



Steve Fielding **Family First** Senator for Victoria



National Employment Standards, Penalty Rates and Meal Breaks

Senate Standing Committee on Education, Employment and
Workplace Relations
Thursday, 21 February 2008
Canberra

EMPLOYMENT AND WORKPLACE RELATIONS PORTFOLIO

Senator Marshall (*Chair*)

In Attendance

Senator Wong, Minister for Climate Change and Water

Department of Education, Employment and Workplace Relations

Ms Lisa Paul, Secretary

Mr Finn Pratt, Acting Associate Secretary

Mr John Kovacic, Acting Deputy Secretary

Senator FIELDING—I want to ask some questions about the National Employment Standards and the paper put out either last week or the week before. It includes 10 items. I take it that these National Employment Standards are fairly important; they would not be put forward unless they were very important. Who is not covered by awards?

Mr Kovacic—At the moment awards apply to cited respondents. For instance, a number of organisations or businesses may have been established post the commencement of the Work Choices system that would not be respondent to federal awards by virtue of the operation of the Workplace Relations Act. There would be traditional categories of employees who have not been covered by awards, and in the main they would be managerial sort of professional employees. In addition, there are some emerging areas of sectors or industry that have not been covered by awards; for instance, some areas of the information technology industry may not be covered by awards. It is largely those sorts of categories that at this stage are not covered by awards in the federal system.

Senator FIELDING—How many, do you think?

Mr Kovacic—In terms of numbers, the most recent sort of data, which goes back to 2006, indicates that about 19 per cent of employees are covered by awards only. In terms of award-free employees, those numbers do not give us a sense as to how many would be

award-free, but I would imagine that it would be, at a guess, probably less than 10 per cent in very broad terms, very much less than 10 per cent.

Senator FIELDING—So, 10 per cent of a workforce of approximately 11 million; is that right?

Mr Kovacic—I think it is about 10 million at the moment. For instance, you would have proprietors of businesses that would not be covered by a federal award, and self-employed persons may not be covered by federal awards, either.

Senator FIELDING—To try to paint a picture in people's minds, and I am always mindful of naming particular companies, but I could probably at least name this one: many of the OneTel staff were not covered by an award. There were reports in the newspapers. There are some nods at the table there. It was a new industry, and a lot of awards were formed basically when IT was not around.

Mr Kovacic—I do not know about OneTel specifically as to whether they were or were not covered.

Senator FIELDING—The National Employment Standards cover 10 items; is that right?

Mr Kovacic—That is correct.

Senator FIELDING—There are weekly hours of work, working arrangements, flexible, parental leave, annual leave, personal carer's leave, community service leave, long service leave, public holidays, notice of termination, redundancy pay, and a fair work information statement. I do not see meal breaks or penalty rates.

A lot of families rely on these. If 10 per cent of people are not covered by awards where these matters would be covered, it seems to me that there will be some exposure of people not being covered by penalty rates and meal breaks.

Mr Pratt—Those people would not be covered by penalty rates and meal breaks under awards currently.

Senator FIELDING—Under *Forward with Fairness* I would think it would be reasonably fair to assume that, as a bare minimum, there would be something about penalty rates and meal breaks. The National Employment Standards are 'to establish a fair and flexible productive workplace relations system for Australia ... that protects fair minimum wages and conditions for all working Australians'. Ten per cent I know already are not covered. Some of those will be managerial staff, but there are still a lot of people who are not covered. Meal breaks and penalty rates are fairly basic items.

Mr Kovacic—In terms of issues such as penalty rates, the point that Mr Pratt has made is that employees who are currently award free do not enjoy any sort of entitlements in that regard. Certainly the discussion paper around the proposed National Employment Standards invites comments around how to deal with machinery provisions, if I can put it that way.

In terms of the proposed new workplace relations system that the government is looking to have fully operational by January 2010, there are two components to the safety net. One is the legislated National Employment Standards; the other component is modern awards. In terms of the entitlement around the legislated standards, the legislation will largely provide for the entitlement and any sort of key machinery provisions that relate to that. But the bulk of the machinery provisions will be dealt with in modern awards.

Part of the discussion or the consultation process is to identify how machinery provisions relating to the elements in the National Employment Standards might be dealt with, and in particular how those sorts of provisions might be dealt with for award free employees or employees earning more than \$100,000 in the new workplace relations system. Certainly those issues are yet to be settled by government, and indeed the consultation process is an opportunity for stakeholders to submit a range of views on those sorts of issues.

Senator Wong—The standards that have been put out for consultation are consistent with the matters that we committed to in *Forward with Fairness*. As you may recall, there were the 10 National Employment Standards; then there were a further 10 minimum employment standards that would be included in awards and that included penalty rates and overtime. I understand the point you are making, but the point I am making is that the government is being entirely consistent with its policy commitments as outlined prior to the election.

Senator FIELDING—I was going to make a point on that consistency. Just for the record, Family First voted against Work Choices because it left Australians vulnerable. Family First is being consistent. We are looking at what is being proposed by the government of the day, such as *Forward with Fairness*. The document states that the National Employment Standards are really important. It covers 10 items, and other items are covered in awards. We have already determined that there will always be some people not covered by awards.

Why would you not, as a bare minimum, have something on meal breaks and penalty rates? People should not have to bargain for a meal break.

Senator Wong—The officers can interrupt me if I am incorrect, but our policy commitment in *Forward with Fairness* was that meal breaks and penalty rates would be dealt with as minimum standards in awards. They would not be matters that you had to try to get; you would get them by virtue of your entitlement under the award.

Senator FIELDING—I fully understand that. My first question is: why should they be in awards when clearly not everybody will be covered by awards? Secondly, why would you leave it to another process? The National Employment Standards are about guaranteeing for all Australians, rather than leaving it to awards to sort out issues of some fairly basic conditions such as meal breaks and penalty rates as a bare minimum.

Mr Kovacic—The intention of including those provisions in modern awards is to enable scope for industry specific requirements to be taken into consideration in terms of developing modern awards as opposed to applying a one-size-fits-all approach with respect to everybody. There are differences in terms of different industry sectors in terms of their needs. So, dealing with these sorts of issues in modern awards provides the scope for them to be developed to the particular needs of industries and the employees working in those industries.

Senator FIELDING—But some of those 10 National Employment Standards may be upgraded in awards anyway; therefore, you could have a bare basic minimum meal break criteria in the National Employment Standards and penalty rates that could be upgraded in awards for those who go through the award process. But why would you not have those two in the National Employment Standards so that everybody has those, so we are not treating 2 am like 2 pm? If the awards will cover everything then let the awards cover it. But these are included as a real bare basic safety net. That is what the National Employment Standards are for. If they are not that important, you would not have them.

Senator Wong—The safety net that we outlined in Forward with Fairness comprises a number of parts, including the National Employment Standards and the minimum standards set out in awards. I understand that essentially your questions go to the effect on a range of non-award employees, in which you and I would be included, on issues such as penalty rates and meal breaks. I am not sure that we can take this further unless Mr Pratt has something he wishes to say. I am happy to say I can communicate to the minister I represent your concern about that group of employees.

CHAIR—Your earlier evidence was that 10 per cent of people are not covered by awards; is that right?

Mr Kovacic—I think it would be up to that; it would not any more.

CHAIR—If you exclude senators and managerial type classifications, about whom are we actually talking? Which people who have real jobs, as opposed to us, do not actually have award coverage?

Mr Kovacic—I think it would be very small. It would just be small pockets, and I think it would be largely in emerging areas such as information technology where there might not be existing award coverage. Beyond that it is very difficult to see what areas there would be. In the federal award system, most industry sectors would have award coverage. Call centres would be covered by awards now.

CHAIR—I think the committee would like to know. That goes to the crux of what Senator Fielding is asking. We are not really worried about our conditions, but we are concerned about people who do not have the bargaining power and who may not be covered by awards and who may also fall outside of the minimum safety net. Could you take it on notice to provide the committee with the sorts of people whom I have described may not be covered by an award under the new legislation?

Ms Paul—I might point out the award modernisation process does not preclude emerging industries from being covered.

Senator FIELDING—No. I appreciate the extra input to the question. I have asked this question, and no one seems to know the answer. I thought the department would have a fairly good handle on those who are covered by awards and those who are not. For example, shopping trolley collectors currently are not covered by an award. I know that has been picked up and it is being looked at. I have read articles, and I have read this document quite well. I understand that in Forward with Fairness you are being consistent with your document.

Family First are being consistent, too, because we have always argued that Australians should not have to bargain for basic things such as meal breaks and penalty rates. Some people will be exposed. You may say that the awards over time will pick them up, but until the awards pick them up, people will be exposed.

If the National Employment Standards are not needed and they are covered by awards, you would not have National Employment Standards. Do you understand what I am saying? You would not have National Employment Standards if awards picked up all of this stuff. Awards do not cover everybody, and the National Employment Standards are to make sure we have a bare basic parameter for working conditions in Australia.

I would think most Australians would expect that meal breaks would be covered in the National Employment Standards, as well as a minimum penalty rate, to make sure that working at 2 am is not treated like working at 2 pm. I am happy for you to argue back and say that the National Employment Standards are not needed and all the awards will take care of everybody, but that is not true.

Senator Wong—No-one in this government is arguing that 2 am and 2 pm should be treated the same. I think we have been very clear in our view about the previous government's Work Choices legislation, and we are doing all we can to amend that and remove AWAs that we regard as unfair. I understand the issue that you raise. Your concern is with non-award employees, presumably not, as Senator Marshall said—and I will not repeat the description he used—people such as senators and members, who may not be covered by an award for a period. It is a situation that I would emphasise has been part of the industrial relations framework for a number of years. That is why awards did have to be extended under various governments to deal with emerging occupations.

Senator FIELDING—Could I turn the question around a bit? I have to reiterate that I hear the government when it says it argued against Work Choices, as did Family First. But we are being consistent on this idea of meal breaks, public holidays and penalty rates. The new government has included public holidays, and it is a very good and sound move to make sure that public holidays are guaranteed for all Australians in the National Employment Standards.

My question goes to why the government continues to exclude a bare minimum of meal breaks and penalty rates so that 2 am is definitely treated the same as 2 pm in a working day, with employees who work from 2 am to 3 am being treated the same as those who work from 2 pm to 3 pm. Why would you allow any Australian to be exposed to not having those two provisions covered? You have covered public holidays, for which I applaud you. Previously we had five minimum standards—the bare bones of five—and we are all aware of those issues. But you have upped it from five to 10, and I just question why not include meal breaks and penalty rates?

Senator Wong—To be fair—

CHAIR—Hang on; it is a question to the minister, but it is very similar to the question you have just asked, so I will ask the minister to respond and then we probably need to move on. This is not the place to debate policy; it is a place to ask questions and obtain answers.

Senator Wong—There are two points. The previous government did not only have five. It also had a system where a great many award conditions could be stripped away without full compensation. It is a very different industrial relations system. I think in fairness you would accept that. Secondly, we are being absolutely consistent with the policy that was outlined prior to the election, and I think fairly extensively looked at by many people in the community.

Finally—and this is possibly an issue on which an officer might comment—generally you would put issues such as meal breaks, et cetera, in awards because different industries obviously would have different times at which you would take meal breaks, rest breaks and the like. So, you would have industry and/or enterprise specific arrangements around those things.

Senator FIELDING—We are being consistent as well about meal breaks and penalty rates. I do not think most Australians know that meal breaks are not covered for all Australians under the National Employment Standards. I do not think they really know that. Even though you can say that *Forward with Fairness* is out there, they knew that Work Choices was a dud.

Senator Wong—We agree on that.

Senator FIELDING—They would vote for anyone who had something different from that. I am saying that I do not think most Australians know that meal breaks and a bare minimum penalty rate is not guaranteed for all Australians. I do not think they know that at all.

Ms Paul—I think most people are aware of awards. That is a well accepted and longstanding major component of our industrial relations landscape. As the minister has pointed out—and I think Mr Kovacic went to before—it makes sense to enable meal breaks and penalty rates to be industry specific, which means you really have to have them in something that is a mechanism that can relate to that particular industry.

The National Employment Standards, which are new and perhaps not as well understood yet in the community broadly as awards, go to the broader scope of nationally consistent issues. That is why it is easier to deal with holidays, for example, in there than it would be for things that are more industry specific. We do understand your point, and the minister has undertaken to take that up with the Deputy Prime Minister, but I am just spelling out the differences between the two mechanisms.

Senator FIELDING—You could add a meal break provision in the National Employment Standards. You could add a bare minimum penalty rate in the National Employment Standards. The awards could have those modified for specific industries. I am saying that you could actually achieve what you want to achieve and what I think most Australians would want to see there, which is meal breaks being guaranteed for all, even if it were on a minimum basis, and the awards could come on top and adjust those for those industries as needed. The industries could also adjust the penalty rates through awards.

Therefore, you have a distinct message going out that all Australians are covered with fairness through the National Employment Standards. That is my proposal. I think the answer would have to be, yes, you could do that. I am not saying that you would want to do

that. For some reason the government is saying you would not want to do that, but you could do it.

Senator Wong—No, we are saying that.

CHAIR—Hang on; while I am enjoying this, and I would love to join this debate, the appropriate place to have this sort of debate is in fact in the Senate chamber. Unless you have some more specific questions, I would ask that we move on.

Senator FIELDING—Could I have my proposition put on the record? I do not want to repeat it. In the National Employment Standards, you could add penalty rates and meal breaks with the awards also adding to those items? Yes or no?

Senator Wong—We have noted your views and I think we have said we will pass on those views. I understand the position you are putting, but again, to put some context around this, given that we are putting things on the record, if we want to talk about fairness—and I do not have figures in front of me—there would be many people on fairly high incomes who would not be covered by awards. I assume your concern would be with low income employees who were award free. My advice from the department is that its view is that would not be a very high figure. I understand that is the group you are concerned about particularly; is that correct?

Senator FIELDING—That is correct.

Senator Wong—It is not the executives of banks or people like that who are award free and earn quite a lot of money, correct?

Senator FIELDING—Yes.

Ms Paul—In the exposure draft of the National Employment Standards, which is a discussion paper, there is a public invitation for people to offer feedback about the impact of the employment standards on those who are award free. You have offered us a fair bit of that now, but these are not yet settled. This is out for exposure.

Senator FIELDING—Submissions close on 4 April 2008. I will help you promote it. I am obviously aware of the document.

Ms Paul—Thank you.

CHAIR—I do now want to move on.

Mr Pratt—Sorry, but—

CHAIR—You are not helping me at all, Mr Pratt.

Mr Pratt—My apologies, but just a final word on this. As to the minister's point, once you exclude high paid managerial people, once you exclude IT professionals and the like, the vast majority of people will be covered by an award and therefore will be subject to meal breaks and penalty rate arrangements. When you look at what the award modernisation

request will seek of the Industrial Relations Commission in modernising awards, we see it states as follows.

The creation of modern awards is not intended to:

(a) extend award coverage beyond those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia ...

I suspect—and I am speculating here—that the employees with whom you are concerned ultimately may get picked up through this final process.

Senator FIELDING—This will be my final question on notice. I have estimated that 100,000 Australians—but I could be wrong, because you do not have the figures, either; we said 10 per cent of 10 million, which is one million—who are not in the managerial class or senior manager class who are workers who may have to bargain their way through and who will not have meal breaks or penalty rates guaranteed. That is from my own analysis.

CHAIR—That question has been taken on notice, and the department will come back to us.

Mr Kovacic—I want to foreshadow that there is a difficulty in terms of data, so we will do our best to come up with an accurate number in terms of the question we have taken on notice.

CHAIR—I am sure you have always done your best in responding to questions on notice, Mr Kovacic.

Senator FIELDING—Thank you for your leniency.

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CHAIR—Senator Fielding.

Senator FIELDING—Thank you. I would like to follow up a little bit further on a different issue but with the National Employment Standards again. Does anyone know how many site awards there are across Australia?

Mr Kovacic—I would have to take that on notice.

Senator FIELDING—Can you tell me what the site awards are?

Mr Kovacic—I presume that they would be a euphemism for project awards in the sense that they probably apply to a particular building project, building site or something of that nature.

Senator FIELDING—They are not industry wide for that site?

Mr Kovacic—No. They would be quite specific in terms of their application.

Senator FIELDING—I am thinking about people who work in industries where the employees do not have much muscle or bargaining power, and just remembering that 80 per cent of the private sector is not unionised, how would they negotiate their site award which may change, which includes penalty rates and meal breaks, knowing that the NES does not have a bare minimum on meal breaks and penalty rates?

Mr Kovacic—I am not sure I understand the process. As a result of the award modernisation process, it will be the Australian Industrial Relations Commission that makes modern awards, and going through that process there will be an opportunity not just for the traditional stakeholders in terms of employer and employee organisations to contribute to the process, but for other interested parties and other interested stakeholders to also contribute to the commission's thinking as part of making modern awards.

Senator FIELDING—I do not want to spring the minister on this question, but is the government guaranteeing that every person covered by an award, whether it is a site award or some other award, will get penalty rates and meal breaks?

Senator Wong—We are guaranteeing that penalty rates and meal breaks will be the minimum standards in awards as we outlined prior to the election.

Ms Paul—You started by talking about negotiation and that sounded like a workplace negotiation. That is not the nature of an award.

Senator FIELDING—I understand collective agreements and how they work. They sit normally above an award, but there are some things called site awards that are very specific to a workplace. My question is: is the government guaranteeing that every person covered by an award will get penalty rates and meal breaks? This is in the backlight that only 80 per cent of the private workforce is unionised, so who is going to be bargaining?

Ms Paul—The question of union coverage does not have anything to do with awards. Awards are the foundation stone, as we have talked about before and there only a few people who are not covered in the minimum standard. It is not the NES here. It is the minimum standard that goes to those things and the government has committed to that through Forward with Fairness. That probably does answer your question.

Senator FIELDING—Is the government guaranteeing that every person on an individual contract will get penalty rates and meal breaks under the new proposed system? My concern is that the National Employment Standards do not have meal breaks and penalty rates as a minimum standard, so I am asking the question: will everybody be guaranteed penalty rates and meal breaks?

Mr Kovacic—In terms of certainty for employees who are covered by awards, bearing in mind the issue of what arrangements may apply to those low paid employees, following on from the discussion we had this morning in terms, who may not be award covered, they are issues that are yet to be worked through and are likely to be raised in the context of comments on the exposure draft of the National Employment Standards.

Common law contracts will need to see employees better off than they are under the safety net, which as I mentioned this morning is a combination of both the legislative National Employment Standards and modern award provisions.

Ms Paul—The test is that they have to be better off.

Senator FIELDING—I do not want to go over old ground because we have said that there are some who are not covered by awards. We will not go back to that ground because we discussed it this morning.

Mr Kovacic—In terms of those low paid, award-free employees, the point I am making is that the process in terms of consultation around NES, together with the award modernisation process, are avenues where those issues will be further considered, and clearly the government will take into account those sorts of considerations in developing its more substantive reforms later this year.

CHAIR—I do not want to restrict you and I try to allow as much flexibility as possible, but I am a little bit concerned that we are asking questions about what will happen post legislation that has not yet been passed through the parliament. I do not want to restrict you but if we go too far down what we really do not know yet then I will start to pull you up.

Senator FIELDING—Thank you. The point I was trying to make is given that 80 per cent of the private workforce is not unionised and as far as the National Employment Standards you could negotiate down to the NES in an area that—

Senator Wong—No. As I understand that is what the officers are trying to explain to you. Union coverage bears no relationship to award coverage, so people are covered by awards, by virtue of the industries in which they work, the occupations in which they work, the work they undertake as a matter of operation of law. Whether or not they are a union member is irrelevant to whether or not they have entitlement under the award.

Senator FIELDING—All right. I will try to clarify it this way. Could I negotiate or could there be a new industry and new award that has as its bare basics just the NES and nothing else in there?

Senator Wong—Not under our policy. Our policy under Forward with Fairness is very clear. We have 10 National Employment Standards and Deputy Prime Minister Gillard has issued those for consultation, and we have invited—given you have some concerns, you are welcome through that forum as well as through this one to make your views known. In addition there are 10 minimum standards, which are to be included in awards.

Senator FIELDING—This is a very black and white question. Could I arrange a so-called site award or something else that looked like that, that only had the 10 National Employment Standards conditions in there?

Mr Kovacic—There would be no need to do that because the National Employment Standards is legislated. It applies to all employees who are subject to the federal workplace relations system.

Senator FIELDING—I understand. That is the bare minimum or starting point, basically.

Ms Paul—The award will have in it the minimum standards, which are separate to the NES, as we discussed last time round, and those things will cover the matters you are interested in. If we are talking about an award those minimum standards will be covered and will satisfy your—

Senator FIELDING—I am talking about a potential new industry, new award, brand new area.

Ms Paul—If this legislation is enacted, according to the policy, any award would need to comprehend those minimum standards, including any new award.

Senator FIELDING—So that is the minimum 10 standards?

Ms Paul—That is right.

Mr Pratt—The safety net has two components.

Senator FIELDING—I understand.

Mr Pratt—The National Employment Standard and the modernised awards. All modernised awards will include the 10 allowable matters including penalty rates and rest breaks.

Senator FIELDING—What I am commenting on is the allowable matters. You could say that it is allowable to have penalty rates but they could be negotiated in a way to zero. You could have, say, zero penalty rates in a brand new award because the National Employment Standards, the 10, is the bare minimum.

Mr Kovacic—It is not a case of bargaining away. As I have mentioned before, in the sense of modern awards it will be the Australian Industrial Relations Commission that creates modern awards and there will be a process leading up to that, and that process will take into account the views of stakeholders and others in terms of what are modern awards.

Certainly penalty rates and meal breaks are allowable matters in the context of modern awards and I would think that it would be very unlikely. I would go further than that. I would be very surprised if the commission was to make a modern award which did not provide for penalty rates or meal breaks that related to the needs of the particular industry. It is not a bargaining process. It is a determinative process.

Senator FIELDING—It is technically possible.

Ms Paul—It is the commission's responsibility. It is not a matter for the particular employer on the site or their employees. It is a matter for the commission. So it is the commission that makes an award and so the commission must take into account the minimum standards. I think your question is well satisfied by the protections of the minimum standards and the fact that it is not a bargained matter making an award. The award is made by the commission.

Senator FIELDING—When you say minimum standards, it is the 10 minimum standards. It is the absolute guaranteed ones because the others are guaranteed in awards. What I am saying is that the 10 basic minimum conditions do exclude meal breaks and penalty rates. They are not there.

Mr Kovacic—As we said this morning and again this afternoon, the safety net comprises two components.

Senator FIELDING—I understand that.

Mr Kovacic—One is the National Employment Standards and in terms of modern awards. Now the point you have made is that with award-free employees there is a question mark as to what applies in respect of those employees, and the point I make there is that this is an issue for the consultation process in respect of the National Employment Standards, but also the award modernisation process itself, and they are issues that are likely to rise in that context and are matters which the government will consider and settle in the context of developing its more substantive reforms.

Senator FIELDING—I do not want to play a game of ping-pong. I am just saying that it is technically possible for somewhere down the track to have a new award for a new industry that may have zero penalty rates because they are not in the 10 national standards. You may say it is unlikely, but it is technically possible.

Mr Kovacic—If you look at current awards, putting aside issue-specific awards such as awards that might solely deal with long service leave and issues like that, I am not aware of any awards that do not deal with penalty rates or meal breaks.

Senator FIELDING—Thank you.