (and firms) against the effects of unfair wage competition; to encourage innovation and long-term productivity growth; to facilitate equitable distribution of productivity gains; and to serve as a platform for regulated flexibilities at other levels and in other aspects of employment. To fulfil these aims, minimum standards need to be as universal and as transparent as possible, carefully monitored and enforced, and subject to ongoing democratic discussion and incremental improvement in line with changing community norms.

In spite of their significance in other countries, legislated minimum standards have been overshadowed in Australia, where, for much of the twentieth century, they were confined to state level and comprised just a few entitlements such as public holidays and long service leave.[4] Most general employment standards were instead developed, both at federal and state level, through the distinctive Australasian mechanism of *awards*, set down by industrial tribunals and loosely defined as legally-binding documents specifying job classifications, minimum rates of pay and minimum conditions of employment for employees in specific industries, occupations or even enterprises.[5]

Increased attention to statutory minimum standards at federal level can be dated to the early 1990s. A first impetus came in 1993 when the Industrial Relations Reform Act 1993 (Cth) was enacted, with partial reliance on the external affairs power, to implement minimum standards on matters such as unfair dismissal, notice of termination, redundancy entitlements, equal pay and parental leave.[6] The second impetus stemmed from government initiatives, inspired by neoliberal philosophies, which aimed at displacing awards, both at state and federal levels, in favour of what was called 'enterprise bargaining'.[7] One side effect was an increased policy emphasis on

4 Bray and Stewart, above n 3, at 27; see also R McCallum, 'Legislated Standards: The Australian Approach', in M Baird, K Hancock and J Isaac (Eds), *Work and Employment Relations: An Era of Change*, Federation Press, Sydney, 2011, p 6; S Cooney, J Howe and J Murray, 'Time and Money under WorkChoices: Understanding the New *Workplace Relations Act* as a Scheme of Regulation' (2006) 29 *UNSWLJ* 215.

5 See Stewart and Bray in this volume.

6 A Stewart et al, *Creighton and Stewart's Labour Law*, 6th edn, Federation Press, Sydney, 2016, p 89; Bray and Stewart, above n 3, at 31.

7 For 'neoliberalism', see M Bray and E Rasmussen, 'Developments in Comparative Employment Relations in Australia and New Zealand: Reflections on "Accord and Discord"' (2018) 28 *Lab Ind* 31.

generalised minimum standards, with the aim of assuaging fears that enterprise bargaining would reduce wages and conditions for many employees. Initially fears of change were addressed through an assurance that awards would continue to function as a 'safety net' and that all enterprise agreements would be subject to a 'no disadvantage test'. As labour market deregulation became more radical under federal Coalition Governments, it aimed at dismantling rather than just displacing awards, and reassurance about the existence of a safety net was redefined in terms of statutory rather than award standards. Thus, the most radical neoliberal reform at federal level, the Howard Government's 2005 Work Choices legislation,[8] using the corporations power in the Constitution, included a set of statutory minima called the Australian Fair Pay and Conditions Standard (AFPCS) as Part 7 of the amended Workplace Relations Act 1996 (Cth). The latter comprised a floor of five statutory entitlements, largely selected from pre-existing award standards, including a minimum hourly wage (plus casual loading), paid annual leave, paid personal leave, unpaid parental leave and a maximum limit on ordinary weekly working hours.[9] In 2007 the federal Coalition Government, in a further bid to calm mounting anxieties about the effects of Work Choices, introduced a new provision for employees to be given a Workplace Relations Fact Sheet by their employer.[10]

The AFPCS was widely criticised.[11] The provisions were seen as few in number, weak and providing little protection for employees. When viewed in the context of the entire Work Choices system, which sought to dismantle award protections, these deficiencies were identified as a major concern, which could allow precariousness to spread more widely amongst employees.[12]

The FW Act, introduced by the federal Labor Government elected in 2007, can be seen as a 'rebalancing' or partial re-regulation after the radical experiment of Work Choices.[13] In the case of statutory minimum standards, the immediate impression was continuity rather than change. Responsibility for minimum wage rates (and minimum casual loadings) was re-assigned to what is currently called an Expert Panel, which is located within the Fair Work Commission (FWC) and operates with new objectives and a new process of annual adjustment.[14] But the other four AFPCS provisions, together with the requirement for an information sheet, now called the Fair Work Information

8 Workplace Relations Amendment (Work Choices) Act 2005 (Cth) ('Work Choices').

9 The AFPCS was supplemented by other statutory standards, located in Part 12 of the Workplace Relations Act 1996 (Cth), covering matters such as meal breaks, public holidays and notice of termination: see Bray and Rasmussen, above n 7; Cooney, Howe and Murray, above n 4; J Murray, 'Work Choices and the Radical Revision of the Public Realm of Australian Statutory Labour Law' (2006) 35 *ILJ* 343.

10 Stewart et al, above n 6, at p 301–2. See also M Pittard, 'Reflections on the Commission's Legacy in Legislated Minimum Standards' (2011) 53 *JIR* 698.

11 Cooney, Howe and Murray, above n 4; J Murray and R Owens, 'The Safety Net: Labour Standards in the New Era', in A Forsyth and A Stewart (Eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy*, Federation Press, Sydney, 2009, p 40; R Owens, 'Working Precariously: The Safety Net after Work Choices' (2006) 19 *AJLL* 161.

12 Owens, above n 11.

13 Bray and Stewart, above n 3.

14 See P Waring and J Burgess, 'Continuity and Change in the Australian Minimum Wage

Statement (FWIS), were transferred across to the NES, somewhat simplified and slightly strengthened, where they were joined by another five provisions. An exposure draft of the 10 NES was published in early 2008, attracting a modest number of submissions. The final version, little changed from the draft, was incorporated into the FW Act and came into operation on 1 January 2010.[15]

The NES were initially seen as relatively uncontroversial. At least four factors explain the lack of contention. First, both sides of politics seemed committed, though perhaps for different reasons, to a floor of statutory standards. Second, most attention in assessing the FW Act was focused elsewhere, eg, on the retention (and modernisation) of awards, the preservation of an expanded national system, the re-introduction of a no-disadvantage test (now called the better-off-overall test or 'BOOT') and the strengthened provisions for single-employer collective bargaining. Third, the fact that statutory standards in the NES were now joined with restored award standards diminished concerns about the implications of their weaknesses. Fourth, the NES contained few surprises.[16] The four directly inherited provisions, together with the requirement for the FWIS, had been examined and discussed under the previous regulatory regime. The five extra provisions were a mixed bag but were also familiar. The provision for notice of termination and redundancy pay had already figured in part in the 2005 Act, and its history stretched back to previous test cases of the Australian Industrial Relations Commission (AIRC). A similar story applied to the public holidays provision. The right to request flexible work arrangements (RTR) appeared more novel, but it too was taken from an AIRC test case decision, the 2005 Family Provisions Test Case.[17] The community service leave provision combined entitlements around jury service and volunteer fire fighting that had previously appeared in award decisions. The long service leave provision is the one exception to the history of drawing either on the previous Act or on award standards. Though it covered a small number of employees, it seemed primarily designed as a temporary construction, intended to house a future national entitlement that would bring together the varied entitlements currently in state legislation.[18]

Concerns

Despite the lack of controversy, several concerns were raised about the NES both in 2009 and in the subsequent decade. Employer associations seemed largely unconcerned by the NES, but they took action to convince the Labor Party to water down aspects of the new RTR flexible work provision (see

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Setting System: The Legacy of the Commission' (2011) 53 *JIR* 681; Murray and Owens, above n 11, at pp 45–6.

15 Pittard, above n 10; Murray and Owens, above n 11.

16 Murray and Owens note the continuity with the AFPCS and suggest that there was 'remarkably little change between Labor and Coalition in relation to the elements found in both codes, and little controversial in the new elements introduced by Labor': Murray and Owens, above n 11, at p 44.

17 *Parental Leave Test Case 2005* (2005) 143 IR 245.

18 Pittard, above n 10; Murray and Owens, above n 11.

below).[19] The principle of legislated minimum standards attracted some mild criticism. Trade unions were torn between support and a fear that statutory minima could undercut union efforts to organise workers and improve wages and conditions through enterprise bargaining.[20] Some scholars expressed concern about legislated minimum standards, suggesting that they would be too exposed to political contest and politicisation.[21]

On the other hand, scholars more favourable to the principle of statutory minima suggested that the introduction of the NES was a missed opportunity. Continuity from the AFPCS meant that the NES suffered from similar frailties. Four main weaknesses have been identified.[22]

(i) Narrow range of entitlements

First, though broader than the AFPCS, the range of entitlements found in the NES is narrow, falling short of what could be expected in a floor of minimum standards for employees in a modern employment system. The NES appear selectively assembled from varied existing sites within the traditional Australian system, but with little thought as to their effective functioning as a foundation layer or floor of protective regulation.[23] It remains true that the NES can be viewed in conjunction with minimum standards in awards, but even in this perspective the Australian system appears somewhat jerry-built and marked by surprising omissions (see below).

(ii) Existence of major gaps

Second, several major gaps affect the NES, leaving a significant proportion of workers unprotected or only partially protected and providing opportunistic employers with 'exit options' for avoiding the obligations of protective regulation. Academic discussion often overlooks the existence of such gaps, which render a national employment system more or less inclusive, but they are crucial for any analysis of employment relations in practice, including the differential impact of employer practices on specific groups of workers such as youth, women and temporary migrant workers. The Australian system of employment regulation, partly due to its multiple layers and its history of ad hoc revision, is a distinctively leaky structure. In spite of their designated role as a 'safety net', the NES contribute little to plugging the gaps; instead they tend to duplicate many of the most problematic holes that mark the Australian system.[24]

One important gap concerns uneven coverage. The NES achieve a broad

19 S Charlesworth and I Campbell, 'Right to Request Regulation: Two New Australian Models' (2008) 21 *AJLL* 116 at 122–3.

20 B Pocock, 'Rethinking Unionism in a Changing World of Work, Family and Community Life' (2011) 66 *RI/IR* 562.

21 K Hancock, 'The Future of Industrial Relations in Australia' (2008) 18(2) *ELRR* 7 at 13–14; R Naughton and MJ Pittard, 'The Voices of the Low Paid and Workers Reliant on Minimum Employment Standards' (2013) 34 *Adel L Rev* 119.

22 Murray and Owens, above n 11. See also L Bamberry, I Campbell and S Charlesworth, *NES Exposure Draft Submission*, Centre for Applied Social Research, RMIT University, Melbourne, 2008.

23 The lack of any clear, articulated rationale for the inclusion of some award standards and the exclusion of others is noted in Pittard, above n 10, at 711.

24 Three major gaps in protection in Australia are identified in I Campbell and P Brosnan, 'Labour Market Deregulation in Australia: The Slow Combustion Approach to Workplace

coverage of employees (in the national system), but they do not extend to non-employees. The lack of clarity in the boundary between employees and the self-employed means that employers, in pursuit of lower labour costs and heightened flexibility, can shift vulnerable workers into self-employment, thereby subjecting the bogus self-employed, including many platform ('gig') workers, to wages and work conditions below those offered to employees.[25]

Another set of gaps is opened up by exemptions and special eligibility rules for certain categories of employees. Requirements concerning a minimum length of continuous service govern access to several NES entitlements. Such requirements may be defined strictly, as in the case of the 12 months needed for access to unpaid parental leave, with the result that many employees with short elapsed job tenure are unfairly excluded. But the most significant and most detrimental exemption in the Australian system concerns casual employees, who, either in total or in part, are excluded from many of the NES provisions. For example, casual employees are explicitly excluded from the NES provision for paid annual leave, which begins with a statement that 'this division applies to employees, other than casual employees' (s 86). They are also excluded from entitlements to paid personal/carer's and compassionate leave. In addition, they are excluded from the entitlements to notice of termination and redundancy pay, as well as the entitlement to make-up pay for jury service leave. Generally, casual employees have a right to the periods of unpaid leave specified in the NES, though in the case of unpaid parental leave, they must meet the 12-month service requirement and have been employed regularly and systematically and have a reasonable expectation of ongoing employment. Similar restrictions apply for the RTR flexible work arrangements.[26] The size of the gap associated with exemptions for casual employees is currently under a cloud, as a result of the Full Federal Court decisions in *WorkPac Pty Ltd v Skene* (*Skene*)[27] and *WorkPac Pty Ltd v Rossato*.[28] But, whatever its precise extent, it is clear that this casual gap defines a large hole in a system of minimum labour standards, which — among other consequences — punctures the common assertion that NES provisions apply to all national system employees.[29]

Change' (1999) 13 *Int Rev Appl Econ* 353 at 355–6; see also S Charlesworth and A Heron, 'New Australian Working Time Minimum Standards: Reproducing the Same Old Gendered Architecture?' (2012) 54 *JIR* 164. The notion of inclusive systems and employer 'exit options' is sketched out in J Gautié and J Schmitt (Eds), *Low-Wage Work in the Wealthy World*, Russell Sage Foundation, New York, 2010.

25 A Stewart and J Stanford, 'Regulating Work in the Gig Economy: What Are the Options?' (2017) 28 *ELRR* 420.

26 Exclusions for casuals in the NES provisions are summarised in Charlesworth and Heron, above n 24, at 171–2. See also A Chapman, 'The Continuing Resonance of Breadwinner Norms: The Australian Labour Law Experience' (2018) 34 *IJCLLIR* 351 at 359–60. Exclusions for casuals are usually justified by reference to a 'casual loading' on their hourly wage. Quite apart from the issue of whether basic entitlements should be able to be 'cashed out' in this way, the casual loading in practice screens the reality of wage penalties for casual employees and multiple advantages for employers: see I Campbell, F Macdonald and S Charlesworth, 'On-Demand Work in Australia', in M O'Sullivan et al (Eds), *Zero Hours and On-Call Work in Anglo-Saxon Countries*, Springer, Berlin, 2019, p 67 at p 72.

27 (2018) 264 FCR 536; 362 ALR 311; [2018] FCAFC 131 (*Skene*).

28 [2020] FCAFC 84 (20 May 2020).

29 Casual employees, defined as 'employees without paid leave entitlements', accounted for

We do not discuss here the gap associated with enforcement.[30] It is worth noting, however, that poor monitoring and enforcement can exacerbate the effects of other gaps. For example, casual work is often undeclared work, undertaken by vulnerable workers in poorly regulated industries such as food services and retail. In this setting, poor enforcement means that even the meagre entitlements prescribed for casual employees in labour regulation fail to reach many workers.[31]

(iii) Lack of substance in individual provisions

Third, irrespective of the scope of their coverage, most NES provisions lack substance, with the result that their value as protective regulation is diminished. We refer to the example of the FWIS in the final section of this article. Another example of a hollow NES provision, labelled as 'maximum working hours', was inherited from the AFPCS and applies in principle to all employees. This defines standard weekly ordinary hours (38) and then points to the possibility of 'reasonable additional hours'. The definition of standard ordinary hours has only limited value because of the possibility of averaging these hours over a longer period, up to six months for employees outside awards and agreements. The most problematic element is, however, the notion of 'additional hours', which can be added on to standard hours with few effective controls. Thus, there is no requirement that additional hours should be paid at premium rates or indeed even that they should be paid at all. There is little control over the number of additional hours other than the requirement that they be 'reasonable', with the definition of 'reasonable' framed in terms of a list of unweighted criteria, including several that refer to business needs. Far from protecting employees, the provision seems oriented more to buttressing the power of employers to impose schedules that suit their interests.[32] Apart from all other objections, the provision is misnamed, since it does not set a maximum limit on working hours.

A more extreme example of a provision that seems designed to protect employer rather than employee interests concerns public holidays. Here the NES provision notes the existence of public holidays, defined in state legislation, but then provides the employer with a right to request that the employee work on a public holiday, so long as the request is 'reasonable'. As in the case of 'maximum hours', a similar incoherent list of unweighted

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24.6% of all employees in August 2018 — Australian Bureau of Statistics, *Characteristics of Employment, Australia, August 2018*, Cat No 6333.0, ABS, Canberra, 29 November 2018. Careless statements about the universality of the NES are common, even in official declarations. For example, the FWO declares that the NES comprise '10 minimum employment entitlements that have to be provided to all employees': FWO, *National Employment Standards*, FWO, at <www.fairwork.gov.au/employee-entitlements/national-employment-standards> (accessed 18 March 2020). A similar stumble over the issue of universality is evident in the 2015 Productivity Commission review of the FW Act: Productivity Commission, *Workplace Relations Framework*, Inquiry Report No 76, Productivity Commission, Canberra, 30 November 2015, at vol 1, 513.

30 Promoting employer compliance with NES standards is the responsibility of the FWO, as part of its general responsibility for enforcing the FW Act. For discussion of FWO efforts, see Hardy in this issue.

31 See I Campbell, M Boese and J-C Tham, 'Inhospitable Workplaces? International Students and Paid Work in Food Services' (2016) 51 *AJSI* 279.

32 Murray and Owens, above n 11, at pp 55–6.

criteria, mixing together business and employee needs, is used to explain what is meant by 'reasonable'. Far from providing a right to employees, this provision seems aimed at taking away the right of an employee to a public holiday.[33] Both the maximum hours and public holidays provisions testify to a fundamental confusion over the purpose of a floor of minimum employment standards, which should — if they are to be more than a sham — define basic enforceable workplace rights and entitlements for employees as human beings in a modern society.

Another disappointing example of lack of substance is the RTR. This provision specifies a right for certain employees, initially employees with caring responsibilities either for pre-school children or for children under 18 with a disability, to ask their employer for a change of work arrangement in order to accommodate these caring responsibilities. There is a duty for employers to 'reasonably consider' such requests. Requests can, however, be refused on 'reasonable business grounds', with employers obliged to respond in writing within 21 days, giving their reasons. In the course of drafting the FW Act, the Labor Government, in response to expressions of concern from employer groups, removed any appeal mechanism for employees whose requests are refused.[34] Without an explicit grievance or enforcement process, unless the employer agrees to one, the RTR appears to be little more than guidance for enterprise policy. In effect it was reduced to a right to ask, but the outcome of the request was left within the realm of management prerogative.[35]

The value of NES provisions in providing protection for employees is further reduced by the possibility of varying (displacing) some terms via awards, registered agreements and employment contracts. Compared to the possibility of varying award standards, the scope of this possibility is limited, but some paths are specified in the FW Act. Two problematic examples concern averaging ordinary weekly hours of work over a longer period and cashing-out a component of paid annual leave and paid personal/carer's leave.[36]

(iv) Lack of a mechanism for review and adjustment

Fourth, there is no direct mechanism for reviewing and altering NES standards. Any system of minimum standards requires frequent adjustment, in order to repair defects and to update in line with changing workforce expectations, changing work practices and changing labour markets. As legislated standards, the NES can be altered through new legislation, but they are not equipped with any internal mechanisms to facilitate analysis and public discussion. In the traditional award system, test cases before the Commission provided a useful mechanism that fused together review, debate,

33 Ibid, at pp 56–7.

34 Charlesworth and Campbell, above n 19, at 122–3.

35 Ibid, at 134. Nevertheless, elements of enforceability remain in connection with the process and when grievance and appeal procedures are incorporated into awards and agreements: See A Chapman, 'Is the Right to Request Flexibility under the Fair Work Act Enforceable?' (2013) 26 *AJLL* 118.

36 Both represent 'flexibilities' that had been available, in broader forms, in the AFPCS: see Stewart et al, above n 6, at p 313.

consultation and change. But the NES conspicuously lack a similar mechanism, raising a risk that the standards might not be updated and might become ossified and out of date.[37]

Changes over the Past 10 Years

The NES have experienced only minor changes over the past decade, leaving intact their many weaknesses. The two main reviews of the FW Act only touched lightly on the NES. The most recent review, by the Productivity Commission, suggested in 2015 that the NES have 'attracted little controversy', though it did note concerns about the details of some entitlements.[38]

We can summarise the minor changes that have taken place under two main headings.

Litigation

Generally the FWO has only pursued matters of noncompliance with NES provisions where the matters are wrapped up with, lead to or are consequences of underpayment. Partly as a result, FWO-led litigation has been limited and has had little effect in altering through case law the interpretation of specific NES provisions. Similarly, litigation by individual employees seems to have had little effect.

The NES provision for 'maximum hours of work', despite its contentious structure, has attracted only a small amount of federal case law. Cases have focused, not unsurprisingly, on what might constitute 'reasonable' overtime[39] as well as on how the specified 38 weekly hours should be calculated.[40] The relatively complex provisions of the unpaid parental leave standard have also been the subject of a handful of cases, most often in conjunction with pregnancy discrimination cases pursued under the Sex Discrimination Act 1984 (Cth) or under the adverse action provisions of the FW Act.[41] Decisions in many of these cases suggest significant weaknesses exist in relation to NES rights during parental leave and on return to work, particularly in relation to the 'job guarantee', which provides that an employee should be returned to the same or similar position she held before taking parental leave.[42]

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37 Murray and Owens, above n 11, at p 69; McCallum, above n 4, at p 14. For a discussion of the role of test cases as a dynamic element in the traditional award system, see J Murray, 'The AIRC's Test Case on Work and Family Provisions: The End of Dynamic Regulatory Change at the Federal Level?' (2005) 18 *AJLL* 325.

38 Productivity Commission, above n 29, at 513.

39 See, eg, *Brown v Premier Pet* [2012] FMCA 1089 (6 November 2012); *Premier Pet Pty Ltd v Brown (No 2)* [2013] FCA 167 (5 March 2013); *Picos v HealthEngine Pty Ltd* [2015] FCCA 1983 (24 July 2015).

40 Such as on a daily, weekly or averaged basis. See, eg, *Beauglehole v The Griffin Coal Mining Co Pty Ltd* [2018] FCA 899 (14 June 2018); *Birner v Aircraft Turnaround Engineering Pty Ltd* (2019) 287 IR 174; [2019] FCA 1085.

41 See A Heron and S Charlesworth, 'Effective Protection of Pregnant Women at Work: Still Waiting for Delivery?' (2016) 29 *AJLL* 1.

42 Ibid, at 18–21. However FWO litigation has been more successful than that brought by individual employees. See, eg, *Fair Work Ombudsman v A Dalley Holdings Pty Ltd* [2013] FCA 509 (19 April 2013); *Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq)* [2012] FCA 479 (9 May 2012).

One significant case implicating the NES, though its precise impact remains unresolved, concerns the Full Federal Court's 2018 decision in *Skene*.[43] This confirmed an earlier judgment, which, noting the absence of a definition of casual employee in the FW Act, used common law principles to determine that *Skene* — an employee on a regular, predictable and continuous roster over a lengthy period of four years with a labour hire firm at a mining site — was not, as the employer argued, a casual employee. It was therefore concluded that he was entitled to paid annual leave as prescribed by the NES. The implications of this case are extremely rich, offering not only a challenge but also an opportunity. The decision challenges the widespread employer practice, aimed at realising the many advantages of casual employment, of designating employees with a regular roster as 'casual' employees. In particular, it challenges common practices, identified with the 'fissured workplace', of regular casual employment administered through triangular arrangements such as labour-hire. It has the direct effect of promising to expand entitlements for many casual employees and to close part of the protective gap associated with casual employment. Employer groups protest that such employees enjoy a casual loading on their hourly wage and that providing access to benefits such as paid annual leave is a form of 'double-dipping'. They have demanded government action to restore existing practices of casual employment and to clarify the meaning of 'casual' employee. Unions, long concerned about the disadvantages faced by long-term regular casuals, have cautiously welcomed the Court decision. Certainly, the situation seems to call for a 'legislative fix', though there is widespread disagreement concerning the desirable content of any legislation and it is difficult to predict what might eventually be submitted to Parliament.

Legislative changes

Two substantive changes to the NES have been introduced in the past 10 years. First, the Fair Work Amendment Act 2013 (Cth), extended the RTR flexible work to a broader group of employees, including anyone with caring responsibilities, as well as victims of family violence and all employees with a disability or aged at least 55. The Act also developed a list of 'reasonable business grounds' that an employer could use to refuse any request. It notably failed, however, to redress the fundamental problem noted above concerning a lack of direct appeal and enforcement mechanisms.[44] Second, in 2018, the Coalition Government, drawing on a FWC decision from the four-yearly review of award provisions, succeeded in passing through Parliament the Fair Work Amendment (Family and Domestic Violence Leave) Act 2018 (Cth), which provided a new entitlement to five days' unpaid family and domestic violence leave, which was added to the provision comprising personal/carer's leave and compassionate leave.[45]

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43 I Landau and D Allen, 'Major Court and Tribunal Decisions in Australia in 2018' (2019) 61 *JIR* 421 at 422–5.

44 S Charlesworth and F Macdonald, 'Women, Work and Industrial Relations in Australia in 2013' (2014) 56 *JIR* 381 at 387–8; Chapman, 'Is the Right to Request Flexibility under the Fair Work Act Enforceable?', above n 35, at 125.

45 S Williamson, M Foley and N Cartwright, 'Women, Work and Industrial Relations in Australia in 2018' (2019) 61 *JIR* 342.

The most important change to legislated minimum labour standards in the past 10 years was the introduction of a national scheme for paid parental leave in 2011. Instead of being included in the NES, however, where it could have been joined with the provision for unpaid parental leave, the new entitlement was installed in a separate statute — the Paid Parental Leave Act 2010 (Cth). This decision seems to have been rationalised with an argument that the scheme was an entitlement to a government-funded payment rather than leave and that it applied more broadly than just to employees. But the decision to separate it from NES leave provisions has led to difficulties in administering the entitlements, eg, in co-ordinating the different eligibility requirements, including in respect to length of service, which are notably tighter for unpaid parental leave than for paid parental leave.[46]

Several proposals for further change have been put forward, especially in the most recent period. Some proposals follow paths already mapped out in the NES. Thus, in response to the Coalition's Bill, the Labor Party proposed an improvement in the standard for family and domestic violence leave (from 5 unpaid to 10 paid days).[47] Another proposal, discussed in the 2015 Productivity Commission review, is for a new provision, to be added to the return-to-work provisions relating to unpaid parental leave, which would facilitate breastfeeding by new mothers in the workplace.[48] Other proposals derive from further outside the current NES parameters. Some are proposals to embed historic entitlements that have become contested. For example, prior to the 2019 election the Labor Party proposed putting certain rights in connection with superannuation into the NES.[49] Similarly, faced with the prospect of an FWC decision to reduce Sunday and public holiday penalty rates in six awards, the Greens advocated introducing penalty rates into the NES; though the proposal was supported by sections of the union movement, it failed to attract support from either the Australian Council of Trade Unions (ACTU) or the Labor Party.[50]

The most recent proposal for change has proven to be surprisingly controversial. The Coalition Government presented a Bill in early 2019 that would have introduced into the NES a right for employees who have been 'designated as casual' and work a regular pattern of hours to request conversion to permanent full-time or part-time employment. This was presented as a simple consolidation of a 2017 FWC decision.[51] But critics

46 Chapman, 'The Continuing Resonance of Breadwinner Norms', above n 26, at 361–2.

47 'Domestic Violence Leave Enshrined in NES', *Workplace Express*, 6 December 2018.

48 Productivity Commission, above n 29, at 552–5.

49 K Murphy and P Karp, 'Bill Shorten Launches Labor Conference with Unpaid Super Election Pitch', *The Guardian*, 16 December 2018.

50 The Greens proposal, and support from the Victorian Trades Hall Council, is reported in E Hannan, 'Victorian Trades Hall Council Breaks Ranks on Penalty Rates', *Australian Financial Review*, 19 May 2016.

51 The FWC, as part of the Four-Year review, inserted into 85 awards a provision that entitled a casual employee, who, after 12 months' tenure, is engaged on a regular basis and with the prospect of ongoing employment, the right to request conversion to permanent employment. The structure of the right was similar to the RTR flexible work. Thus, the employer could refuse any request on reasonable business grounds, and the grounds for refusal had to be communicated in writing. See D Allen and I Landau, 'Major Court and Tribunal Decisions

argue that the Bill represented 'casual' employment in a way that was consistent with the demands of employer groups, which were seeking to overcome the *Skene* decision.[52] In rejoinder, the Labor Party promised a Bill to introduce a similar right, but with strengthened protective provisions, into the NES. The Coalition Bill lapsed with the federal election in May 2019 but may be reintroduced as part of a broader package of measures on casual employment after the current review commissioned by the Minister for Industrial Relations, Christian Porter.

This review of the changes in the NES over 10 years suggests that initial fears of intense political contest and politicisation have not been realised. It would be premature to speak of an opposite problem of ossification. However, in contrast to the healthy degree of analysis and public debate around annual changes to minimum wage rates, there is only stuttering interest and activity in connection with the NES. Recent proposals indicate increasing interest in the potential of the NES, but the power and plausibility of new proposals is undermined by ongoing weaknesses, especially a lack of channels for review and consultation.

Impact

Determining the impact of the NES is difficult, given the existence of so many confounding factors. In the absence of a formal review and evaluation process, the challenge of producing an assessment has largely been left to academic scholars. The most concerted effort is in connection with the RTR flexible work. Two empirical studies conclude that this provision has had only a limited impact. A first study in two large organisations reveals the continued importance of managerial discretion in handling such requests.[53] A second study found that the introduction of a formal RTR did not appear to boost the proportion of employees who were requesting and achieving changes to their work arrangements. The authors argue that existing RTR regulation is too weak in the face of prevailing managerial cultures and practices and is unable to shore up the low workplace power of many employees.[54]

A similar conclusion of limited effectiveness is likely to apply to other NES provisions. Though limited effectiveness is linked to the varied weaknesses of the NES, especially gaps and lack of substance, it is also important to take into account the impact of fragmented labour markets and more aggressive employer business models, which are exerting pressure on regulatory systems in most countries, shrinking the sphere of collective bargaining and threatening to expand exclusionary processes.[55]

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in Australia in 2017' (2018) 60 *JIR* 397 at 399–400; Campbell, Macdonald and Charlesworth, above n 26.

52 The debate can be traced in the Senate Education and Employment Legislation Committee, *Fair Work Amendment (Right to Request Casual Conversion) Bill 2019 [Provisions]*, Parliament of Australia, Canberra, March 2019.

53 R Cooper and M Baird, 'Bringing the "Right to Request" Flexible Working Arrangements to Life: From Policies to Practices' (2015) 37 *ER* 568.

54 N Skinner, A Cathcart and B Pocock, 'To Ask or Not to Ask? Investigating Workers' Flexibility Requests and the Phenomenon of Discontented Non-Requesters' (2016) 26 *Lab Ind* 103.

55 J Rubery, *Re-Regulating for Inclusive Labour Markets*, Conditions of Work and

Some commentators argue that the NES might work better if they were relocated into modern awards. But award standards are vulnerable to many of the criticisms levelled at the NES, and they are subject to additional deficiencies.[56] The key advantage of award standards in the past derived from the presence of dynamic elements provided by union application for award variation plus more general reviews, eg, via test cases. However, these dynamic elements appear to be disappearing, despite the Modern Award Review mechanism.[57] In our judgment, the preferable path forward, in order to realise the many advantages of statutory minimum standards, is through strengthening and extending the existing NES provisions, with support from a robust review mechanism.

A Modest Proposal

The NES are failing in their function of providing a foundation layer of employee protection. There is no room in this article for developing a full programme for NES reform. But it may be helpful to conclude by outlining a single, modest proposal for change that illustrates the potential of such reform. Our proposal is to replace the existing FWIS provision with a new information document, which we term a Statement of Terms and Working Conditions. This proposal both strengthens and extends the NES. It strengthens by replacing a hollow requirement that serves little purpose with a requirement that is useful to employees. It extends by rectifying a major omission in the Australian regulatory system.

The lack of substance in the current provision is clear. The FWIS, a two-page statement drafted by the FWO, which the employer is required to provide to all new employees, is a remarkably vacuous document, presenting a basic introduction to the Australian regulatory system, but offering little information that would be useful to employees in understanding their current job.[58] In contrast, the new Statement would aim to communicate information in writing concerning the specific job, including features of interest to the employee such as job title (and classification), wage rates, working-time conditions including applicable premia for overtime and unsocial hours of work, type of employment and the name of the relevant regulatory instrument (eg, award, enterprise agreement). Similar to the current FWIS, the Statement

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Employment Series No 65, International Labour Office, Geneva, 2015. See G Whitehouse and M Brady, 'Parental Leave, Social Inequalities and the Future of Work: Possibilities and Constraints within the Australian Policy Framework' (2019) 29 *Lab Ind* 257.

56 In addition to gaps similar to those in the NES, award standards host further problems, such as eroding protections for regular part-time employees and gendered differences in working-time standards between male and female-dominated industries: see Charlesworth and Heron, above n 24, at 178.

57 Stewart et al, above n 6.

58 FWO, *Fair Work Information Statement*, FWO, at <www.fairwork.gov.au/employee-entitlements/national-employment-standards/fair-work-information-statement> (accessed 18 March 2020). See also Stewart et al, above n 6, at pp 233–4. The FWIS has recently been revised, with effect from 1 July 2018, to include information about the current national minimum wage rates for adult permanent and casual employees: see A Fels and D Cousins, 'The Migrant Workers' Taskforce and the Australian Government's Response to Migrant Worker Wage Exploitation' [2019] (84) *JAPE* 13.

should be provided by the employer to employees shortly after the commencement of the job (and annually thereafter).

A requirement for employees to receive a written Statement of Terms and Working Conditions should be the starting point of any set of statutory minimum standards, and its absence in Australia is surprising.[59] Such a requirement sometimes appears in awards and enterprise agreements, and it is sometimes freely provided by employers as part of good employment practice, but it is clear that a substantial proportion of the workforce, often vulnerable workers in low-wage sectors, are only given verbal understandings, supplemented perhaps by the example of workplace practices. Lack of information has, however, negative consequences. It prompts misunderstandings and confusion, which effectively disempower employees. It also supports reprehensible practices of employer noncompliance, including underpayments, which have spread widely within certain industry sectors in Australia.[60]

Most other industrialised countries already possess such a provision. This means that there is no lack of models for Australia to follow. New Zealand, for example, requires employers to provide a 'written employment agreement'. The government promotes a simple template for the written employment agreement, which is disaggregated into mandatory, recommended and optional elements. Mandatory elements include: the name of the employer and the employee; a description of the work to be performed; an indication of the place of work; the agreed hours or an indication of the hours (eg, number, start and finish times, days of the week); the wage rate or salary and how it will be paid; a plain explanation of grievance procedures; a statement of premium payments for working on a public holiday; information on employment protection; any other matters agreed on, and the nature of the employment.[61] The United Kingdom has a requirement for the employer to provide employees within two months of the start of employment with a 'written statement of employment particulars', which covers similar matters to those specified in New Zealand. The UK provision is largely in line with a 1991 European Union (EU) Written Statement Directive (91/533/EEC), which imposes obligations on all EU states to ensure that every worker is provided with a written statement containing information on the essential elements of the contract or employment relationship (plus any change in these essential elements).[62]

The regulatory burden of this proposal on employers should be minor, since it merely replaces an existing obligation and requires information that employers must already assemble in the course of managing work systems,

59 Murray and Owens, above n 11, at p 68.

60 E Cavanough and L Blain, *Ending Wage Theft: Eradicating Underpayment in the Australian Workplace*, Report, McKell Institute Victoria, Melbourne, March 2019.

61 See Employment New Zealand, 'Things an Agreement Must Contain', at <www.employment.govt.nz/starting-employment/employment-agreements/things-an-agreement-must-contain/> (accessed 18 March 2020).

62 This Directive has been recently revised. It will be replaced by an innovative new Directive (2019/1152) on Transparent and Predictable Working Conditions, which seeks to include new groups of workers: see A Piasna, 'The Space for Regulation beyond Borders? The Role of the EU in Regulating Zero Hours Work', in M O'Sullivan et al (Eds), *Zero Hours and On-Call Work in Anglo-Saxon Countries*, Springer, Berlin, 2019, p 179.

keeping records of employment and providing employees with pay slips. Any regulatory burden could be lessened, as in the New Zealand case, by government action to disseminate a template document. Apart from the benefits for employees, there are wider labour market benefits. Increased worker knowledge is by no means a panacea, but it helps to build confidence and assists employees in exercising their rights. In this way, it can for example serve as an important aid in the ongoing struggle against systemic underpayments.