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National Standards

The commencement of the National Employment Standards (NES) under the Fair Work Act (FWAct) means that a minimum entitlement to redundancy (or severance) pay applies to a broader category of employee than was previously the case.

Redundancy pay previously had only been a legal entitlement for award/agreement-covered employees, however, the NES now provides a statutory entitlement to redundancy pay for all full-time and part-time employees employed by a company that is not a small business, including award/agreement-free employees.

This guide summarises the circumstances under which an employee may have an entitlement to redundancy pay and the amount of redundancy pay payable to an employee. It also provides some answers to some common questions surrounding redundancy pay.

Operative date

The scale of payments provided under the NES is payable to eligible employees for a redundancy that occurs on or after 1 January 2010.

What is a redundancy?

The following definition applies for the purposes of redundancy pay under the NES:

Redundancy occurs if the employee's employment is terminated by the employer because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour, or because of the insolvency or bankruptcy of the business.

Employees excluded from redundancy pay

The NES redundancy pay scale does not apply to an employee's termination of employment if, immediately before the time of the termination due to redundancy, or at the time when the person was given notice of the termination:

- the employer employs less than 15 full-time employees
- an employee has less than 12 months continuous service with the employer
- the person is a casual employee
- the employee is terminated because of serious misconduct
- the employee is employed for a specified task, or a specified period of time, or a specified season
- a training arrangement applies to the employee and his/her employment is for a specified period of time, or limited to the period of the training arrangement
- the employee is an apprentice
- an industry-specific redundancy scheme in a modern award applies to the employee or is incorporated into an enterprise agreement which applies to the employee.
# NES — amount of redundancy pay

The NES prescribes a scale of redundancy or severance payments based on an eligible employee’s years of continuous service with the employer and the employee’s age. The scale of payments is calculated based on the following scale:

<table>
<thead>
<tr>
<th>Continuous Service</th>
<th>Redundancy Pay</th>
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</thead>
<tbody>
<tr>
<td>Less than one year's continuous service</td>
<td>Nil</td>
</tr>
<tr>
<td>At least 1 year but less than 2 years continuous service</td>
<td>4 weeks pay</td>
</tr>
<tr>
<td>At least 2 years but less than 3 years continuous service</td>
<td>6 weeks pay</td>
</tr>
<tr>
<td>At least 3 years but less than 4 years continuous service</td>
<td>7 weeks pay</td>
</tr>
<tr>
<td>At least 4 years but less than 5 years continuous service</td>
<td>8 weeks pay</td>
</tr>
<tr>
<td>At least 5 years but less than 6 years continuous service</td>
<td>10 weeks pay</td>
</tr>
<tr>
<td>At least 6 years but less than 7 years continuous service</td>
<td>11 weeks pay</td>
</tr>
<tr>
<td>At least 7 years but less than 8 years continuous service</td>
<td>13 weeks pay</td>
</tr>
<tr>
<td>At least 8 years but less than 9 years continuous service</td>
<td>14 weeks pay</td>
</tr>
<tr>
<td>At least 9 years but less than 10 years continuous service</td>
<td>16 weeks pay</td>
</tr>
<tr>
<td>At least 10 years continuous service</td>
<td>12 weeks pay*</td>
</tr>
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</table>

* The reason the amount of redundancy pay entitlement is reduced after 10 years continuous service is that the government assumes that the employee is also entitled to long service leave pay at this point.

The national workplace relations tribunal, Fair Work Australia (FWA), is able to reduce the amount of redundancy pay (which may be nil) where the employer obtains other acceptable employment for the employee, or if the employer cannot pay the amount which is legally payable. The employer must apply to FWA for this reduction.

## Definitions — NES

### Ordinary pay

The amount of redundancy pay equals the employee’s ‘base rate of pay’ for his or her ordinary weekly hours of work.

The base rate of pay is the employee’s ordinary weekly rate of pay for their ordinary hours of work, excluding incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates, any other separately identifiable amounts.

Note that a modern award (see below) may continue to recognise more beneficial redundancy provisions that were provided prior to the commencement of the modern award. For example, providing that entitlements are calculated on an ordinary rate of pay rather than the lesser ‘base rate of pay’.
Continuous service

The NES recognises an employee’s service with their employer prior to 1 January 2010, provided the terms of an employee’s contract of employment included an entitlement to redundancy pay.

New provision for award/agreement-free employees

Where an employee’s contract of employment does not include an entitlement to redundancy pay, service for the purposes of calculating redundancy pay under the NES commences from 1 January 2010. This will mainly affect award/agreement-free employees who did not have a previous entitlement to redundancy pay under the conditions of their contract of employment.

Excluded service

Redundancy pay is based on the number of years of continuous service the employee has completed with their employer. The FWAct states that all employment with the employer counts as service except for the following absences:

- any period of unauthorised leave
- any period of unpaid leave or authorised unpaid absence, other than community service leave and a period of employee stand-down (the latter means when the employer ceases paying wages to employees for whom it has no work, until work is again available, but the employee remains employed by the employer)

This means that any paid absence from work, such as annual leave, personal/carer’s leave (including compassionate leave), a public holiday, jury service and long service leave counts as service for the purposes of calculating redundancy pay. However, unpaid absences, such as unpaid parental leave, leave without pay granted by the employer, unpaid carer’s leave or unpaid compassionate leave, do not count as service and are excluded from any calculation of continuous service.

Modern awards

Australia has a new system of modern awards which commenced operation from 1 January 2010. There are 122 modern awards which have replaced the 1,500 federal and state awards which operated under the previous system.

Together with the NES, modern awards provide the safety net of terms and conditions of employment for employees.

Modern awards can impose additional obligations on an employer with respect to redundancy pay, to be read in conjunction with the minimum entitlements under the NES. These usually relate to ‘transitional provisions’ which preserve redundancy pay provisions under a NAPSA¹ that are more beneficial to the employee. Other modern award provisions with respect to redundancy usually relate to transfer to lower duties, an employee leaving during the notice period and job search entitlement.

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¹ A NAPSA is a Notional Agreement Preserving a State Award. NAPSA’s were created under the previous WorkChoices system when what were previously State Awards were brought into the Federal system using the device of a ‘notional agreement’. In practice the employer and employee had to do little other than to recognise that the industrial instrument was now a federal one; changes which would have had more impact down the track were circumvented by the change in federal government and the introduction of Fair Work.
Transitional provisions

Most modern awards contain a transitional provision regarding the scale of redundancy payments under a NAPSA that are more beneficial to an employee than the NES. The transitional provision will usually cease to operate after five years, on 31 December 2014.

The ‘standard’ transitional redundancy pay provision in modern awards usually provides that an employee is entitled to the amount of redundancy pay that would have applied to him/her immediately prior to 1 January 2010 as set out in the NAPSA. The employee only has this entitlement if he/she was in their current circumstances of employment at that time and no workplace agreement had applied to him/her that would have entitled him/her to more redundancy pay than he/she was entitled to, if any, under the NES.

Standard redundancy pay provisions contained in NAPSAs in a number of state jurisdictions are more beneficial than the NES, such as New South Wales and Queensland. These provisions will continue to be enforceable during the five-year transition period. The redundancy pay provisions of a NAPSA may differ from the NES in a number of respects, including the scale of redundancy pay, a greater entitlement to redundancy pay for an employee aged over 45 years, or the inclusion of additional payments under the definition of ordinary pay for the purposes of redundancy pay.

For example, the NSW Clerical and Administrative Employees (State) Award (a NSW NAPSA) provided a scale of redundancy pay more beneficial than the NES (depending on the employee’s years of continuous service), including an additional week’s pay for an employee with at least 2 years continuous service with the employer and who is over 45 years of age. Also, the NAPSA defines a ‘week’s pay’ to mean the all-purpose rate for the employee concerned at the date of termination, including overaward payments, shift penalties and allowances provided for in the relevant award. These provisions will prevail over the NES until 31 December 2014.

However, a redundancy pay entitlement under a NAPSA that diminishes an employee’s entitlement to redundancy pay when compared to the NES is invalid.

Transfer to lower paid duties

Most modern awards provide that employees who are transferred to lower paid duties as a result of their positions becoming redundant must be given the same period of notice as they would have been entitled to as if their employment had been terminated.

The employer may choose to pay an amount equal to the difference between the former ordinary time rate of pay and the new ordinary time rate of pay for the number of weeks notice still owing.

Employee leaving during notice period

Most modern awards will usually provide that an employee who is given notice of termination in circumstances of redundancy may terminate his/her employment during the period of notice. The employee is entitled to receive the benefits and payments he/she would have received under the award had he/she remained in employment until the expiry of the notice period, but is not entitled to payment instead of notice.
Job search entitlement

Most modern awards will usually provide that an employee who is given notice of termination in circumstances of redundancy must be allowed up to one day’s time off with pay during each week of notice for the purpose of seeking other employment. At the employer’s request, the employee must produce proof of attendance at an interview or there is no entitlement to payment for the day. A statutory declaration would be sufficient proof for this purpose.

Consultation

Modern awards contain a ‘standard’ provision that places an obligation on an employer to consult with employees regarding major workplace change. The award requires an employer to notify affected employees when a definite decision has been made to introduce major changes that are likely to have significant effects on employees. ‘Significant effects’ include termination of employment.

The obligation on an employer to consult with employees would arise in most redundancy situations. Failure to implement proper consultation procedure may result in a claim of unfair dismissal because, for example, the selection criteria used to identify which employee(s) where to be made redundant was subjective and discriminatory.

Transfer of employment

Recognition of service with the first employer does not apply with respect to redundancy pay under the NES where the transfer is between non-associated entities and if the second employer decides not to recognise the employee’s service with the first employer. Where a transfer of employment occurs, a transferring employee is not entitled to redundancy pay at the time of the transfer of employment where employment with the second employer is ongoing. The NES also provides that an employee is not entitled to redundancy pay if:

✓ the employee rejects an offer of employment made by another employer that is on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than the terms and conditions of employment with the first employer immediately before the termination, and recognises the employee’s service with the first employer; and

✓ had the employee accepted the offer, his/her employment would have been transferred.

FWA may order the first employer to pay an amount of redundancy pay if it is satisfied the offer of employment with the second employer operates unfairly to the employee.

Relocation

Disputes can occur when the employer relocates his/her business operations to another locality and an employee refuses to accept the same position at the new premises, because the new location is too distant or inconvenient for the employee to travel. The location of an employee’s work is regarded as a condition of employment and to vary this would require the employee’s agreement in the absence of a specific condition addressing this issue in the employee’s contract of employment.

Industrial courts and tribunals have considered whether an employee’s refusal to transfer to the new premises is reasonable in the circumstances and, consequently, whether an employee is entitled to
redundancy or severance pay. The reasonableness or otherwise of an employee’s refusal to relocate is based on the presumption there is no effective change to the employee’s conditions of employment.

**What is reasonable?**

The question usually considered by a court or tribunal in any relocation matter is whether the change in location of employment is of such a degree that it amounts to a repudiation of the contract of employment. The following factors have been considered relevant by tribunals when determining an employee’s entitlement to redundancy pay. This list is not exhaustive nor is any particular factor a greater determinant than another:

- similar alternative employment is offered at the new location, ie similar remuneration and employment status
- the amount of notice given by the employer to employees of the planned relocation
- whether or not there is a total rejection of the relocation or whether some employees accept the alternative offer
- the additional time taken and the number of kilometres travelled by employees to the new location.

In determining the reasonableness, or otherwise, of a new location, distance is not necessarily an overriding factor in justifying the reasonableness of an employee’s refusal to relocate, although a tribunal’s reasoning on this point can be subjective. For example, in one case an employee was offered identical terms and conditions at the new location which resulted in an increase in the distance travelled of more than 40 kilometres. The tribunal considered this reasonable and, consequently, determined there was no entitlement to redundancy pay.

Conversely, other cases have resulted in an order for payment of redundancy pay where the relocation was less than 30 kilometres. In most instances, the employer also offered financial or logistical assistance to employees to alleviate any inconvenience in travelling to the new location.

**Benefits to relocate**

An employer may offer additional benefits to employees as an incentive to relocate to the new business premises. Some employers have offered a relocation allowance, as either a lump sum payment or a weekly allowance, designed to meet some of the portion of the additional cost of travel to the new location. A weekly allowance may be payable only for a specific period or is absorbed by future wage increases.

In other cases, the employer has organised free transport, eg a bus service, for an interim period after the relocation to allow time for the employees to arrange suitable private transport, although this will depend on the amount of notice the employer was able to give employees of the intended relocation.

**Other acceptable employment**

The amount of redundancy pay may be reduced (which may be to nil) by Fair Work Australia where the employer arranges other acceptable employment and the terms and conditions offered with respect to the other employment are deemed to be fair.
Industrial tribunals have previously considered factors to determine the suitability of the other employment offered. The test to be applied in this case is an objective one and should take into account each individual employee’s circumstance. This test should be applied when the employer is either trying to organise other acceptable employment with another employer or attempting to arrange other employment within the same organisation. Such factors to be considered when determining the fairness of an offer of other employment include:

Pay levels — if the salary offered for an alternate job is similar or the same as the redundant position, this could be viewed as making the offer acceptable.

Hours of work — where the other employment involves a change of starting and finishing times, a change from shift work to day work, or vice versa, or work on different days of the week, this may be deemed unsuitable, depending on the circumstances of the individual person, including the person’s family responsibilities.

Nature of the employment — the offer of part-time or casual employment to a current full-time employee may be deemed unsuitable. This may also fail on the basis of a lower salary level associated with these types of employment.

Employment status/seniority — the offer of a non-managerial position to a manager may be unsuitable as there is a certain ‘status’ associated with the current position. Such an offer could be viewed by FWA as a ‘demotion’.

Skills & qualifications — does the offer involve a position that that the employee has the necessary skills and/or qualifications to perform? If not, the employer must have offered to provide the necessary training for the employee to acquire the necessary skills and/or qualifications.

Location of the new offered position — where there is a relocation of the position, the FWA may consider such factors as: the similarity of the job at the new location; the notice given to employee(s) of the new location; whether the new location offers similar transport facilities; and the amount of additional time, if any, travelled by the employee(s) to the new location.

Loss of fringe benefits — FWA may also look at the overall impact of the offer of other employment on the employee’s contract of employment. The loss of benefits such as the provision of a company motor vehicle, share option plan, shift or penalty rates, bonus or commission payments or regular overtime payments, may make the offer unsuitable despite the base salary remaining the same.

Job security — this can be a factor in the offer of casual work to an employee because, with casual employment, there is no guarantee of permanent employment. Also, if the new position offered is of a temporary nature, this could be viewed as unsuitable.

Re-employment after redundancy

The redundancy provisions of the NES do not prevent the re-employment of an employee previously made redundant, nor is there a provision disqualifying redundancy pay if the employee is re-employed within a particular period after the original redundancy occurred. An employee re-employed at any future time would not be required to forfeit their redundancy pay.

A common company policy is the restriction on re-employing an employee whose previous position was made redundant. The existence of such a policy may be a response to existing taxation law. For tax purposes, the redundancy pay must relate to a ‘bona fide’ redundancy. This determines whether the payment receives a concessional taxation rate compared to other eligible termination payments. For example, an agreement at the time of termination to later employ the employee (in any capacity)
prevents a payment from being regarded as a bona fide redundancy payment. Likewise, it would be unacceptable for the employer to agree, at the time of termination, to contract with a consulting company established by the employee where, under the contract, the consulting company will provide the employee's services as a contractor to the employer.

**Notice and redundancy pay**

While an employee's payment in lieu of notice and redundancy pay are often treated together by an employer to arrive at a 'global' redundancy package, the separate nature and purpose of the two entitlements remains. Under the FWAct and the NES, an employer is required to provide both the appropriate minimum period of notice of termination to an employee as well as payment of the relevant redundancy pay when an employee's position becomes redundant. The two entitlements are mutually exclusive and must be treated and recognised separately.

A period of notice is to give an employee the opportunity to adjust to the change in circumstances which is to occur and to seek other employment. Redundancy pay is to provide the employee with sufficient remuneration to cover an anticipated period of unemployment.

**Selection criteria**

An area of potential disputation relates to selecting which employee are to be made redundant where a reduction in the overall numbers of employees has been decided upon. This decision may be influenced by a number of factors, including union pressure, award obligations, or anti-discrimination legislation.

However, the factors determining which positions are to be redundant should be based on objective criteria and should be known by employees in advance, such as through a company policy. Criteria that are objective and measurable present far less difficulties than criteria that are subjective. This is because subjective criteria may be easily manipulated by personal dislike or other subjective factors. Examples of subjective criteria are a reference to factors such as integrity, trust, credibility, etc, which will have a wide range of meanings to individual managers and the community. It is much more difficult to assess criteria when a judgement is called for that may vary widely among managers in the workplace.

The recommended approach is for the employer to select who is to be made redundant by referring to the skills, experience, training and performance of individuals compared to the current and future needs of the organisation. If, after such an assessment, employees are found to be comparatively equal, then period of service may be appropriate unless there is some other pressing domestic issue is raised by the individual concerned.

**Voluntary redundancy**

Voluntary redundancy is a mechanism whereby an employee may volunteer to have his/her employment terminated by the employer due to redundancy.

Voluntary redundancy does not relieve the employer of its legal obligations relating to a termination of employment, as industrial tribunals have determined that this arrangement does not mean a termination by the employee. Although the process is voluntary, the employer should have the final decision on whether to accept an employee’s offer for voluntary redundancy. Constant monitoring and coordination of the redundancy process is necessary to ensure that managers are making decisions on staff departures which do not damage the company’s ability to productively survive the rationalisation
process or a downturn in trade. Good employees tend to apply for voluntary redundancy as they are confident of obtaining employment elsewhere, while experienced employees may be at an age where semi-retirement has become an option. The employer can control this problem by ensuring that any offer of voluntary redundancy is subject to its approval.

If the employer controls the process properly it can also be an opportunity to manage out those employees who are less productive without breaching unfair dismissal laws. This would mean taking considerable care to be as specific as possible in relation to the positions that will become redundant. Another advantage is affected employees can opt for redundancy and consider it their own decision rather than undergoing the trauma of an unexpected redundancy imposed on them. The employee may feel there is a level of control in their departure from the company.

Q&As

Award/agreement-free employees

Q Our company employs a number of employees who are considered to be award/agreement-free. We understand that these employees now are covered by the redundancy pay provisions under the NES. We have never had a company policy that provides redundancy pay to our award/agreement-free employees.

The position of one of these employees may become redundant in the early part of 2010. She will have been employed by us for over five years at the proposed date of termination of employment. Because the NES commences from 1 January 2010, is an award/agreement-free employee entitled to redundancy pay calculated only on service from this date, which would mean no entitlement to redundancy pay until at least January 2011?

A The NES recognises an employee’s service with the employer prior to its introduction, provided the terms of an employee’s contract of employment included an entitlement to redundancy pay. Where an employee’s contract of employment does not include an entitlement to redundancy pay, service for the purposes of the redundancy provisions under the NES for an award/agreement-free employee commences from 1 January 2010.

Service would be based on the total period of employment with the employer, although any period of unauthorised absence, a period of unpaid leave or authorised unpaid leave does not count as service for the purposes of calculating redundancy.

A period of casual employment with the employer does not count as service nor does a casual employee have an entitlement to redundancy pay under the NES.

In this case, the employee would need to have completed 12 months continuous service with the employer from 1 January 2010 to be eligible for an amount of redundancy pay if her position is made redundant. This is because the redundancy pay scale under the NES does not apply to an employee with less than 12 months continuous service with the employer.

Genuine redundancy payment

Q The Australian Tax Office considers a ‘genuine redundancy payment’ to be ‘the excess paid to the employee over what they would have received had they terminated their employment voluntarily’. Is it correct that this interpretation would not include the standard
notice the employee would be obligated to work out as if they provided this notice when departing voluntarily? And, based on the ATO’s statement above, are notice periods paid in lieu when an employee’s position is made redundant deemed a ‘genuine redundancy payment’?

A Notice provisions remain notice provisions and do not become ‘redundancy benefits/payments’ simply because the notice relates to a redundancy. This means that an employer’s obligations to pay severance pay are not reduced by making payment in lieu of notice.

If an employer chooses to pay out the notice in lieu of requiring the employee to work out the notice period, this simply results in the employee being paid notice that is due in relation to any termination of employment.

A separate issue relates to the tax treatment of payment in lieu of notice in the circumstances of a redundancy. Payment in lieu would attract special tax treatment in this context.

**Fixed term contracts**

Q We have employed several people on fixed term salary arrangements in anticipation of winning a tender — unexpectedly we lost this tender and so have an excess of staff. Some of these staff have a fixed term in their contracts covering a defined purpose and their contracts were due to expire on the end date of the work. Is the termination excluded from s119 redundancy provisions?

A The disappearance of a position would trigger an entitlement to redundancy benefits under the National Employment Standards. The period of employment may be relatively short in the scenario outlined so your liability may not be great.

Fixed term contracts often have ‘early’ termination clauses as there can be events occurring that require early termination — eg one party simply fails to meet the requirements of the contract. The contract should be checked in this respect.

Note also that the legislation provides:

*FAIR WORK ACT 2009 — SECT 121*

121 Exclusions from obligation to pay redundancy pay

(1) Section 119 does not apply to the termination of an employee’s employment if, immediately before the time of the termination, or at the time when the person was given notice of the termination as described in subsection 117(1) (whichever happened first):

(a) the employee’s period of continuous service with the employer is less than 12 months; ....’

**Further help**

[FairWork Australia](http://www.fairwork.gov.au)

[FairWork Ombudsman](http://www.fairwork.gov.au)

Modern awards: the content of each modern award can be viewed at [www.airc.gov.au](http://www.airc.gov.au)
Paul Munro — Workplace relations commentator and writer

Paul has over 30 years’ experience providing advice to employers on workplace issues, with over 25 years as a workplace relations advisor with New South Wales Business Chamber. Paul has also been in a workplace advisory role with employer organisations in the timber industry and club industry.

Paul ensures that employers have the necessary information to make considered business decisions relating to their workplace and helps to simplify some of the more complex statutory and award-based obligations placed on employers.

Paul currently writes regular feature articles for the web-based subscription publication WorkplaceInfo and has published over 300 articles.