



Inquiry into the Operation and Adequacy of the National Employment Standards

Submission of the
Australian Industry Group
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1. Executive Summary

1. The Australian Industry Group welcomes the opportunity to provide a submission to the Commonwealth Government's House of Representatives Standing Committee Inquiry into the operation and adequacy of the National Employment Standards (**NES**) under the *Fair Work Act 2009* (Cth) (**Act**) (**Inquiry**).
2. The Inquiry is an appropriate and timely avenue for technical issues and notorious complexities affecting the NES to be ventilated and addressed.
3. The Australian Industry Group has identified 35 opportunities for technical improvements to the NES which will address ambiguity and improve ease of application of the NES at both an individual and workplace level, summarised below:

Opportunities for Improvement

1. Delete modern award clauses that do no more than reference or summarise the NES.
2. **Extend flexibilities that apply to award/agreement free employees to all employees** — regardless of industrial instrument coverage.
3. **Clarify the expression 'detrimental to an employee in any respect'** contained in section 55(4) of the Act to improve the workability of terms in modern awards and enterprise agreements that supplement the NES.
4. Address complexities that arise in relation to **payment of safety net entitlements** by:
 - a. Inserting a statutory annualised salary arrangement provision into the NES, including appropriate safeguards for employees; and
 - b. Clarifying for the purposes of various entitlements that the requirement to pay an employee at the full rate of pay for a period (or in lieu of a particular period) applies only to the hours to be worked during the period under a firm agreement between the parties.
5. Amend **Division 3 — Maximum Hours of Work** so that section 64 (which concerns averaging of hours of work) applies to award and agreement-covered employees as well as award/agreement free employees.
6. Amend **Division 4 — Requests for flexible working arrangements** so as to require an employee's request for a flexible arrangement to be in writing and set out:
 - a. Details of the change(s) sought,
 - b. Whether the change is being sought on a permanent or temporary basis (and if temporary, the dates on which it is proposed the arrangement would start and end),
 - c. The circumstance(s) in that apply to the employee, and which the employee relies upon as rendering them eligible to make the request, and



d. An explanation of why the request is made because of those circumstances.

7. Amend **Division 5 - Parental Leave** to:

- a. Re-draft it in full, in order to reduce both length and complexity;
- b. Provide for more appropriate notice requirements where an employee takes flexible unpaid parental leave; and
- c. Address identified technical complexities in relation to sections 81(3)(a) and 81A(1)(b).

8. Amend **Division 6 — Annual Leave** to:

- a. Provide a single definition of the class of shift worker who would receive an additional week of annual leave;
- b. Specify the circumstances in which a requirement to take annual leave will be reasonable including:
 - shutdowns,
 - excessive leave accruals,
 - annual leave in advance,
 - arrangements agreed between an employee and employer about when annual leave will be taken, provided a specified minimum period of notice is given, and
 - arrangements permitting twice as much leave to be taken at half pay;
- c. Permit an employer to direct an employee to take unpaid leave for the duration of a notified shut down, where the employee has insufficient annual leave accrued and refuses to take leave in advance;
- d. Convert the annual leave entitlement to an hourly entitlement for administrative ease; and
- e. Expressly permit all employees and employers to agree to purchased leave arrangements for annual leave.

9. Amend **Division 7 — Personal/carer's leave etc** to:

- a. Convert the paid personal/carer's leave entitlement to an hourly entitlement for administrative ease; and
- b. Expressly permit all employees and employers to agree to purchased leave arrangements for personal/carer's leave.

10. Amend **Division 9 — Long service leave** to:

- a. Sensibly harmonise long service leave nationally; and

- b. Provide employers and employees with the ability to agree to cash out long service leave, and to permit parties to deal with long service leave in enterprise agreements.

11. Amend **Division 10 — Public holidays** to:

- a. Allow an employer to *'require'* (rather than *'request'*) an employee to work on a public holiday where reasonable, and to allow an employee to refuse a *'requirement'* (rather than a *'request'*) to work on a public holiday, in the circumstances currently provided for in s 114;
- b. Remove the capacity for modern awards to include terms dealing with substitution of public holidays by agreement between employers and employees and instead provide for this directly (as is done in relation to award/agreement free employees); and
- c. Address various technical complexities identified, including in relation to public holiday entitlements for employees who do not have a static work location, who work a shift that partially spans a public holiday or who are absent from work for a period that includes a public holiday.

12. Amend **Division 11 — Notice of termination and redundancy pay** to:

- a. Deal with notice of termination by both employers and employees;
- b. Provide for both payment of wages in lieu of notice by employers and forfeiture of wages by employees in the event that insufficient notice is provided;
- c. Remove the prohibition on terminating an employee until certain payments are made to them;
- d. Implement a standard requirement that employees are to be paid in lieu of notice and for any applicable NES entitlements within seven days of an employee's termination date, or on the employee's next regular pay day following termination, whichever is later (other than in the circumstance below);
- e. Without detracting from (d), amend the NES to permit modern awards and enterprise agreements to set a longer period for payment, or for a longer period to be agreed between an employer and an Award/agreement free employee;
- f. Clarify timing requirements for employers to make an application to the Fair Work Commission to vary redundancy pay, where the employer has obtained other acceptable employment for an employee whose role is redundant;
- g. Exempt employers from the requirement to pay redundancy pay where such an application has been made, and instead require the employer to pay redundancy pay on a date determined by the Fair Work Commission (or once the application has been discontinued); and
- h. Provide a right for employers who have obtained other acceptable employment for an employee to apply to the Fair Work Commission to have redundancy entitlements that are more generous than the NES reduced, where an enterprise agreement or modern award does not deal with the issue.



13. Amend **Division 13 — Miscellaneous** to provide that section 130 overrides Commonwealth, State and Territory workers' compensation laws in relation to taking or accruing leave or absence while receiving workers' compensation, to create a single national standard.
14. Amend the Act to permit, subject to appropriate safeguards, **Individual Flexibility Arrangements** to be made between an employee and employer in relation to matters contained in the NES, regardless of whether they are covered by a modern award, enterprise agreement or award/agreement free.

4. Critically, the Terms of Reference should not be a catalyst or mandate to dramatically recut the scope of the NES, whether by way of expansion or diminution of the current entitlements of employers and employees contained therein, or the types of workers to whom it applies.
5. There is merit for both employers and employees in a stable and cohesive NES platform to take them into the future, and for this to shape the nature of the Inquiry.
6. The improvements proposed by the Australian Industry Group are sensible and modest changes, aligned to this objective.
7. We urge the House of Representatives to adopt the proposals set out in this submission.



2. The objective and purpose of the NES as part of the safety net framework, as well as individual NES entitlements

8. The NES replaced the Australian Fair Pay and Conditions Standard (**AFPCS**), an earlier safety net of legislated minimum entitlements contained in the *Workplace Relations Act 1996* (Cth) comprising five standards dealing with basic rates of pay and casual loadings, maximum ordinary hours of work, annual leave, personal leave (including sick, carer's leave and compassionate leave) and parental leave (including related entitlements).¹
9. First forged as part of the *Fair Work Bill 2008* (Cth), the NES was expressed to be part of an opportunity to 'reconceptualise the legislation from first principles and ensure that Australia's workplace relations legislation: provides a **clear and stable framework** of rights and obligations; is **simple and straightforward to understand in terms of structure, organisation and expression**; and **reduces the compliance burden on business**'.² (our emphasis)
10. It was intended to be 'structured in a way that ensures the provisions are **easy to understand and apply for employers and employees at the workplace**'.³ (our emphasis)

3. Role of the NES in Promoting the Object of the Act

11. The NES is also central to promoting the Object of the Act 'to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion',⁴ particularly with respect to: (our emphasis)
 - (a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are **flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity** and take into account Australia's international labour obligations; and
 - (b) ensuring a guaranteed safety net of **fair, relevant and enforceable minimum terms and conditions** through the National Employment Standards, modern awards and national minimum wage orders; and
 - ...
 - (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements;

¹ Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) at r.22.

² Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) at r.4.

³ Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) at r.25.

⁴ Section 3 of the Act.



4. Interaction between the NES and other Workplace Instruments

12. In addition to being central to the Object to the Act, the NES is intended by design ‘to “lock in” to modern awards and enterprise agreements ... by including provisions that specifically allow awards and agreements to deal with specific issues’.⁵
13. Section 55 of the Act was drafted with the purpose of:

‘(setting) out the relationship between the NES on the one hand and modern awards and enterprise agreements on the other ... (and allowing) modern awards and enterprise agreements to deal with machinery issues (such as when payment for leave must be made) (and allowing) awards to provide more beneficial entitlements than the minimum standards provided by the NES’.⁶
14. Section 55 stipulates that modern awards and enterprise agreements:
 - (a) must not exclude the NES;⁷
 - (b) may include any terms that the instrument is expressly permitted to include by a provision of the NES (or associated regulation) — in which case, the NES have effect subject to those terms;⁸ and
 - (c) may also include terms that are ancillary or incidental to the operation of an entitlement of an employee under the NES, or that supplement the NES, but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.⁹

⁵ Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) at [233].

⁶ Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) at [206] — [214].

⁷ Section 55(1) of the Act.

⁸ Sections 55(2) and (3) of the Act.

⁹ Section 55(4) of the Act.



5. Adequacy, Relevance and Coherence of Existing NES Entitlements

5.1 Relevance

15. Since its inception the NES has continued to evolve such that the entitlements contained therein can be accepted as having ongoing **relevance** as a contemporary cornerstone for the broader system of safety net entitlements.
16. Indeed, the NES has undergone 16 rounds of substantive amendment since the time since it was first introduced into the Act, including:
 - in 2009, to deal with transitional matters associated with the transition of national system employers and employees from the AFPCS to the NES, and the application of the NES to employers and employees in States who referred their industrial relations powers to the Commonwealth;¹⁰
 - in 2012, to:
 - extend NES entitlements to TCF (textile, clothing or footwear) contract outworkers;¹¹
 - amend the parental leave provisions to deal with a range of matters, including ‘*keeping in touch days*’, arrangements where a pregnancy ends (other than by birth of a living child) or a child born alive dies; and parental leave replacement employees;¹² and
 - deal with the application of the NES to employees who transferred from the State public sector to employment with a national system employer;¹³
 - in 2013, to insert various ‘*family friendly*’ measures including concurrent parental leave entitlements, amended rights to request flexible working arrangements, transfer to safe job and paid/unpaid ‘*no safe job*’ leave;¹⁴
 - in 2015, to prohibit an employer from refusing a request to extend a period of unpaid parental leave unless the employer has given the employee a reasonable opportunity to discuss the request;¹⁵
 - in 2018, to insert an entitlement to unpaid family and domestic violence leave;¹⁶
 - in 2020, to deal with parental leave entitlements for parents of stillborn children, a child who is hospitalised for a period after the birth or who dies before turning two;¹⁷

¹⁰ Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 and Fair Work Amendment (State Referrals and Other Measures) Act 2009 (Cth).

¹¹ Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012 (Cth).

¹² Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Act 2012 (Cth).

¹³ Fair Work Amendment (Transfer of Business) Act 2012 (Cth).

¹⁴ Fair Work Amendment Act 2013 (Cth).

¹⁵ Fair Work Amendment Act 2015 (Cth).

¹⁶ Fair Work Amendment (Family and Domestic Violence Leave) Act 2018 (Cth).

¹⁷ Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020 (Cth).



- in 2021, to:
 - insert Division 4A to deal with offers and requests for casual conversion, and providing for the Fair Work Ombudsman to prepare and publish a Casual Employment Information Statement;¹⁸ and
 - amend the parental leave provisions to address circumstances where an employee (or an employee's spouse or de facto partner) miscarries;¹⁹
- in 2022, to:
 - amend the domestic and family violence leave entitlement by replacing the 5 day unpaid entitlement with an entitlement to 10 paid days per year;²⁰ and
 - insert a new definition of '*de facto partner*'; expand the provisions regarding flexible work requests (including a right to request flexible arrangements due to pregnancy or experiencing family and domestic violence, new detailed requirements for employers responding to requests for flexible working arrangements and the ability for the Fair Work Commission to arbitrate disputes regarding flexible work requests); and deal with pay slip requirements where an employee takes domestic and family violence leave;²¹
- in 2023, to:
 - amend the parental leave provisions to deal with flexible unpaid parental leave and insert Division 10A to incorporate the requirement to make superannuation contributions on behalf of employees an NES entitlement;²² and
 - amend the redundancy pay provisions in relation to businesses that become 'small businesses' due to earlier rounds of terminations leading to bankruptcy or winding up;²³
- in 2024, to amend Division 4A to insert a new '*employee choice pathway*' for casual employees to convert to permanent employment, including the ability for the Fair Work Commission to arbitrate disputes regarding the operation of the provisions, and changed requirements for employers in relation to issuing the Casual Employment Information Statement;²⁴ and
- in 2025, to protect the entitlement of employees (and their spouse or de facto partner) to receive employer-funded paid parental leave where a child is still born or dies following the birth.²⁵

¹⁸ Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth).

¹⁹ Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021 (Cth).

²⁰ Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022 (Cth).

²¹ Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth).

²² Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023 (Cth).

²³ Fair Work Legislation Amendment (Closing Loopholes) Act 2023 (Cth) (**Closing Loopholes Act**).

²⁴ Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 (Cth) (**Closing Loopholes No.2 Act**).

²⁵ Fair Work Amendment (Baby Priya's) Act 2025 (Cth).



5.2 Adequacy

17. By virtue of its continued evolution, and for the additional reasons below, the NES are also adequate with respect to the range of matters for which it currently prescribes minimum standards, and the types of workers to whom they apply.

5.2.1 Adequacy of the Range of Matters for which the NES currently provides

18. Turning firstly to the adequacy of the range of matters and workers for which the NES currently provides, in respect of which we make three points.
19. The **first point** is that the adequacy (or otherwise) of the NES should not be considered in isolation of the broader safety net of entitlements.
20. The NES is only one part of a broader safety net of entitlements within Australia's workplace relations system. The Fair Work Commission, through the mechanism of modern awards, can and does make provision for the NES to be supplemented within the context of particular industries and occupations.
21. It is also frequently supplemented by employers and employees within the terms of an enterprise agreement. Numerous matters dealt with in the NES — such as long service leave, superannuation and public holiday legislation — are supplemented in critical respects by other legislation. The 'Maximum weekly hours' protection in Division 3 of Part 2-2 of the Act must be contextualised against broader frameworks concerning discrimination and work health and safety.
22. Whilst elements of the Terms of Reference touch on the interaction of the NES with workplace instruments, for the reasons outlined above the nature of the Inquiry process does not permit a fulsome consideration of the entire context in which the NES operate.
23. Any assessment of the adequacy (or otherwise) of the NES for the purpose of considering any expansion in substantive new rights and protections for employees is therefore likely to suffer from some degree of myopia, and be an infirm basis for any legislative reform to the substantive NES entitlements.
24. The **second point** is that the role of the Fair Work Commission in the development of substantive employee entitlements must be acknowledged and respected. This Inquiry is not an appropriate pathway to legislate any substantive expansion of NES entitlements, to the extent other parties may seek to do so.
25. Both historically and now, Australia's industrial tribunals play the role of incubator for significant evolution in workplace entitlements. A recent example of this was the insertion of new section 65A in Division 4 of Part 2-2 of the Act to enshrine a new standard with respect to employer responses to employee requests for flexible working arrangements. The evolution of that entitlement involved:
- In September 2018, the Fair Work Commission developing a 'model term' to supplement the NES (as it then was) by setting out detailed requirements for employers when responding to



an employee's request for flexible work arrangements, as part of its 4-yearly review of modern awards;²⁶

- In December 2022, the passage of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) to insert new 65A to 'provide a more detailed procedure for how employers must respond to requests for flexible work arrangements ...(which) is based on the model award term developed by the FWC'²⁷; and
- Following which, modern awards were varied to ensure they reflected the new entitlement.

26. The evolution of this entitlement over more than four years allowed the Fair Work Commission to — appropriately - receive submissions from a broad array of interested parties, have evidence placed before it and tested, and carefully craft substantive entitlements with input from interested parties.
27. Similarly, in the same period of time the Fair Work Commission has conducted at least five other major matters concerning issues which involve some interplay between modern awards and NES, including:
 - Various matters conducted as part of the 4-yearly Review to review provisions of modern awards that parties submitted were not consistent with the NES;²⁸
 - A review of the annual leave shut down provisions in numerous modern awards (such provisions being permitted by section 93 of the Act);²⁹
 - Development of an entitlement to 5 days unpaid family and domestic violence leave, and subsequently expressing a view to insert an entitlement to 10 days' paid family and domestic violence leave (as a precursor to this entitlement then being legislated);
 - A review of part day public holiday provisions in modern awards;³⁰ and
 - To deal with 'sun-setting' provisions in modern awards relating to (amongst other things) redundancy pay.³¹
28. Ultimately, the role of the Fair Work Commission must be respected. In a hastily conducted Inquiry such as this, in which the Committee is desirous of parties limiting written submissions to 10 pages and there is no provision for evidence, the Inquiry is simply not an appropriate mechanism by which firm conclusions regarding the substantive adequacy of NES entitlements may be reached.

²⁶ *Family Friendly Working Arrangements* [2018] FWCFB 5753

²⁷ Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth) at [607].

²⁸ <https://www.fwc.gov.au/hearings-decisions/major-cases/4-yearly-review/alleged-nes-inconsistencies>

²⁹ AM2014/47.

³⁰ AM2014/301 and AM2019/17.

³¹ AM2014/190.



5.2.2 Adequacy of the Range of Workers to Whom the NES Apply

29. Turning secondly to the adequacy of the range of matters and workers for which the NES currently provides.

(a) NES and the Changing Nature of Work

30. The NES applies to ‘employees’ and ‘employers’.³² For most purposes of the NES, this refers to ‘national system employees’ and ‘national system employers’.³³
31. The NES also has extended application in particular respects. TCF (Textile, Clothing and Footwear) contract outworkers are also taken to be employees for the purpose of the NES, where performing work directly or indirectly for a Commonwealth outworker entity and (if the entity is a constitutional corporation) the work is performed for the purposes of a business or undertaking of the corporation.³⁴ In addition, the provisions of the NES dealing with the entitlement to unpaid parental leave and related entitlements,³⁵ paid family and domestic violence leave³⁶ and notice of termination or payment in lieu of notice³⁷ apply to employees and employers as those terms take their ordinary meaning (that is, they extend to non-national system employees and employers).
32. It is trite to observe that the nature of work has changed significantly since the NES was first introduced. Two of the most significant ways in which it has changed, concern the rise of gig economy and shifts to hybrid and other more flexible modes of employment.
33. At the point in time when the *Fair Work Bill 2008* (Cth) containing the NES was introduced into Parliament,³⁸ Uber was still nearly four years away from entering the Australian market.³⁹ Similarly, the Covid-19 pandemic — which spurned a significant shift in where and how work, particularly in white-collar and office-based roles, was undertaken — was still 12 years away from impacting Australia.
34. The NES has not undergone any adaptation or expansion to apply to gig work. This is entirely appropriate. The NES is designed to regulate employment relationships. The minimum standards it contains are relevant (only) in an employment context. The Act has now been amended to recognise gig workers are ‘employee-like’ — but are not, and should not have extended to them entitlements and protections designed for, employees.⁴⁰
35. Instead, the Object of the Act has been amended so as to ‘*provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by...ensuring a safety net of fair and relevant minimum terms*

³² Section 60 of the Act.

³³ Sections 13, 14 and 60 of the Act.

³⁴ Sections 789BA and BB of the Act.

³⁵ Division 5 of Part 2-2 and section 744 of the Act.

³⁶ Subdivision CA of Division 7 of Part 2-2 and section 757B of the Act.

³⁷ Subdivision A of Division 11 of Part 2-2 and section 759 of the Act.

³⁸ The *Fair Work Bill 2008* (Cth) was introduced into the House of Representatives on 25 November 2008. See: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r4016

³⁹ Uber entered the Australian market in October 2012. See: [https://www.uber.com/en-AU/newsroom/10years/#:~:text=Uber%20launched%20in%20Australia%20in,Sydney%20in%202012&text=725%2C000%2B%20people%20have%20earned%20through,\(driver%20partners%20and%20delivery%20people\)](https://www.uber.com/en-AU/newsroom/10years/#:~:text=Uber%20launched%20in%20Australia%20in,Sydney%20in%202012&text=725%2C000%2B%20people%20have%20earned%20through,(driver%20partners%20and%20delivery%20people))

⁴⁰ Section 15P of the Act.



*and conditions for regulated workers through enforceable minimum standards orders and related measures’.*⁴¹

36. New Chapter 3A of the Act provides a framework for the making of ‘*minimum standards orders*’ (MSOs) to employee-like workers. It follows that any expansion to the NES in respect of gig workers is both unnecessary and inappropriate, having regard to the existence of this jurisdiction and the nature of the working relationship.
37. With respect to the shift to more flexible and hybrid work practices, the key adjustment to the NES has been the strengthening of the rights of employees to request flexible work arrangements, through the expansion of the circumstances giving rise to the right to request flexibility, a more detailed framework for employer responses to flexible work requests, and the capacity for the Fair Work Commission to arbitrate a dispute in relation to an employer’s refusal to approve a flexible working arrangement.⁴²
38. However, more could — and should — be done to enable the NES to operate as a flexible and relevant safety net. We expand upon both of these proposals later in the submission.

(b) Consideration of Differences of Experience of the NES by Types of Workers Covered by the NES

39. Workers will naturally experience the NES differently, depending on the extent to which a particular entitlement is relevant to their employment type (noting for example the differing application of entitlements for permanent and casual employees) and the nature of the employee’s personal, family or household characteristics or circumstances that may create eligibility for and a need to access, particular entitlements (for example, flexible work arrangements, personal/carer’s and compassionate leave and parental leave).
40. The scope of this Inquiry includes specific consideration of the experience of women, workers over 55, young workers, First Nations workers and workers with disability under the NES.
41. The NES has been amended in a number of respects since first introduced, in ways which may strengthen and improve how these categories of worker – who are typically accepted as being vulnerable in their employment – experience it.
42. The *first* such way in which the NES has been amended is in relation to the expansion of the circumstances which entitle an employee to make a request for flexible work arrangements, to include situations where the employee is pregnant,⁴³ is experiencing family or domestic violence,⁴⁴ and/or provides care or support to a member of the employee’s immediate family or household who requests care or support because the member is experiencing family and domestic violence.⁴⁵
43. Within Australia, women and children are most at risk (and most likely to experience) family and domestic violence. Additional risk factors for experiencing family and domestic violence exist for persons with disability and/or First Nations people, with First Nations women particularly at risk (including much higher rates of hospitalisation involving family violence) than non-

⁴¹ Section 3(ca) of the Act.

⁴² Division 4 of Part 2-2 of the Act.

⁴³ Section 65(1A)(a) of the Act.

⁴⁴ Section 65A(1A)(e) of the Act.

⁴⁵ Section 65A(1A)(f) of the Act.





Indigenous women. Older workers may also experience elder abuse within the context of family and domestic violence.⁴⁶

44. The **second** way as to how these vulnerable workers' experience of the NES may have improved follows on from the first, and concerns the new capacity for the Fair Work Commission to arbitrate a dispute in relation to an employer's refusal to approve a flexible working arrangement.⁴⁷ This change strengthens the enforceability of the entitlement for workers.
45. The **third** way in which the experience of the NES may have improved for women and young people relates to the changed definition of 'casual' employment under the Act, and insertion into the NES of a casual 'employee choice pathway'.⁴⁸ In Australia, the individuals most likely to be employed on a casual basis are women and young people.⁴⁹ The effect of the new provision is to provide a strengthened pathway for employees to transition to permanent employment, including the arbitration of disputes by the Fair Work Commission.
46. The **fourth** improvement follows on from the third, in so far as permanent employees are entitled to enhanced benefits under the NES, most notably access to paid annual leave, paid personal/carer's and compassionate leave, and paid community service leave for jury service.
47. It follows from the above that the NES has evolved in recent years in significant respects in ways that may be anticipated to improve the experience of women, workers over 55, young workers, First Nations workers and workers with disability.

5.2.3 The NES are adequate with respect to the range of matters for which it currently prescribes minimum standards, and the types of workers to whom they apply

48. The incremental 16-year evolution of the NES and parallel consideration of its interaction with modern awards and enterprise agreements, makes it imperative that the focus of this Inquiry is on the cohesiveness, consolidation and simplicity of the NES — and not on its expansion with respect to new or increased employee entitlements.
49. Over the last 3 years, employers have faced an unrelenting wave of significant amendments to vast areas of the Act — including but not limited to the NES.
50. What Australian workplaces now need is a stable and cohesive NES platform to take them into the future.
51. At the forefront of the desired outcome of this Inquiry should be the creation of a consolidated and cohesive set of entitlements that represent a sensible and workable platform for Australia's future workplaces. Given the extensive change that has occurred since the NES was introduced, and that the most recent rounds of amendments occurred in the context of much broader change to the Act, the NES are adequate with respect to the range of matters for which it currently prescribes minimum standards, and the types of workers to whom they apply.
52. The most important outcomes that should be addressed by this Inquiry are equilibrium,

⁴⁶ Australian Institute of Health and Welfare, Family, domestic and sexual violence, accessed 25 February 2026.

⁴⁷ Division 4 of Part 2-2 of the Act.

⁴⁸ Division 4A of Part 2-2 of the Act.

⁴⁹ Australian Bureau of Statistics, *Working Arrangements*, accessed 25 February 2026.





simplification and reduction of regulatory burden.

53. For these reasons, this Inquiry should not result in any expansion of either the *range* of matters nor the types of workers the NES covers.
54. Ultimately, it is the imperative of a stable workplace relations system that must shape the nature and outcomes of the Inquiry. We do not here simplistically argue that the safety net must forever be 'set in stone' but emphasise that the system already contemplates a path for supplementation of the NES through the careful and expert work of the Fair Work Commission in its exercise of modern award powers and at the enterprise level through bargaining (and indeed, now more broadly given the enhancement of access to multi-enterprise bargaining). Further, we urge the Inquiry to be mindful that stability not only minimises regulatory burden and delivers the certainty that business needs, it is also arguably the most important facilitator of compliance. Industry is still grappling with the avalanche of significant change to workplace laws implemented over recent years. Now is not the time to embark upon the implementation of a further round of legislative changes, further expanding employer obligations.

5.3 Coherence

55. Notwithstanding that the NES are adequate with respect to the range of matters for which it currently prescribes minimum standards and the types of workers to whom they apply, a number of existing entitlements within the range of matters already covered should be supplemented to include ancillary and/or incidental detail which is included in a common and consistent way across modern awards. This would aid the coherence of the safety net as a whole, by streamlining the content of modern awards and minimising the likelihood of unintended and impermissible encroachments on the NES in the drafting of enterprise agreements.
56. By way of illustration, many modern awards contain clauses which state simply that an entitlement is '*provided for in the NES*'.
57. For example, the seven most commonly used modern awards⁵⁰ all contain a clause simply stating that the entitlement is provided for in the NES, in relation to requests for flexible working arrangements, parental leave and related entitlements, community service leave and family and domestic violence leave — with no substantive supplementary or ancillary detail.
58. These references are unnecessary and simply add length to modern awards, in circumstances where many modern awards run to over one hundred pages.
59. By way of further example, many modern awards also supplement the NES in similar ways.
60. One instance is in relation to public holidays, whereby all seven of the most commonly used awards allow for substitution of public holidays by agreement between an employer and an employee.
61. Another instance is in relation to annual leave. All seven of these awards supplement the NES in the same areas as one another in relation to the definition of shiftworker for the purpose of additional annual leave, annual leave loading, the management and taking of excessive leave

⁵⁰ The seven most commonly used modern awards were identified in the *President's Statement - Modern Awards Review 2023-24* dated 15 September 2023, at paragraph [10](1).



accruals, taking annual leave in advance and cashing out. Five of the seven awards also all deal with directions to employees to take annual leave during shutdowns. While the provisions are not all identical, there is a high degree of commonality amongst the substantive entitlements.

62. This creates unnecessary complexity for employers, particularly for employers for whom there are two or more awards applying to their workforce and who need to check multiple sources for similarity and difference — which in some cases may simply be semantics, and in other cases are substantive differences — across similarly supplemented NES entitlements.
63. As far as possible, matters dealt with under the NES should be regulated comprehensively under the legislation. Where there is a high degree of commonality amongst awards with respect to additional detail concerning NES entitlements, the most appropriate outcome is for this to be consolidated into the NES to improve the cohesiveness of its operation as a safety net.
64. This should not be a ‘levelling up’ exercise in which a highest watermark approach is adopted. Rather, this should be approached in a fair and balanced way that recognises that the NES is part of a ‘safety net’ of minimum conditions, with modern awards continuing to play a role — albeit, in more limited and exceptional circumstances — in supplementing the NES where there is a genuine reason for it to be dealt with in a modern award.
65. The role of modern awards in supplementing the NES should be reserved for unique, industry or occupation specific matters which are not appropriate to form part of the statutory safety net.
66. Of course, appropriate arrangements may be required in some instances to ensure that entitlements are not inappropriately extended to employees who have traditionally not been award covered (and for whom the NES is the sole source of minimum entitlements under the Act, save for any enterprise agreement that may be in place) — for example, with respect to annual leave loading.
67. However, particularly for items where the NES provides for additional detail in relation to the operation of an NES entitlement for award/agreement free employees, the cohesion of the NES would be greatly improved by dealing with those matters for all employees — irrespective of whether they are award of agreement covered. These include:
 - Section 64 — *Averaging of hours of work for award/agreement free employees*; and
 - Section 94 — *Cashing out and taking paid annual leave for award/agreement free employees*.
68. This reflects the original intention expressed in the *Explanatory Memorandum* for the new workplace relations system under the Act to be built on:
 - (a) a strong safety net of 10 legislated National Employment Standards for all employees;
 - (b) a modern, simple award system that complements the National Employment Standards, providing certainty, flexibility and stability for employers and their employees;
 - (c) an enterprise-level collective bargaining system focused on promoting productivity.⁵¹

⁵¹ Explanatory Memorandum to the Fair Work Bill 2008 (Cth) at r.5.

69. In the context of the ‘averaging of hours issue’, consideration should then be given by the Fair Work Commission as to whether, in the interests of simplicity and also only including content to the extent it is necessary, averaging provisions in modern awards should be amended or removed.
70. There would — and should — remain some capacity for parties to deal with specified issues under enterprise agreements. In advancing this proposal as a way to simplify the safety net, we are not arguing for any reduction in the capacity of parties to agree on arrangements that suit their particular workplace through enterprise bargaining. Adoption of a ‘one size fits all approach’ should be avoided by permitting employers and employees or their representatives to continue to vary any aspect of the safety net that may currently be varied by agreement or through enterprise bargaining. Indeed, where employers wish to make comprehensive agreements that wholly displace the operation of the underpinning modern award(s), the inclusion of the additional detail in the NES rather than the underpinning award would likely aid bargaining and ease of approval of these deals.
71. In relation to this last point it is noted that, in the context of its powers in relation to the approval of enterprise agreements, the Fair Work Commission has identified chronic defects regarding the way in which employers and employees have framed their deals around NES entitlements.
72. Section 56 of the Act provides that ‘A term of a modern award or enterprise agreement has no effect to the extent that it contravenes section 55’. Section 186 sets out requirements for approval of enterprise agreements, which include that the Fair Work Commission must be satisfied that the terms of the agreement do not contravene the NES.⁵²
73. The Fair Work Commission observes the NES as posing a persistent difficulty for employers in having enterprise agreements approved in relation to:
- **Shiftworkers:** The agreement failing to describe or define an employee as a shiftworker for the purposes of the NES, where the modern award that covers the employee does so (contrary to sections 187(4) and 196 of the Act);
 - **Quantum of Leave:** The agreement describes annual leave and/or paid personal/carer’s leave entitlements in hours or days which equate to less than the quantum of leave entitlements provided for in the NES (for example, due to a work pattern involving days of greater than 7.6 hours). The expression in the NES of a ‘week’ of leave authorises an employee to be absent from work during the working days falling within a 7-day period (contrary to sections 87(1) and 96(1) of the Act);
 - **Accrual of Leave:** The agreement provides for annual leave and/or paid personal/carer’s leave entitlements to be accrued at a certain point in time, rather than progressively during a year of service (contrary to sections 87(2) and 96(2) of the Act);
 - **Cashing out of Annual Leave:** Terms in the agreement which allow employees to make an agreement to cash out annual leave do not meet the requirements in section 93(2) of the Act;
 - **Notification of personal/carer’s leave:** The agreement requires notification of an absence within 24 hours of a shift starting, whereas section 107(2) of the Act requires notice to be given as soon as practicable, which may be after the leave has started;

⁵² Section 186(2)(c) of the Act.



- **Limits on taking carer's leave:** The agreement restricts the amount of personal leave that can be taken as carer's leave, contrary to section 97 of the Act;
- **Limits on taking compassionate leave:** The agreement expresses the entitlement to compassionate leave as being 'per year' rather than 'per occasion' (contrary to sections 104 — 105 of the Act);
- **Incorrect leave entitlements for casuals:** The agreement does not provide for (unpaid) carer's leave and/or compassionate leave for casuals (contrary to sections 102 and 104 of the Act);
- **Parental leave entitlements less favourable than the NES:** For example, the agreement may restrict the circumstances when the leave can be taken or not permit an employee to request an additional 12 months' parental leave (in addition to the first 12 months of leave) (contrary to sections 67 — 85 of the Act);
- **Description of public holidays:** Where the agreement purports to list public holidays, it does not include 'holidays declared or prescribed by, or under, a law of a State or territory' in which the agreement operates, contrary to section 115 of the Act;
- **Reduction or removal of notice of termination and redundancy entitlements:** Contrary to sections 117 — 123, the agreement provides for a lesser notice of termination or redundancy pay entitlement; or may exclude apprentices from termination entitlements; or states that the employee forfeits their right to payment on termination if they do not attend work for a given number of days (but where employment is terminated by the employer);
- **Flexible working arrangements:** The agreement limits the right to request part-time employment to the first year following a period of maternity leave, contrary to section 65 of the Act.⁵³

74. As noted above, the NES was intended by design to 'lock in' to enterprise agreements.

75. However, this list is demonstrative of a situation whereby instead of joining together neatly as two pieces of a puzzle, the NES has become something that enterprise agreements (unnecessarily) restate and/or (unintentionally) override in non-permitted ways.

76. To overcome this, the Commission recommends (to avoid the need to provide undertakings) that enterprise agreements should contain an 'NES precedence term', and gives the following example:

This Agreement will be read and interpreted in conjunction with the National Employment Standards (NES). Where there is an inconsistency between this agreement and the NES, and the NES provides a greater benefit, the NES provision will apply to the extent of the inconsistency.⁵⁴

77. This solution brings an agreement into conformity with the Act, so as to enable it to be approved by the Commission, but it does not rectify the underlying uncertainty or complexity that arises from retention within its provisions of terms that may be inconsistent with the NES. What we

⁵³ See: <https://www.fwc.gov.au/national-employment-standards-common-defects-issues> and [Meet the terms in the National Employment Standards | Fair Work Commission](#)

⁵⁴ Fair Work Commission, <https://www.fwc.gov.au/optional-terms> (Accessed 12 March 2026).



propose in this submission is a 'higher order' solution to this issue, achieved by forging an improved 'fit' between the NES and enterprise agreements.



6. Implications for the Scope of the Inquiry

78. The focal point of the Inquiry is the **operation** and **adequacy** of the NES, with particular reference to nine considerations contained in the Terms of Reference:
- the objective and purpose of the NES as part of the safety net framework, as well as individual NES entitlements;
 - the extent to which the NES is fit for purpose, having regard to the changing nature of work;
 - the role of the NES in promoting the object of the Act;
 - the adequacy, relevance and coherence of existing NES entitlements;
 - the effectiveness and application of the NES, including opportunities for technical improvements;
 - the interaction between the NES and other workplace instruments, including modern awards, enterprise agreements, and individual flexibility arrangements;
 - the types of workers covered by the NES and consideration of differences in experience of the NES, including experiences of women, workers over 55, young workers, First Nations workers and workers with disability;
 - whether there are any gaps in data information about any of these matters and what action is required to address these; and
 - any related matters.⁵⁵
79. For the reasons outlined to here, the Terms of Reference should represent neither a catalyst nor mandate to recut the scope of the NES, whether by way of expansion or diminution of the current entitlements of employers and employees it contains. It is notable that the Government did not take any policy for expansion of the NES to the last election. While further consideration of the NES was a matter contemplated as an outcome of the Jobs and Skills Summit, it is trite to observe that was not a rigorous, fair or genuine consultation process.
80. The Inquiry should instead represent an appropriate and timely avenue for technical issues and notorious complexities to be ventilated and addressed.

⁵⁵ Terms of Reference — Parliament of Australia.



7. Gaps in Data Information regarding Matters forming part of Terms of Reference

81. In the context of this Inquiry, there are two ways in which the information before the House of Representatives is wanting, in terms of forming the basis for substantive NES change.
82. The first is that neither the scope nor timeframe within which this Inquiry is being undertaken afford an appropriate opportunity for this. Instead, any substantive development or evolution in entitlements is best kept as the domain of the Fair Work Commission, which can receive and test evidence and submissions, and commission research where appropriate.
83. The second is the recency of many changes to the Act — most notably, the *Closing Loopholes Act* and *Closing Loopholes No. 2 Act* — and the fact that a separate statutory review process is still in progress with respect to those changes.⁵⁶ As a consequence, the full impact of changes to the Act to date cannot yet be known.
84. Fulsome information regarding the potential impacts of any proposed changes before acting is vital. These limitations command caution with respect to this Inquiry forming the catalyst for any substantive change.

⁵⁶ See: [Review of the Closing Loopholes Acts - Department of Employment and Workplace Relations, Australian Government](#) (accessed 9 March 2026).



8. Effectiveness and Application of the NES

8.1 Opportunities to improve the effectiveness of the interaction of the NES with awards and agreements

85. Modern award clauses that do little more than reference or summarise the NES should be deleted. This primarily includes clauses dealing with personal carer's leave, domestic violence leave and community service leave. These clauses are of little practical utility and simply add length to modern awards. This may seem like a small point, however given the notorious complexity of awards every opportunity to simplify them ought to be taken. Removing unnecessary detail is a modest step towards this.

Opportunity for Improvement - 1

Delete modern award clauses that do no more than reference or summarise the NES.

86. The provisions of the NES that allow for modified operation, or supplementary or additional detail, to be agreed only with 'award/agreement free' employees or under a modern award / enterprise agreement, should be amended to simply allow agreement between an employee and employer on the issue — regardless of and without the need for an industrial instrument.

Opportunity for Improvement - 2

Extend flexibilities that apply to award/agreement free employees to all employees — regardless of industrial instrument coverage.

Whilst we deal with these in more detail below, at this point we simply note that these flexibilities include:

- averaging of hours of work;⁵⁷
- cashing out of annual leave;⁵⁸
- the ability of an employer to require an employee to take a period of paid annual leave, where the requirement is reasonable;⁵⁹
- the ability to agree on how and when paid annual leave may be taken by an employee;⁶⁰ and
- substitution of public holidays.⁶¹


⁵⁷ Section 64 of the Act.

⁵⁸ Section 94(1) — (4) of the Act.

⁵⁹ Section 94(5) of the Act.

⁶⁰ Section 94(6) of the Act.

⁶¹ Section 115(4) of the Act.

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87. There is also a need for clarification of the expression '*detrimental to an employee in any respect*' contained in section 55(4) of the Act.
88. Terms in a modern award or enterprise agreement are not inconsistent with the NES if the terms supplement the NES and are not detrimental to an employee in any respect when compared to the NES (as stated in section 55(4) of the Act).
89. The expression '*detrimental to an employee in any respect*' in section 55(4) should be interpreted in a similar manner to the similar expression in Item 23 (The No Detriment Rule) in Schedule 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth). Item 23 clarifies that when comparing the entitlements in a transitional instrument to those in the NES, to determine whether they are '*detrimental to an employee, in any respect*', the entitlements may be compared:
- on a '*line-by-line*' basis, comparing individual terms; or
 - on a '*like-by-like*' basis, comparing entitlements according to particular subject areas; or
 - using any combination of the above approaches the FWC sees fit.
90. The above provision in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) supports the interpretation that the expression '*detrimental to an employee in any respect*' in section 55(4) was not intended to be applied merely on a line-by-line basis and, in appropriate cases, was intended to be applied on a like-by-like basis, with entitlements compared on the basis of particular subject areas, e.g. an annual leave scheme in an enterprise agreement compared to the annual leave scheme in the NES.
91. This interpretation is also supported by Note 1 in section 55(4) which provides the example of an employee taking twice as much annual leave for half the pay.
92. Section 55 of the Act is based on the former section 172 of the *Workplace Relations Act 1996* (Cth). This former section uses the expression '*in a particular respect*', which is similar to the expression '*in any respect*' in section 55(4) in the Act. For the purposes of section 172 in the *Workplace Relations Act 1996* (Cth), the *Workplace Relations Regulations* clarified that '*paid annual leave*', '*paid sick leave*' and '*paid carer's leave*' were '*a particular respect*', and not the numerous individual entitlements within these subject areas. This approach was designed to ensure there was flexibility for employers to implement an annual leave scheme etc that was different to the scheme in the AFPCS but no less favourable to the employees.
93. The current lack of clarity about the meaning of '*detrimental to an employee, in any respect*', is inhibiting the implementation of mutually beneficial arrangements for employers and employees and, in some cases, has delayed the approval of enterprise agreements due to uncertainty about this issue.

Opportunity for Improvement - 3

The NES should be varied to expressly clarify the meaning of this expression through the following section 55(4A) being added to the Act:

(4A) For the purposes of subsection 55(4), a term in a modern award or enterprise agreement

is not detrimental to an employee in any respect, if the term is not detrimental to the employee when the entitlements are compared:

- (a) either:
 - (i) on a 'line-by-line' basis, comparing individual terms; or
 - (ii) on a 'like-by-like' basis, comparing entitlements according to particular subject areas; or
- (b) using a combination of any of the above approaches the Commission sees fit.

Alternatively, any other such changes should be made to the NES as are necessary to address this issue.

94. This sensible amendment would benefit all parties.

8.2 Opportunities for Technical Improvements

8.2.1 Matters concerning payment under the NES

(a) 'Full rate of pay' for hours worked during a particular period

95. There are three circumstances in which NES entitlements are required to be paid at the employee's 'full rate of pay':

- (a) Section 81 provides that a pregnant employee who is transferred to an appropriate safe job must be paid for the safe job '*at the employee's full rate of pay (for the position the employee was in before the transfer) for the hours that the employee works in the risk period*';⁶²
- (b) Section 106BA requires an employee who takes paid family and domestic violence leave to be paid the full rate of pay which is worked out either '*as if the employee had not taken the period of leave*' (in the case of full-time or part-time employees)⁶³ or '*as if the employee had worked the hours in the period for which the employee was rostered*' (in the case of casual employees);⁶⁴ and
- (c) Section 117 requires an employer to pay an employee in lieu of notice of termination (where the minimum period of notice is not provided) for '*at least the amount the employer would have been liable to pay to the employee...at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice*'.⁶⁵

96. Section 18 of the Act defines 'full rate of pay' as the rate of pay payable to an employee including incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and any other separately identifiable items. A separate definition is provided for

⁶² Section 81(4) of the Act.

⁶³ Section 106BA(1)(a) of the Act.

⁶⁴ Section 106BA(1)(b) of the Act.

⁶⁵ Section 117(2)(b) of the Act.



pieceworkers.⁶⁶

97. These provisions pose difficulties in respect of some other categories of employees, such as those with non-standard remuneration entitlements or variable working patterns.
98. For example, under the *Road Transport (Long Distance Operations) Award 2020*, employees are remunerated by either a 'kilometre driving method' (that is, by multiplying the number of kilometres travelled by the cents per kilometre rate for the vehicle) or 'hourly driving method' (being an hourly rate for the number of hours travelled).⁶⁷ There is inherent difficulty in an employer being able to ascertain for the period in respect of which payment is to be made, what the employee would have earned by reference to distance travelled or time taken to travel when these are not set or predictable matters.
99. A further example is where an employee has variable hours of work and the period of payment extends beyond the immediate roster period (say for example, where a roster is only required to be notified 7 days in advance however payment in lieu of notice is to be made for a 5 week period). A factual contest between the parties is likely to arise in relation to the hours the employee may have been rostered to work.
100. Other examples include where entitlement to a payment depends in some way upon the activities undertaken (such as dirty work allowances or travel allowances) but the precise work to be undertaken is a variable.
101. A myriad of other examples could be provided but those identified above are sufficient to demonstrate that this element of the NES cannot be applied or complied with accurately. At best it invites parties to speculate or simply guess as to what amounts should be paid. This is obviously a deficiency in the legislation and one that warrants urgent attention given employers face crippling penalties for non-compliance with the NES.
102. It is noted that section 118(2) provides avenues to address this issue and suggests an anticipation in the development of the legislation of difficulties determining the full rate of pay. These avenues have proven inadequate given the above challenges persist so long after the NES's commencement. An alternate approach is clearly warranted.

Opportunity for Improvement - 4

The requirement to pay an employee at the full rate of pay for a period (or in lieu of a particular period) should apply only to entitlements the quantum of which are certain, such as where this is a firm agreement between the parties as to what will work or hours of work will be undertaken and the quantum of any associated payment is known. This could be, for example, a contractual entitlement to particular hours or agreed minimum hours, or a roster that is set without any capacity for either party to change it.

(b) Annualised Salary Arrangements

103. A commonplace practice is for employers to agree with their award-covered employees (and to a lesser extent, enterprise agreement covered employees) to be paid a salary in satisfaction of

⁶⁶ Section 18(2) of the Act.

⁶⁷ Clause 16 of the *Road Transport (Long Distance Operations) Award 2020*.



variable and itemised amounts under the award (or enterprise agreement).

104. One way in which this practice may be lawfully accommodated is via off-setting arrangements contained in a common law employment contract.
105. By way of alternative, some modern awards contain ‘annualised wage arrangement provisions’, pursuant to which an employer is permitted to pay a salary in lieu of specified award entitlements. These provisions were an original feature of some modern awards where the relevant pre-modern instruments contained similar provisions,⁶⁸ and were the subject of further consideration by the Fair Work Commission as part of the 4-yearly review of modern awards.
106. Whilst annualised wage arrangement provisions are now a feature of more than 20 modern awards, this is only a relatively small range of awards and leaves a large portion of award-covered employers and employees without access to annualised wage provisions.
107. The annualised wage arrangements are also not a complete or entirely adequate solution. Currently, the way the annualised wage arrangements provisions work leave employers who use them exposed to severe penalties, including millions in fines and even imprisonment, unless they record and monitor all hours of work and undertake periodic reconciliations. The evolution of annualised wage arrangement provisions in 2018 as a consequence of Fair Work Commission proceedings, so as to require such monitoring and records, has given rise to widespread concern and significant discontent within industry.
108. It is notorious that employers are struggling with these requirements. In the decision leading to the development of the provisions, the Fair Work Commission itself expressed ‘grave doubts’ annual reconciliation requirements in annualised wage arrangements ‘*would actually be the subject of widespread compliance.*’⁶⁹ The Fair Work Commission also noted that strict compliance with such a term ‘*...would obviate many of the benefits of an annualised wages arrangement which we have earlier identified. There would be little if any benefit in administrative simplicity: the employer would still have to keep records of all hours worked.*’⁷⁰ However, it ultimately considered it had no discretion in this regard in light of the inflexibility of the requirements for the award term as contained in section 139(1)(f) of the Act.
109. The alternatives to annualised wage arrangements — absorption provisions, exemption rates and common-law contracts - are hardly a source of optimism for employers.
110. Modern awards previously contained an ‘*absorption*’ provision, which allowed employers to absorb monetary obligations imposed by the modern award into over-award payments. However, the short point in this regard is that such terms were a transitional arrangement accompanying the establishment of modern awards and were removed in the 4 Yearly Review.
111. The ability for Commission to exercise its discretion to vary awards to includes ‘exemption rates’ if determined that this would be fair and relevant safety net has been tightly curtailed through

⁶⁸ See *Award Modernisation* [2009] AIRCFB 945 at [69] — [70].

⁶⁹ *Annualised Wage Arrangements* [2018] FWCFB 154 at [120].

⁷⁰ *Annualised Wage Arrangements* [2018] FWCFB 154 at [118].



the heavy handed amendment introduced through the *Fair Work Amendment (Protecting Penalty and Overtime Rates) Act 2005*.

112. As emphasised by the outcome of recent Federal Court proceedings,⁷¹ common law offsetting arrangements are prone to significant legal and practical difficulties. This carries with it the consequence of employers being exposed to significant penalties and other enforcement action — notwithstanding salary arrangements are typically mutually beneficial for both employers and employees as compared to payment of variable and itemised amounts under a modern award.
113. Given the widespread practice of salary arrangements in Australian workplaces, there is significant merit to the Act being amended to incorporate a statutory mechanism for employees and employers to agree to annualised salary arrangements without the need to rely upon a provision enabling this under a modern award (or to have to make an enterprise agreement containing an annualised salary provision).
114. This would also have the added benefit of potentially allowing complex and problematic annualised wage arrangement provisions to be removed from modern awards, thus reducing their length and thereby aiding in ease of use.
115. This change would go a long way to addressing a major difficulties for employers. It would assist employers to pay employees well and in stable arrangements that many employees crave. Absent such a change, there is significant risk that employers will increasingly see less utility in offering annualised salaries to employees in light of the above-mentioned Federal Court decision.⁷²

Opportunity for Improvement - 5

Insert a provision in the NES which enables employers and employees to enjoy the benefits of annualised salary arrangements without contravening payment terms of modern awards or section 323 of the Act, or needing to comply with the currently unworkable record-keeping requirements or annualised wage arrangement provisions in modern awards.

8.2.2 Division 3 — Maximum Weekly Hours

(a) Section 64 — Averaging of hours of work for award/agreement free employees

116. Section 64 of the Act permits an employer and an award/agreement free employee to agree in writing to an averaging arrangement, with a specific averaging period of up to 26 weeks.⁷³ The agreed averaging arrangement may also provide for average weekly hours that exceed 38

⁷¹ *Fair Work Ombudsman v Woolworths Group Limited; Fair Work Ombudsman v Coles Supermarkets Australia Pty Ltd; Baker v Woolworths Group Limited; Pabalan v Coles Supermarkets Australia Pty Ltd* [2025] FCA 1092

⁷² *Fair Work Ombudsman v Woolworths Group Limited; Fair Work Ombudsman v Coles Supermarkets Australia Pty Ltd; Baker v Woolworths Group Limited; Pabalan v Coles Supermarkets Australia Pty Ltd* [2025] FCA 1092

⁷³ Section 64(1) of the Act.



hours (for a full-time employee) or the lesser of 38 hours and the employee's ordinary hours of work in a week (for a casual or part-time employee), if the excess hours are reasonable.⁷⁴

117. Section 63 of the Act allows modern awards and enterprise agreements to include terms providing for the averaging of ordinary hours of work over a specified period. Such clauses are arguably a common feature of modern awards. In the seven most commonly used awards for example, all seven permit averaging of ordinary hours. It is not however entirely clear that such clauses deal with averaging of hours as contemplated by section 63.
118. Nonetheless, what is certain is that modern awards have not generally included the kind of provisions contemplated by section 63(2) of the Act. This provision has not operated as anticipated and this should be addressed. While we contend that section 63 should be retained, the basic flexibility afforded under section 64 should accordingly be extended to all employees.

Opportunity for Improvement 6

Amend section 64 to apply to all employees.

8.2.3 Division 4 — Requests for Flexible Working Arrangements⁷⁵

(a) Section 65 — Requests for flexible working arrangements

119. Where an eligible employee makes a request for a flexible work arrangement, section 65(3) requires the request to be in writing, and *'set out the details of the change sought and of the reasons for the change'*.⁷⁶
120. The content requirements for the request are in this respect, fairly non-prescriptive. This is in contrast to the prescriptive list of matters required to be included by an employer in any written response refusing a request.⁷⁷
121. As a consequence, employers may receive an insufficient or incomplete description of the nature of the change(s) sought. This may in turn, impact the efficiency and fulsomeness of consideration of the employer's consideration of the request.
122. Further, whilst employees are required to state *'the reasons for the change'*, a recurring failure of employee requests that has been identified by the Fair Work Commission (in the exercise of its new powers under sections 65B and 65C of the Act) is the absence of any articulation regarding why the flexible arrangement is required **because of** the circumstance which makes them eligible to make the request.⁷⁸

Opportunity for Improvement - 7

⁷⁴ Section 64(2) of the Act.

⁷⁵ We note that while the operation of the specific provisions of Division 4 that have been amended are excluded from the scope of this review, the Terms of Reference do not prevent consideration of either the non-amended provisions, nor the amended provisions in relation to how they interact with other NES entitlements.

⁷⁶ Section 65(3)(a) and (b) of the Act.

⁷⁷ Section 65A(6) of the Act.

⁷⁸ See for example: *Smith v Costco Wholesale Australia Pty Ltd* [2025] FWC 2691; *Collins v Intersystems Australia Pty Ltd* [2025] FWC 1976; *Sampsonidis v Make It Mine Finance Pty Ltd* [2025] FWC 1330.

Amend section 65 of the Act to require an employee's request for a flexible arrangement to be in writing and set out:

- Details of the change(s) sought
- Whether the change is being sought on a permanent or temporary basis (and if temporary, the dates on which it is proposed the arrangement would start and end)
- The circumstance(s) in section 65(1A) that apply to the employee, and which the employee relies upon in making the request
- An explanation of why the request is made because of those circumstances

8.2.4 Division 5 — Parental Leave and Related Entitlements⁷⁹

(a) Division 5 — Parental Leave and Related Entitlements

123. The parental leave provisions in the NES are lengthy and extremely complex. When the NES was first introduced, the parental leave provisions accounted for 18 pages of the Act.⁸⁰ They now stretch to 32 pages.⁸¹
124. The evolution of this aspect of the safety net is extremely difficult for both employers and employees to navigate. By way of just one example, section 71 (which sets out the period of leave) stretches over nearly two pages and contains 6 notes. Section 72A, which relates to flexible unpaid parental leave, stretches over three pages and contains 4 notes.

Opportunity for Improvement - 8

Re-draft Division 5 of Part 2-2 in full, to reduce both length and complexity.

(b) Sections 72A and 74 — Notice requirements for flexible unpaid parental leave

125. Section 72A entitles an employee to take up to 100 days of unpaid parental leave as 'flexible unpaid parental leave' during the first 24 months of their child's life (subject to satisfying the requirements contained in the section).
126. To access flexible unpaid parental leave under the Act, the employee must provide written notice to the employer of his/her intention to take the leave,⁸² and then provide further notice of the

⁷⁹ We note that while the operation of the specific provisions of Subdivision B of Division 5 that have been amended are excluded from the scope of this review, the Terms of Reference do not prevent consideration of either the non-amended provisions, nor the amended provisions in relation to how they interact with other NES entitlements.

⁸⁰ See *Fair Work Bill 2008* (Cth) at pages 78 — 96 (inclusive).

⁸¹ See *Fair Work Act 2009* (Cth), Volume 1, pages 185 — 217 (inclusive).

⁸² Section 74(2) of the Act.



specific days to be taken 4 weeks in advance, unless it is '*not practicable*' to do so, which may enable an employee to provide notice after the leave has been taken.⁸³

127. The taking of potentially up to 100 days of flexible parental leave may be hugely disruptive for employers, co-workers and replacement employees to manage. It permits an extended period of leave to be unilaterally taken, potentially as either ad hoc single day or multiple block absences (or a combination of both), in circumstances where the duration of the period(s) of leave and days on which the employee intends to take it need not be confirmed with his/her employer until 4 weeks prior, or if not practicable, at a later stage, including after the leave has commenced.
128. This fails to grant employers with sufficient information and timeframes to be able to plan for employee absences on unpaid flexible parental leave (an impact which has been magnified by the increase in 2020 of the number of days able to be taken as flexible unpaid parental leave from 30 to 100). This in turn may have the undesirable effects of:
 - (a) Adversely impacting business continuity and productivity;
 - (b) Unfairly increasing the workload for other employed co-workers;
 - (c) Hampering an employer's ability to plan for or communicate to replacement employees the likely duration of employment; and
 - (d) Stymieing and discouraging employer-funded paid parental leave schemes due to the uncertain nature of flexible unpaid parental leave absences serving as a constraint on employer budgets and/or as an additional cost to administering compliance with the NES requirements.
129. Other forms of extended leave such as annual leave or long service leave, which may also be taken as single days, are generally accessible by agreement with the employer, provided that the employer does not unreasonably refuse the request for leave.⁸⁴

Opportunity for Improvement - 9

Amend section 74(2) to:

1. require an employee who proposes to take separate periods of unpaid flexible parental leave to:
 - provide (as far as reasonably practicable) a minimum of 10 weeks' written notice of their intention to take leave; *and*
 - nominate *all* the specific days that are *requested* for the leave to be taken; and
2. provide that an employer must not unreasonably refuse the requested days on which the unpaid flexible parental leave is to be taken.

⁸³ Section 74(4B) of the Act.

⁸⁴ See section 88 of the Act in respect of annual leave. Many state laws regulating long service leave allow for single day access by agreement between the employer and employee.

The proposal at (2) is similar to the threshold for employer agreement in section 88 of the Act in relation to annual leave.

(c) Section 81 — Transfer to a safe job

130. Where an employee meets the requirements for transfer to a safe job under section 81 of the Act, the safe job is appropriate only where it has the same ordinary hours of work as the employee's present position, or a different number of ordinary hours agreed to by the employee.⁸⁵
131. An issue arises if section 81(3)(a) is interpreted as referring to the ordinary hours in the same job needing to be the same number, worked at the same times and days, as the present position to be 'appropriate'. Where an employee has variable days of work and start and finish times (for example, as part of a roster able to be varied on notice), or an industrial instrument or contract of employment entitles the employer to unilaterally vary an employee's pattern for working ordinary hours (typically on notice), the employer should retain the ability to do so as part of the identification of an appropriate safe job.
132. We regard the NES as operating in this manner already, but note that it has given rise to uncertainty in industry and as such, ought to be expressed in clearer terms.

Opportunity for Improvement - 10

Amend section 81(3)(a) to read: 'the same ordinary hours of work as the employee ~~ee's~~ works or may be required to work in their present position'

(d) Section 81A — Paid No Safe Job Leave

133. Section 81A entitles a pregnant employee to '*paid no safe job leave*' where there is no appropriate safe job available, the employee is entitled to unpaid parental leave, and has complied with the notice and evidence requirements under section 74 of the Act for taking unpaid parental leave.⁸⁶
134. Uncertainty exists as to what is meant by the words '*is entitled to unpaid parental leave*'.⁸⁷ Specifically, section 67 of the Act provides that an employee is not entitled to unpaid parental leave unless they will have completed at least 12 months' continuous service prior to commencing unpaid parental leave, while section 71 of the Act provides that unpaid parental leave may start up to 6 weeks before the expected date of birth of the child (or earlier if agreed to by employer and employee).
135. There is some confusion about whether an employee is '*entitled to unpaid parental leave*' if they are not yet entitled to take unpaid parental leave

Opportunity for Improvement - 11

⁸⁵ Section 81(3) of the Act.

⁸⁶ Section 81A(1) of the Act.

⁸⁷ Section 81A(1)(b) of the Act.

Amend section 81A(1)(b) of the Act to clarify what is meant by ‘entitled to unpaid parental leave’.

8.2.5 Division 6 — Annual leave

(a) Section 87 — Entitlement to annual leave

136. Section 87(1) of the Act deals with the amount of annual leave to which an employee is entitled. Under the provision, employees are entitled to either 4 weeks of paid annual leave, or 5 weeks if a modern award or enterprise agreement that applies to the employee defines or describes them as a shiftworker for the purposes of the NES, or they are an award/agreement free employee that meets the shiftworker criteria under section 87(3) of the Act.
137. Modern award definitions as to who is a shiftworker that qualifies for the additional week of annual leave under the NES vary considerably, and are not straightforward. The following recent observation of Deputy President Boyce in *Bega Dairy and Drinks Pty Ltd formerly known as National Foods (Dairy Foods) Limited v United Workers’ Union* [2024] FWC 171 describes the unsatisfactory nature of modern awards in this regard:

[27] Current or existing modern awards contain provisions that define “shiftworker” for the purposes of the additional NES week of annual leave. By their words, these provisions are not uniform. For example, an employee need only work outside of the ordinary hours of a dayworker under the Aged Care Award 2010 (AC Award) to be a “shiftworker” under that award for the purposes of an entitlement to an additional NES week of annual leave.¹⁶ Conversely, under the Hospitality Industry (General) Award 2020 (Hospitality Award), a “shiftworker” for the purposes of the additional NES week of annual leave is a relevant employee who must firstly, be a 7 day shiftworker, secondly, be (themselves) regularly rostered to work (and thus perform work) on Sundays and public holidays, and thirdly, be working in a business in which shifts are continuously rostered 24 hours a day for 7 days a week. In other words, the Hospitality Award contains three separate and distinct qualifiers for an entitlement to additional NES annual leave to arise, whilst under the AC Award one need only be a shiftworker.

[28] Multiple modern awards include the term “seven day shiftworker” to define or describe a shiftworker for NES additional annual leave purposes.¹⁷ It is unfortunate, including from a plain English perspective, that none of these awards provide a simple, straightforward and unambiguous definition or description of a seven day shiftworker. This is especially so in circumstances where a failure to properly comply with a term of a modern award or enterprise agreement is determined on a strict liability basis, and carries potentially hefty pecuniary penalties.

Opportunity for Improvement - 12

Amend section 87 to provide a single definition of the class of shift worker who would receive an additional week of annual leave.

Opportunity for Improvement - 13

Remove provisions from modern awards which define employees as shiftworkers for the purpose of the fifth week of annual leave.

(b) **Section 93 — Modern awards and enterprise agreements may include terms relating to cashing out and taking paid annual leave**

138. The current approach to regulating cashing out and taking of annual leave under the NES gives rise to a number of problems.
139. The *first* is the need to look at two sources of information. Annual leave is dealt with partly in modern awards and partly in the NES. This alone creates complexity.
140. The *second* is the 'patchwork' of rules under modern awards about the taking of leave. By design, the NES leaves it to modern awards to specify rules around the taking of leave. These have evolved largely in response to specific claims being advanced by parties in Fair Work Commission proceedings or by reference to the terms of pre-modern awards. There nonetheless remain gaps in some awards where claims have not yet been advanced, for example:
- No capacity for parties to agree to twice as much leave at half pay (except for as temporarily provided in awards in the context of COVID-19 schedules);
 - Some modern awards do not provide a capacity to ask employees to take leave in the event of a shutdown (thus effectively prohibiting the common practice of employers shutting down for the purpose co-ordinating of the taking of leave across a workforce);
 - No general capacity to ask employees to take leave in circumstances where it may be reasonable; and
 - No general capacity for employees to agree to an arrangement relating to the taking of annual leave as contemplated by section 94(6) (which applies only to award/agreement free employees).
141. The *third* issue concerns the diversity of approaches to various provisions relating to annual leave, which are unjustifiable. Subsections 94(1) — (4) inclusive deal with cashing out of annual leave by agreement. Insofar as this is a common feature amongst modern awards, having one common standard (in the NES) against which all employees cash out annual leave would reduce complexity and compliance burden for employers who operate under multiple awards. Similarly, requirements to take paid annual leave (section 94(5) of the Act) and agreements about taking paid annual leave (section 94(5) of the Act) would create a more sensible, streamlined and coherent safety net if all were dealt with in the NES in respect of all employees — regardless of whether they are award covered, agreement covered or award/agreement free.
142. *Fourthly*, some award provisions concerning annual leave are both unnecessarily and unjustifiably complex.
143. A *fifth* issue concerns the potential invalidity of aspects of annual leave provisions in some modern awards. Even where a modern award deals with when an employee may be required to take leave, there is scope for uncertainty over whether current provisions are enforceable given

the operation of sections 93(3) and 55(4) of the Act. For example, the *Passenger Vehicle Transportation Award 2020* states that annual leave loading does not apply to proportionate leave on termination of employment.⁸⁸ The *Airline Operations-Ground Staff Award 2020* also states that annual leave loading will not be paid on termination.⁸⁹ The *Electrical, Electronic and Communications Contracting Award 2020* states that annual leave loading will not apply to proportionate leave on termination where an employee is dismissed by the employer for reasons of malingering, inefficiency, neglect of duty, misconduct or refusing duty.⁹⁰

144. In these situations, employers may comply with the provisions of an applicable modern award but nonetheless be in breach of the NES. This is unsatisfactory.

Opportunity for Improvement - 14

Amend section 94 of the Act so that it:

- applies to all employees; and
- without limiting the generality of subsection 94(5), specifies circumstances in which a requirement to take annual leave will be reasonable. This should include:
 - Shutdowns
 - Excessive leave accruals
 - Annual leave in advance
 - Arrangements agreed between an employee and employer about when annual leave will be taken, provided a specified minimum period of notice is given
 - Arrangements permitting twice as much leave to be taken at half pay.

As part of this, provisions of modern awards dealing with annual leave (save for the quantum of annual leave loading) should be deleted.

(c) Shutdowns — Ability to direct employees to take unpaid leave

145. On a separate but related note to the above, the model annual leave term inserted into awards during the 4 Yearly Review of Modern Awards⁹¹ provides an employer with three options regarding employees taking leave for the duration of the shutdown:

- (a) The first is to direct an employee who has sufficient annual leave accruals, to take their leave. The direction must be in writing and reasonable;
- (b) The second is to reach an agreement with the employee to take leave without pay; and

⁸⁸ Clause 21.3 of the *Passenger Vehicle Transport Award 2020*.

⁸⁹ Clause 26.5(b) of the *Airline Operations-Ground Staff Award 2020*.

⁹⁰ Clause 21.4(c) of the *Electrical, Electronic and Communications Contracting Award 2020*.

⁹¹ The model term was developed in AM2014/47 — 4 yearly review of modern awards — Annual leave.



(c) The third is to reach agreement for the employee to take annual leave in advance.

146. Critically, there is no ability for an employer to *direct* an employee to be required to take either leave without pay or annual leave in advance, where the employee is not agreeable to doing so.
147. Prior to the Act coming into operation State legislation, such as the *Annual Holidays Act 1944* (NSW), provided for the right of an employer to implement a close-down of its business, in whole or in part, and enabled an employer to direct an employee to take a period of unpaid leave to cover the close-down period, where the employee had insufficient leave accrued.⁹²
148. The Fair Work Commission, when considering the model shut down provisions for modern awards, determined that the Act did not permit the clause to include a provision to the effect that an employer can stand down an employee without pay during a shutdown period; nor to include a provision by which an employer may *require* an employee to take leave without pay during a shutdown period where the employee does not have sufficient annual leave entitlements to cover the period.⁹³
149. The ability to do so was — and continues to be — important to being able to achieve a true, blanket shutdown of operations which are an important opportunity for employers and employees alike to properly rest and recuperate from work.

Opportunity for Improvement - 15

Further amend section 94 to permit an employer to require an employee to take unpaid leave for the duration of a shutdown period, where the employee has insufficient annual leave accruals to cover the shutdown and refuses to agree to take annual leave in advance.

Any such requirement should include appropriate safeguards, potentially including appropriate notice requirements and a stipulation that the shutdown be for a purpose including coordination of the taking of leave by an employers' workforce (or part of the workforce).

(d) Sections 87 and 90 — Accrual, deduction and taking of leave

150. Under the annual leave provisions of the NES:

- the entitlement to annual leave is expressed in 'weeks';⁹⁴
- accrual occurs '*progressively during a year of service...according to the employee's ordinary hours of work*';⁹⁵ and
- whilst on annual leave an employee an employee is entitled to be paid for their '*ordinary hours of work in the period*'.⁹⁶

⁹² Section 4A of the *Annual Holidays Act 1944* (NSW).

⁹³ 4 *Yearly review of modern awards — Plain language — Shutdown provisions* [2022] FWCFB 161 at [140] — [141].

⁹⁴ Section 87(1) of the Act.

⁹⁵ Section 87(2) of the Act.

⁹⁶ Section 90(1) of the Act.



151. This has caused difficulty and uncertainty in its application for employers who operate non-standard work patterns.⁹⁷

Opportunity for Improvement - 16

Amend section 87 to convert the annual leave entitlement to an hourly entitlement for administrative ease.

(e) Purchased Annual Leave

152. The *Fair Work Regulations 2009 (Cth)* permit award/agreement free employees to agree with their employer to the provision of extra annual leave in exchange for foregoing an equivalent amount of pay.⁹⁸
153. There is no discernible reason as to why this should not form part of the NES proper and be available to all employers and employees more broadly (and irrespective of the application of a modern award or enterprise agreement). Many employers offer purchased leave arrangements as an employee benefit; and the ability to purchase additional leave by agreement is often attractive to employees who may wish to take extended holidays and/or to assist them to balance caring responsibilities by having more annual leave available to cover school holidays.

Opportunity for Improvement - 17

Amend Division 6 of Part 2-2 of the Act to expressly permit employees and employers to agree to purchased leave arrangements for annual leave.

8.2.6 Division 7, Subdivisions A, B, C & D — Personal/Carer's Leave and Compassionate Leave

(a) Sections 96 and 99 — Accrual, deduction and taking of leave

154. Not dissimilarly to annual leave, the paid personal/carers' leave provisions of NES state that:
- (a) the entitlement is expressed in 'days';⁹⁹
 - (b) accrual occurs '*progressively during a year of service...according to the employee's ordinary hours of work*';¹⁰⁰ and

⁹⁷ See for example, *RACV Road Service Pty Ltd v Australian Municipal, Administrative, Clerical and Services Union* [2015] FWCFB 2881; *Construction, Forestry, Mining and Energy Union v Glendell Mining Pty Limited* [2017] FCAFC 35; *Australian Workers' Union, The - Queensland Branch v Cleanaway Operations Pty Ltd T/A Cleanaway* [2020] FWC 6907.

⁹⁸ Reg 2.03 of the *Fair Work Regulations 2009 (Cth)*.

⁹⁹ Section 96(1) of the Act.

¹⁰⁰ Section 96(2) of the Act.



- (c) whilst on personal/carer's leave an employee is entitled to be paid for their 'ordinary hours of work in the period'.¹⁰¹

155. The complexity of the operation of these provisions have previously achieved notoriety in proceedings involving employer Mondelez, which ultimately required the correct application of section 96(1) of the Act to be determined by the High Court of Australia.¹⁰²

Opportunity for Improvement - 18

Amend section 96 to convert the paid personal/carer's leave entitlement to an hourly entitlement for administrative ease, and to reflect the way it technically works.

(b) Purchased Paid Personal/Carers Leave

156. Similar to the issue above concerning annual leave, the *Fair Work Regulations* permit award/agreement free employees to agree with their employer to the provision of extra personal/carer's leave in exchange for foregoing an equivalent amount of pay.¹⁰³
157. There is again no discernible reason as to why this should not form part of the NES and be available to all employers and employees more broadly (and irrespective of the application of a modern award or enterprise agreement). Where employees or their dependents suffer from a chronic, recurring or long-term illness or injury the ability to purchase additional personal/carer's leave is likely to be of significant benefit, including to buffer what can be serious household budget consequences where an employee has exhausted their paid personal/carer's leave entitlement and needs to take unpaid leave.

Opportunity for Improvement - 19

Amend Division 7 of Part 2-2 of the Act to expressly permit employees and employers to agree to purchased leave arrangements for personal/carer's leave.

8.2.7 Division 9 — Long Service Leave

(a) Section 113 — Entitlement to long service leave

158. Section 113 of the Act creates an entitlement for employees to continue to receive long service leave in accordance with award terms that applied prior to the commencement of the NES in relation to their employment. It does so by preserving those entitlements in 'applicable award-derived long service leave terms'.
159. For the vast majority of Australian workers, it otherwise does not provide an entitlement to long service leave — which continues to be dealt with under relevant Commonwealth, State and Territory legislation instead.

¹⁰¹ Section 99 of the Act.

¹⁰² *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; Minister for Jobs and Industrial Relations v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29.

¹⁰³ Reg 2.03 of the *Fair Work Regulations* 2009.

160. At the time when the NES was introduced, the Explanatory Memorandum stated: *'The NES will preserve current arrangements for long service leave. Meanwhile, the Government is working with the states and territories to develop nationally consistent long service leave entitlements'*.¹⁰⁴
161. Since the NES was introduced, the patchwork nature and complexity of long service leave entitlements — particularly for employers who work across jurisdictions and/or who are exposed to one or more portable schemes for particular occupations.
162. Many workers — particularly since the rise in work from home arrangements — work interstate from the jurisdiction with which their work may be connected. Complexity arises where periods of service are completed overseas or in different Australian jurisdictions.

Opportunity for Improvement - 20

Commence consultation on harmonising long service leave nationally.

The harmonisation of patchwork of long service leave schemes is warranted. It is however recognised that this must be done in a way that is fair to employers and employees. Harmonisation should not come at any cost — particularly having regard to the fact that the overwhelming majority of businesses operate in one jurisdiction. It is imperative that this be done in a balanced way and *not* as a 'levelling up' exercise.

The current situation, which is burdensome for employers and fraught with complexity and compliance risk, should no longer persist within the safety net framework.

Equally however, employers who are currently bound by award-derived long service leave entitlements should not be drawn in to schemes based on any amalgamation of *'highest watermark'* entitlements derived from a myriad of State-based schemes. Similarly, employers under State schemes should not be forced to be subject to elements from other State schemes that are disproportionately beneficial to employees when compared to current arrangements.

It is noted that some States (including in particular, South Australia) have particularly generous entitlements for employees. A fair balance in any harmonised arrangement should be struck, it should not merely reflect the most beneficial elements for employees in each scheme.

163. See also our proposal below for individual flexibility arrangements to be made about matters contained in the NES, including long service leave.

(b) Cashing out long service leave

164. Unlike the parts of the NES dealing with annual leave and personal/carer's leave, no specific provision is made in Division 9 of Part 2-2 of the Act for employers and employees to agree to

¹⁰⁴ Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) at r.76.



cash out long service leave in an enterprise agreement. In the case of annual leave, cashing out can also be agreed between employers and award/agreement free employees.

165. In *Armacell Australia Pty Ltd; Wilmaridge Pty Ltd as Trustee for the O'Neill Family Trust t/a Direct Paper Supplies; Downer EDI Works Pty Ltd* [2010] FWAFB 9985 (**Armacell Decision**) a Full Bench of (then) Fair Work Australia held that terms of an enterprise agreement:

- are of no effect to the extent a term permits cashing out of long service leave in circumstances where the underpinning long service leave entitlement is contained in State legislation, and cashing out would not be permitted under the relevant legislation;¹⁰⁵ and
- contravene section 55 of the Act (and therefore prevent approval of the enterprise agreement pursuant to section 186(2)(c)) where an employee has an award-derived long service leave entitlement operating as part of the NES (pursuant to section 113) and the agreement provides for more expansive rights to cash out leave than under that entitlement.¹⁰⁶

166. The Full Bench also stated:

We add for completeness that in our view a term which permits cashing out of long service leave cannot be characterised as a supplementation of the NES in s.55(4). Cashing out of leave generally cannot be regarded as an additional or supplementary provision. We point out by analogy that, despite provision for supplementation of the NES in s.55(4), the legislature deemed it necessary to include separate provisions dealing specifically with cashing out of annual leave (ss.92-4).¹⁰⁷

167. There is no logical basis as to why employers and employees should not be able to cash out long service leave — by agreement, and with appropriate safeguards - in circumstances where they are otherwise permitted to do so in relation to other types of leave.

Opportunity for Improvement - 21

Amend Division 9 of Part 2-2 of the Act to provide employers and employees with the ability to agree to cash out long service leave.

Opportunity for Improvement - 22

Amend Division 9 of Part 2-2 of the Act to permit parties to deal with long service leave in enterprise agreements. In recognition of the notorious difficulties of harmonising such entitlements into a national scheme, this would be a sensible first step towards relieving employers of the burden and complexity of the current patchwork of long service leave schemes and enabling parties to develop agreed adjustments to the operation of restrictive schemes.

¹⁰⁵ *Armacell Decision* at [30].

¹⁰⁶ *Armacell Decision* at [32].

¹⁰⁷ *Armacell Decision* at [32].



8.2.8 Division 10 — Public Holidays

(a) Section 114(1) — Public holidays *‘where the employee is based for work purposes’*

168. Sub-section 114(1) of the Act entitles an employee to be absent from their employment where there is a public holiday *‘in the place where the employee is based for work purposes’*.
169. Many employers find this confusing where an employee does not have a static work location. This includes fly in/fly out workers, employees who are temporarily based interstate, ‘border’ employees (for example, who work in the Albury/Wodonga region) and employees whose role inherently involves travel (such as a sales employee with large territory that spans across regional and/or interstate borders).

Opportunity for Improvement - 23

Amend section 114(1) to improve its application to employees without a static work location.

One option may be for an employer and an employee to agree on a location to be designated as the employee’s base for the purpose of public holiday entitlements, in circumstances where the employee does not have an ordinary ‘base’ location of work.

(b) Section 114(1) — Entitlement to be absent *‘on a day or part-day that is a public holiday’*

170. Sub-section 114(1) of the Act entitles an employee to be absent from their employment *‘on a day or part-day that is a public holiday’*.
171. This wording does not take into account the practical realities of night shifts that cross midnight. Take the following example:
- Wednesday is a full-day public holiday.
 - A shift-worker works a night shift commencing on Tuesday (the day before the public holiday) at 10pm, which concludes at 6am on Wednesday morning (the public holiday).
 - The shift-worker returns to work another shift commencing at 10pm on Wednesday (the public holiday) and finishing at 6am on Thursday morning (the day after the public holiday).
172. Some confusion (and as a corollary, compliance risk) arises for employers relating to how the entitlement to be absent applies in situations such as the above example. Further difficulty arises in an example such as the above, in understanding how to pay a shiftworker who may be absent on one shift and work the other shift.
173. This is particularly so where the shiftworker and public holiday provisions in modern awards include ‘major portion’ rules, to identify whether a shift attracts a public holiday penalty payment based on whether the major portion of the shift falls on the holiday; as compared to the NES which operates on a ‘midnight to midnight’ basis (for full-day holidays).
174. In some situations, employers are at risk of inadvertently breaching the NES by requiring employees to work a shift that has a minor portion on a public holiday because the employer



does not understand the distinction in how the NES and ‘majority portion’ provisions of modern awards operate.

Opportunity for Improvement - 24

Clarify the operation of section 114(1) where an employee’s ordinary hours partially span a public holiday.

(c) Section 114(2) — Reasonable requests to work on public holidays

175. Whilst section 114(1) of the Act entitles an employee to be absent from his or her employment on a public holiday, section 114(2) provides:

However, an employer may request an employee to work on a public holiday if the request is reasonable.

176. Section 114(3) permits an employee to refuse an employer’s request to work on a public holiday, where either the request is not reasonable, or the employee’s refusal is reasonable. Section 114(4) lists factors that must be taken into account in determining whether a request, or a refusal of a request, to work on a public holiday is reasonable.

177. In *Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd* [2023] FCAFC 51 (**OS MCAP Decision**), a Full Court of the Federal Court of Australia interpreted these provisions as requiring an employer to make a request for employees to work on a public holiday, before it could effectively ‘require’ employees to work on a public holiday where their refusal to work would not be reasonable.¹⁰⁸ The Full Court stated:

All that is required is that an employer ensures that employees understand either that the roster is in draft requesting those employees who have been allocated to the holiday work that they indicate whether they accept or refuse that allocation, or where a request is made before the roster is finalised. Similarly, a contract may contain a provision foreshadowing that the employees may be asked to work on public holidays and may be required where the request is reasonable and a refusal unreasonable.¹⁰⁹

178. Accordingly, to comply with section 114 employers must follow a 3-step process - *request, refusal, require* - to arrive at a concluded roster covering public holidays. A breach of section 114 occurs when an employer requires an employee to work on a public holiday, and the employee does in fact work, but no request was made (or a request that was not reasonable was made).¹¹⁰ This is so, even where employees are involved in critical services, or where it is

¹⁰⁸ *OS MCAP Decision* at [43].

¹⁰⁹ *OS MCAP Decision* at [44].

¹¹⁰ *OS MCAP Decision* at [50].



desirable (although ‘not critical’) to remain open on public holidays and the Full Court has acknowledge the ability of employers to ultimately require employees to work.¹¹¹

179. The operation of this provision is unnecessarily complex and burdensome for employers.
180. An employer should be able to notify employees at the outset of their employment of the need to work on public holidays, and standing agreement reached with an employee regarding their preparedness to do so (for example, as a term of the contract of employment).
181. This is particularly so where an employee is engaged in critical services. An employer should not have to undertake the 3-step process where an outcome in which the employee may be required to work (if they refuse) is inevitable.

Opportunity for Improvement - 25

Amend:

- Section 114(2) - to allow an employer to ‘*require*’ (rather than ‘*request*’) an employee to work on a public holiday where reasonable, and
- Section 114(3) - to allow an employee to refuse a ‘*requirement*’ (rather than a ‘*request*’) to work on a public holiday, in the circumstances currently provided for in that sub-section.

(d) Section 115 — Substituted Public Holidays

182. Section 115(3) of the Act leaves it to modern awards and enterprise agreements to deal with substitution of public holidays (in respect of employees covered by either of those types of instruments). Section 115(4) of the Act simply permits agreement about substitution to be made between an employer and an award/agreement free employee.
183. Many modern awards provide for this by agreement between an individual employee and their employer. Some awards have traditionally permitted this by agreement between a group of employees and their employer, but such provisions have recently been removed given their inconsistency with the NES.
184. Greater flexibility in application is needed to ensure that employers and employees can readily reach agreement to substitute public holidays where desired by an employee and agreeable to their employer. This may be particularly important for First Nations workers (in relation to substitution of the Australia Day public holiday) and to accommodate differing cultural backgrounds and religious beliefs (and where for example, public holidays for Easter and Christmas may be substituted for other dates of religious significance).

Opportunity for Improvement - 26

Amend section 115 to remove the capacity for modern awards to include terms dealing with substitution of public holidays by agreement between employer and employee and instead provide for this directly (as is done in relation to award/agreement free employees).

¹¹¹ OS MCAP Decision at [43].

Consideration should be given to including provisions for groups of employees to agree to substitution through majority support — as has previously been provided for under some awards. This should be permitted through the NES, but in the very least should be permitted to be dealt with under awards or enterprise agreements.

(e) Section 116 — Payment for absence on a public holiday

185. Section 116 of the Act requires an employer to pay an employee who is absent from their employment on a public holiday, for the employee's ordinary hours of work on the public holiday.
186. A frequent source of confusion for employers concerns the entitlement of employees to be paid for a public holiday which occurs while the employee is on a period of unpaid leave or if an employee is on unpaid leave on one side of a public holiday.

Opportunity for Improvement - 27

Clarify that section 116 only confers an entitlement to payment where the employee is absent from work *because of* the public holiday.

8.2.9 Division 11 — Notice of Termination and Redundancy Pay

(a) Subdivision A of Division 11 — Notice of Termination

187. Section 117 of the Act prescribes the minimum period of notice (or payment in lieu thereof) that must be provided by an employer to employees (other than those excluded from the provision).
188. Section 118 of the Act permits modern awards and enterprise agreements to include terms specifying the period of notice an employee must give in order to terminate their employment.
189. Some, but not all, modern awards include minimum periods of notice required of employees. Of the awards that do deal with employee notice periods, provisions are inconsistent regarding the consequences of an employee failing to provide the minimum period of required notice.
190. The NES should be amended to include a mutual requirement to provide both notice of termination of employment and either forfeiture of wages or payment in lieu (as applicable) where the required notice is not given.
191. The provisions in the Act concerning compliance with the NES would also need to be amended to reflect the imposition of obligations on employees. For example, presently s 44 of the Act only states that an employer must not contravene the NES.

Opportunity for Improvement - 28

Amend the NES to:

- deal with notice of termination by both employers and employees; and

- provide for both payment of wages in lieu of notice by employers and forfeiture of wages by employees in the event that insufficient notice is provided.

The same period of notice should be required of both parties save that there should not be a requirement for additional notice to be provided by an employee on account of an employee's age.

(b) Section 117(2)(b) — Timing for payments on termination of employment

192. In correspondence sent by the Australian Industry Group to the Minister for Employment and Workplace Relations in November 2025, we raised a pressing concern regarding section 117(2)(b) of the Act, which states that where an employer has not provided an employee with the specified minimum period of notice, the employer *'must not terminate the employee's employment unless...the employer **has paid to the employee...**payment in lieu of notice...'*. (our emphasis)
193. A copy of the correspondence is **attached** to this submission.
194. Pleasingly, we understand that the proposal is now supported by other key employer groups with whom we had shared the correspondence.
195. For the reasons explained below, employers face considerable uncertainty regarding their obligations under section 117(2)(b) due to difficulties identified by the Fair Work Commission in the *Four Yearly Review — Payment of Wages* proceedings and two recent judgments of the Federal Circuit and Family Court of Australia.
196. Technical amendments to section 117(2)(b) are required to address uncertainty regarding:
- (a) the types of payments to which section 117 relates; and
 - (b) how it interacts with modern award terms relating to the timing of final payments on termination.

(i) Relevant background - The default monthly requirement for payments to employees

197. Section 323 of the Act provides that an employer must pay amounts payable to an employee in relation to the performance of work at least monthly. This default monthly payment requirement applies unless there are any relevant provisions in the NES or an applicable industrial instrument that require payments to be made more frequently.
198. In a Statement ([\[2016\] FWCFB 7455](#)) issued by the FWC in the early stages of the *Four Yearly Review — Payment of Wages* proceedings, a five-member Full Bench of the Fair Work Commission commented that, if the monthly timeframe in section 323 does not apply to NES annual leave and redundancy payments on termination of employment, *'there would seem to be a legislative gap'*:

[15] While s.323 clearly requires an employer to pay wages and related amounts such as leave payments not later than one month after they have accrued, it is not clear whether "amounts payable to the employee in relation to the performance of work" encompasses amounts accrued under an award or the NES upon termination such as payment in lieu of annual leave (FW Act s.90(2)) and redundancy pay



(s.119(1)). There does not appear to be anything else in the FW Act that addresses the timing of termination payments generally. Consequently, if s.323 does not encompass all termination payments, there would seem to be a legislative gap.

(ii) ***The uncertainty associated with s 117(2)(b) of the Act***

199. In the above Statement, the Full Bench proceeded to discuss section 117(2)(b) of the Act, which deals with payments in lieu of notice of termination. The Fair Work Commission noted the lack of clarity that arises from the provision:

[16] One provision of the FW Act that does deal expressly with the timing of a termination payment is s.117. Specifically, s.117(2)(b) appears to require, where employment is terminated with payment in lieu of the statutory notice period, that the payment in lieu be made prior to or upon the termination of employment:

...

[17] How s.117(2)(b) sits with current award provisions in relation to payment on termination is unclear.

200. Section 117(2) of the Act states:

(2) The employer must not terminate the employee's employment unless:

- (a) the time between giving the notice and the day of the termination is at least the period (the minimum period of notice) worked out under subsection (3); or
- (b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.

201. If interpreted literally, the words 'has paid' in section 117(2)(b) indicate that payments in lieu of notice of termination must have been paid before the employment ends. This approach is often unworkable in practice and conflicts with widespread industry practice.

202. In its subsequent *Four Yearly Review — Payment of Wages Decision*¹¹², the Full Bench determined that a model award term for 'Payment on Termination of Employment' would be created and would include a Note drawing attention to section 117(2)(b). The Fair Work Commission did not at that time form a concluded view on the construction of section 117(2)(b):

[105] We are also satisfied that the provisional default term requires qualification to deal with the interaction with s.117(2)(b).

[106] As we have mentioned, on a literal reading s.117(2) prohibits an employer terminating the employment of an employee without (relevantly) making payment in lieu of notice before, or at the time of, termination of employment.

...

[110] If the literal meaning of s.117(2) is the correct construction then, absent a variation to the provisional default term, employers may be inadvertently misled into a contravention of s.117(2)(b).

[111] Ai Group and ABI support the inclusion of a note to ensure that employers are not inadvertently misled into a contravention of s.117(2)(b). ABI proposed a note in the following terms:

¹¹² [2016] FWCFB 8463.



‘Note: Employers who do not provide written notice of termination but instead provide a payment in lieu of notice must comply with s.117(2)(b) of the Fair Work Act, which requires payments in lieu of notice to be made at or before the time of termination.’

[112] ABI submits that such a note will serve as an important contextual guide which confirms that the provisional default term is not intended to operate in a manner inconsistent with s.117(2)(b) and will ensure no person is misled as to their payment obligations in respect of the termination of an employee’s employment.

[113] Ai Group expressed some reservations about the breadth of the note proposed by ABI. Others expressed reservations about the inclusion of a note, in whatever form.

[114] Of course, s.117(2)(b) only applies to payments in lieu of notice and hence it regulates a narrower range of entitlements than those covered by the default term. A model term would also cover, for example, payments for accrued leave, wages for time actually worked and redundancy pay.

[115] We think the provisional default term should be amended to make clear that it is subject to s.117(2)(b) and to include a note drawing attention to that statutory provision. The note will be phrased so as to avoid the need to form a concluded view about the proper construction of s.117(2)(b).

203. The Note referred to in paragraph [111] in the above extract is now Note 1 in the model award term. The wording of the Note was refined before the model term was settled.

204. The model term was settled by the Fair Work Commission in a 2018 decision¹¹³, as follows:

X. Payment on termination of employment

- (a) The employer must pay an employee no later than 7 days after the day on which the employee’s employment terminates:
 - (i) the employee’s wages under this award for any complete or incomplete pay period up to the end of the day of termination; and
 - (ii) all other amounts that are due to the employee under this award and the NES.
- (b) The requirement to pay wages and other amounts under paragraph (a) is subject to further order of the Commission and the employer making deductions authorised by this award or the Act.

Note 1: Section 117(2) of the Act provides that an employer must not terminate an employee’s employment unless the employer has given the employee the required minimum period of notice or “has paid” to the employee payment instead of giving notice.

Note 2: Paragraph (b) allows the Commission to make an order delaying the requirement to make a payment under clause X. For example, the Commission could make an order delaying the requirement to pay redundancy pay if an employer makes an application under section 120 of the Act for the Commission to reduce the amount of redundancy pay an employee is entitled to under the NES.

Note 3: State and Territory long service leave laws or long service leave entitlements under s.113 of the Act, may require an employer to pay an employee for accrued long service leave on the day on which the employee’s employment terminates or shortly after.

205. It can be seen from the above model award term, that the default monthly payment requirement in section 323 of the Act is altered in the following ways for employers and employees to whom the model award term applies:

- (a) Wages for any complete or incomplete pay periods must be paid within seven days of the termination date (clause X.(a)(i));

¹¹³ [2018] FWCFB 3566 at [119].



- (b) NES payments in lieu of notice of termination must be paid within seven days of the termination date, subject to any more onerous requirements in section 117(2) (clause X.(a)(ii) and Note 1);
- (c) NES payments for accrued annual leave must be paid within seven days of the termination date (clause X.(a)(ii));
- (d) NES redundancy payments must be paid within seven days of the termination date unless the Fair Work Commission makes an order under section 120 of the Act delaying the requirement to make the payment (clause X.(a)(ii) and Note 2); and
- (e) NES long service leave entitlements under section 113 of the Act must be paid within seven days of the termination date, unless the relevant 'applicable award derived long service leave terms' require payment at an earlier time (clause X.(a)(ii) and Note 3).

(iii) The Court's judgments in Jewell

206. The Jewell Penalty Judgment concerned the quantum of penalties to be imposed on Magnium Australia Pty Ltd for breaching the Act due to the late payment of pay in lieu of notice of termination, accrued annual leave, and redundancy pay, to an employee (Dr Jewell) who had been dismissed.
207. Judge Champion of the Federal Circuit and Family Court of Australia imposed the following penalties on the employer:
- (a) a penalty of \$6,200 for not complying with the requirement in s 117(2)(b) to make a payment in lieu of notice by no later than the date of dismissal;
 - (b) a penalty of \$6,200 for not paying accrued annual leave on the date of dismissal; and
 - (c) a penalty of \$6,200 for not paying the redundancy entitlement on the date of dismissal.
208. The dismissal of Dr Jewell by Magnium occurred on Friday 21 April 2023. On Tuesday 2 May 2023 (9 days later), the employer paid the notice and accrued annual leave. On 18 July 2023, the employer paid the redundancy pay.
209. In the earlier Jewell Liability Judgment, Judge Champion:
- (a) determined that the employer had not breached the Act by paying Dr Jewell his salary for the final week of his employment (i.e. 17-21 April 2023) on 2 May 2023, because the payment was made within the monthly window required by section 323 of the Act (see paragraphs [177] to [192]);
 - (b) noted (at paragraph [205]) that: "*Magnium had to make payments as to notice, redundancy pay and accrued and unused annual leave as at the date of the dismissal of Dr Jewell. It did not do so. It late paid these entitlements*"; and
 - (c) noted (at paragraph [204]) that the employer "*admitted that it contravened provisions of the National Employment Standards as to non-payment to Dr Jewell of notice (s. 117), redundancy pay (s. 119) and unpaid accrued and unused annual leave (s. 90)*".



210. Judge Champion's liability and penalty judgments in *Jewell* interpret section 117(2)(b) as requiring a payment in lieu of notice to be made no later than the date of dismissal.
211. The judgments also interpret the annual leave and redundancy provisions of the NES as requiring payments for accrued annual leave and redundancy pay to be made no later than the date of dismissal, rather than within the one-month time window in section 323. In the *Jewell* Liability Judgement, Judge Champion held that:
- [205] Magnium had to make payments as to notice, redundancy pay and accrued and unused annual leave as at the date of the dismissal of Dr Jewell. It did not do so. It late paid these entitlements.
212. The *Jewell* Liability Judgement indicates that Magnium had made admissions as to various contraventions of the NES, including in relation to late payment of redundancy pay and accrued and unused annual leave, and that Judge Champion determined to 'make declarations as to its admissions' (see [10]). The judgments do not otherwise identify any particular basis for this interpretation.
213. In the Australian Industry Group's view, the interpretation is not correct. It is directly inconsistent with the finding of the Full Bench in the *Four Yearly Review — Payment of Wages Decision* [2016] FWCFB 8463, where it stated at [114] that 'Of course, s.117(2)(b) only applies to payments in lieu of notice.'
214. The Fair Work Commission's model 'Payment on Termination of Employment' clause has clearly been drafted and implemented on the assumption that it is open for the Fair Work Commission to prescribe a seven day deadline for the payment of NES entitlements on termination of employment, for employees to whom an Award applies (with the possible exception of payments in lieu of notice of termination by the employer). If Judge Champion's interpretation of the NES annual leave and redundancy provisions is correct, aspects of the Fair Work Commission's model term would be of no effect due to inconsistency with the NES.
215. In addition, the *Jewell* judgments are inconsistent with the longstanding advice that the Fair Work Ombudsman has provided to employers and employees (and continues to provide) that there *may* be rules about the timing of termination payments in the relevant Award, enterprise agreement or employment.¹¹⁴ There is nothing in the FWO guidance which refers to statutory requirements under the Act to process final payments within a particular period.

(iv) ***Problems, risks and unfairness for employers***

216. The Australian Industry Group has been approached by various member companies since the Court's judgments in *Jewell* were handed down, expressing major concerns about the workability, risks and unfairness that result from the interpretations of the law reflected in the judgments.
217. Some of the concerns raised by member companies are identified in the following table:

Scenario	Issue
Termination of employment on weekends and public holidays	When an employee's employment ends on a weekend or public holiday, the employer cannot process payments on the date of

¹¹⁴ Final pay - Fair Work Ombudsman.



Scenario	Issue
	termination due to banking limitations.
Late lodgement of timesheets by an employee	An employee's entitlements on termination are typically based on their working hours. When an employee submits their timesheet for the final week of employment late, or at the last minute on the final day of employment, there is insufficient time to calculate and pay the entitlements before the employment ends. This includes employees working in remote locations.
The need to accurately calculate accrued annual leave and long service leave entitlements	The amount of accrued annual leave that an employee is entitled to on termination depends upon the amount and type of absences and leave that an employee has taken. Unauthorised absences and most types of unpaid leave and unpaid authorised absences do not count as 'service' for the purposes of NES annual leave and long service leave accruals (see section 22 of the Act). If any of these types of leave or absence occur in the final days of employment, there is often insufficient time to calculate and pay the entitlements before the employment ends.
The need to accurately calculate accrued personal/carer's leave entitlements, where such leave is paid out on termination.	Many enterprise agreements give an employee an entitlement to be paid for any untaken personal/carer's leave on termination, if the employee is made redundant. Also, clause 29.3 in the <i>Timber Industry Award 2020</i> requires that an employer pay a relevant employee (or their estate) any excess accrued personal/carer's leave if the employee: retires due to age or incapacity; has more than 10 years' service; or dies while an employee of the business. If any personal/carer's leave occurs in the final days of employment, there is insufficient time to calculate and pay the entitlements before the employment ends.
Death of an employee	In this unfortunate scenario, the employer cannot pay the termination payments until it has instructions from the estate as to where the payments are to be directed. Section 117 may have no application in this context but any regulation of final payments should deal with such a contingency.
Redundancy	Employers have an obligation to redeploy employees whose positions are redundant, whenever it is reasonable to do so (see section 389(2) of the Act). This obligation continues until the termination date. Locking-in or scheduling termination payments ahead of the termination date may be inconsistent with an employer's redeployment obligations. In contexts where an employer obtains acceptable alternate employment for an employee, there should be time for an employer to make an application seeking reduction of their liability for redundancy pay, as contemplated by section 120 of the Act.
Calculation of entitlements for flexible part-time and casual employees	The calculation of NES annual leave and long service leave entitlements for flexible part-time employees and the calculation of NES long service leave entitlements for long term casuals can be extremely complex given the variable hours that these employees work. Given the complexity of the calculations and the



Scenario	Issue
	variability of the working hours (including in the last week of employment) there is often insufficient time to pay the employee for accrued NES annual leave and long service leave entitlements on the date of termination.
Summary dismissal or immediate resignation	When an employee is summarily dismissed, or resigns with immediate effect (i.e. without providing the applicable notice), there is often insufficient time to pay the employee for accrued NES annual leave and long service leave entitlements on the date of termination. Section 117 would not have application in this context, but any regulation of final payments should deal with such a contingency.

218. The Australian Industry Group has identified opportunities to improve s 117(2)(b) so as to provide the following benefits to employers and employees:

- (a) provide certainty for all parties;
- (b) address the unworkability of the legislation effectively requiring payment in lieu of notice of termination and other NES payments to be made on the last day of employment (and reduce real and unacceptable exposure to civil penalties resulting from the unworkability of existing legislative requirements, as highlighted in the Jewell Liability Decision);
- (c) allow capacity for parties to agree to a longer arrangement where this may suit their circumstances (subject to appropriate safeguards);
- (d) provide a benefit for employees in being entitled to an earlier payment date for NES annual leave, long service leave and redundancy payments than the default one month period in s 323 of the Act (assuming that the judgments in Jewell are not correct on these matters); and
- (e) close the potential 'regulatory gap' regarding the regulation of payment times for redundancy pay in a manner that aligns with the capacity for employers to seek, pursuant to section 120, a modification to the amount of redundancy pay applicable under section 119.

Opportunity for Improvement - 29

Amend section 117(2)(b) of the Act to:

- remove the prohibition on terminating an employee until certain payments are made to them; and
- implement a standard requirement that employees are to be paid for any applicable NES entitlements and any amounts contemplated by section 117(2)(b) within seven days of an employee's termination date, or on the employee's next regular pay day following termination, whichever is later (other than when an employee has died and the payments must be made to the estate, or an application is made under section 120 of the Act — see below).



Opportunity for Improvement - 30

Amend the NES to permit modern awards and enterprise agreements to set a longer period for payment, or for a longer period to be agreed between an employer and an Award/agreement free employee. The outer limit of time for payment should in all instances not exceed one month, so align with section 323 of the Act.

(c) Section 120 — Variation of redundancy pay for other employment or incapacity to pay — entitlements other than NES

- 219. Section 120 of the Act enables an employer to apply to the Fair Work Commission to have an amount of redundancy pay owing to an employee set aside or reduced, where the employer either obtains other acceptable employment for the employee, or cannot pay the amount.
- 220. Whilst the provision does enable an employee's potential redundancy pay to be reduced (including to zero), it is not designed to be punitive but rather, to incentivise an employer to endeavour to secure alternative employment for an employee whose position is redundant and whose employment would — but for the identification of appropriate alternative employment — terminate.
- 221. The provision only applies in relation to NES redundancy entitlements.
- 222. Many enterprise agreements include more generous redundancy entitlements than what is contained in the NES. Some modern awards also include industry-specific redundancy schemes. Employers are not able to rely on section 120 to apply to the Commission to have the non-NES redundancy pay set aside or varied. Where an enterprise agreement or modern award does not deal with an employer's ability to reduce above-NES redundancy payments in these circumstances, it represents a disincentive for an employer to endeavour to secure other employment for an employee as an alternative to their employment terminating.

Opportunity for Improvement - 31

Amend section 120 of the Act to extend to more generous entitlements to redundancy pay in an enterprise agreement (that is in addition to the NES entitlement to redundancy pay) where the enterprise agreement does not deal with the issue, as well as industry sector redundancy schemes in modern awards.

(d) Section 120 — Variation of redundancy pay for other employment or incapacity to pay — Timing for application

- 223. An employer may apply to the Commission to have redundancy pay set aside or varied where '*an employee is entitled to be paid an amount of redundancy pay...*'.
- 224. It is not clear whether an employer can make the application before the employee's employment has been terminated and the entitlement to redundancy pay crystallises under section 119 of the Act; nor how long after the entitlement becomes payable the application can be made.



Employers and employees would also have greater certainty if section 120 contained an outer-time limit for making applications.

225. Further, due to the same issues arising as outlined above concerning the operation of section 117(2)(b) of the Act, there should be a clear exception to the time for payment of redundancy pay following an employee's termination date where an employer has made an application pursuant to section 120 to vary the amount of redundancy pay applicable under section 119 of the Act.
226. In such a context the employer should instead be required to pay redundancy pay on a date determined by the Fair Work Commission, provided that such a date cannot be earlier than either seven days from the date any such determination is issued or seven days of the employer's application being discontinued.

Opportunity for Improvement - 32

Amend section 117 to:

- exempt the requirement to pay redundancy pay where an application has been made pursuant to section 120 of the Act, and
- instead require the employer to pay redundancy pay on a date determined by the FWC, provided that such a date cannot be earlier than either seven days from the date any such determination is issued or seven days of the employer's application being discontinued.

Opportunity for Improvement - 33

Amend section 120 to:

- clarify that an application can be made prior to the amount of redundancy pay becoming payable; and
- include an outer-time limit for employers to make an application to the Fair Work Commission to vary the amount of an employee's redundancy pay entitlement.



8.2.10 Division 13 — Miscellaneous

(a) Section 130 — Restriction on taking or accruing leave or absence while receiving workers' compensation

227. Section 130(1) of the Act states that an employee is not entitled to take or accrue any paid or unpaid leave or absence under the NES during a period when the employee is absent for an illness or injury for which workers' compensation is payable.
228. However, section 130(2) states that this does not prevent an employee from taking or accruing leave in these circumstances if it is permitted by the taking or accruing of the leave is permitted by a Commonwealth, State or Territory law about workers' compensation.
229. This is complex for employers to apply, in that it requires employers to check multiple sources to ascertain the relevant requirements.

Opportunity for Improvement - 34

Amend section 130 to override Commonwealth, State or Territory workers' compensation laws in relation to the issue, to create a single standard.



9. Interaction of NES with Individual Flexibility Arrangements

230. Both modern awards and enterprise agreements are required to include ‘flexibility terms’ — provisions which enable an employee and his or her employer to agree on an arrangement (an ‘*individual flexibility arrangement*’ or IFA) varying the effect of the award or enterprise agreement in relation to the employee and the employer, in order to meet their genuine needs.
231. Flexibility terms in modern awards allow for agreement to be reached on five matters — arrangements for when work is performed, overtime rates, penalty rates, allowances and annual leave loading.
232. The ‘model’ flexibility term for enterprise agreements¹¹⁵ contains the same list of matters, however the list of matters able to be the subject of an IFA can be either narrowed or broadened by agreement.
233. Nevertheless, IFAs can only vary terms of a modern award or enterprise agreement. As the NES sits outside of these instruments, there is no ability for parties to make an IFA varying the application of NES entitlements.
234. There are various instances in which this may mutually meet the needs of, and be beneficial to, employers and employees.
235. For example, an employee may wish to vary the list of days that are public holidays for the purpose of the entitlement to be absent where the employee does not wish to observe one or more of the days listed in section 115 of the Act for cultural or religious reasons. The employee may instead agree to nominate different days which are of cultural or religious significance, where the employee would prefer to be entitled to be absent from work. For employers who run critical operations and/or who have a need (or desire) to roster employees to work on standard public holidays, this arrangement is likely to meet the needs of the employer as well.
236. By way of further example, an employer may wish to create its own arrangements for the taking of long service leave to operate as a provision of the NES. Examples may include allowing employees to take leave earlier and/or in shorter blocks than would otherwise be permissible. This may be of assistance to employers who operate across jurisdictions and/or industries under a myriad of long service leave schemes. Any organisation-specific scheme could also meet the genuine needs of employees and result in them being better off overall by (for example) being more flexible in its application and/or providing more generous entitlements than traditional long service leave entitlements.

¹¹⁵ Determination - Model terms for enterprise agreements and copied State instruments (PR784579, 20 February 2025)

Opportunity for Improvement - 35

Amend the Act to permit Individual Flexibility Arrangements to be made between an employee and employer in relation to matters contained in the NES, where this would meet the genuine needs of the parties and result in the employee being better off overall than if the NES were to operate in a standard way in relation to them. This should be supported by appropriate safeguards.

Such agreements should be able to be made with employees regardless of whether they are covered by a modern award, enterprise agreement or award/agreement free.



10. Conclusion: Is the NES Fit for Purpose?

237. This Inquiry poses the question of whether the NES is ‘fit for purpose’.
238. The necessary starting point for any such evaluation, must be the purpose for which the NES was designed.
239. As we set out at the start of this submission, the NES was intended to:
- be simple and straightforward to understand in terms of structure, organisation and expression;
 - reduce the compliance burden on business;
 - promote the objects of the Act, which include having workplace relations laws that are flexible for businesses; and
 - ‘lock in’ to awards and agreements.
240. This Inquiry is a timely and much-needed ‘health check’ on the fitness of the NES in relation to:
- its interaction with modern awards and enterprise agreements, and
 - the simplicity and flexibility for employers with which it operates.
241. These deficiencies do not require any radical overall of the types or quantum of entitlements forming part of the NES. Nor is this Inquiry an appropriate forum in which to pursue any substantive re-cut of minimum terms and conditions of employment.
242. Instead, sensible technical improvements are needed to address notorious complexities, and ensure the NES is operating in a more cohesive and straightforward manner for both employers and employees (including in particular, with respect to how it operates alongside modern awards and enterprise agreements).
243. We urge the House of Representatives to make these changes without delay.



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20 November 2025

The Hon Amanda Rishworth MP
Minister for Employment and Workplace Relations
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Minister,

Payments on termination of employment under the *Fair Work Act 2009*

We are writing to urge the Federal Government to make some technical amendments to the *Fair Work Act 2009* (**FW Act**) to address uncertainties identified by the Fair Work Commission (**FWC**) in the *Four Yearly Review – Payment of Wages* proceedings and, more importantly, to address industry concerns arising from the recent judgments of the Federal Circuit and Family Court of Australia in [Jewell v Magnium Australia Pty Ltd \[2025\] FedCFamC2G 201 \(20 February 2025\)](#) (**Jewell Liability Judgement**) and [Jewell v Magnium Australia Pty Ltd \(No 2\) \[2025\] FedCFamC2G 676 \(15 May 2025\)](#) (**Jewell Penalty Judgement**).

In brief, the uncertainty and concern relates to the types of payments to which s 117 of the FW Act relates, and how s 117 interacts with model Award terms relating to the timing of final payments on termination. These uncertainties and concerns could be addressed in a manner that reduces the regulatory burden and risks for employers, whilst at the same time benefiting employees. Our legislative reform proposal is set out in section 6 of this letter.

In short, we are proposing that:

1. the prohibition under s 117(2)(b) of the FW Act on terminating an employee until certain payments are made to them is removed; and
2. that the above-mentioned prohibition be replaced with clear and comprehensive requirements to pay both the amounts specified in s 117(2)(b) and any National Employment Standards (**NES**) entitlements that arise on termination within an alternate appropriate timeframe.

Importantly, we contend that any timeframe for payment should be able to be aligned with an employee's regular pay periods. This arrangement would reflect the common practice of providing termination payments by way of electronic funds transfer, rather than in cash. We acknowledge that earlier iterations of these legislative provisions were first developed at a time when common practice involved making employee payments in cash, and so there was previously an arguable justification for requiring



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final payments to be provided prior to an employee physically leaving their employment. However, we suggest that the widespread adoption of electronic methods of paying wages (and likely the popularity of such arrangements with workers) removes the justification for requiring final payments to be processed prior to termination.

The change will also provide benefits for employees by filling a 'regulatory gap' which has been identified by the FWC and which relates to when NES entitlements on termination of employment must be paid.

The proposal is supported by the Business Council of Australia, the Australian Chamber of Commerce and Industry, and the Council of Small Business Organisations Australia. We have also had initial discussions with the ACTU regarding the matter.

Relevant background information and the basis for our request

1. The default monthly requirement for payments to employees

Section 323 of the FW Act provides that an employer must pay amounts payable to an employee in relation to the performance of work at least monthly. This default monthly payment requirement applies unless there are any relevant provisions in the NES or an applicable industrial instrument that require payments to be made more frequently.

In a Statement ([\[2016\] FWCFB 7455](#)) issued by the FWC in the early stages of the *Four Yearly Review – Payment of Wages* proceedings, a five-member Full Bench of the FWC commented that, if the monthly timeframe in s 323 does not apply to NES annual leave and redundancy payments on termination of employment, *“there would seem to be a legislative gap”*:

[15] While s.323 clearly requires an employer to pay wages and related amounts such as leave payments not later than one month after they have accrued, it is not clear whether “amounts payable to the employee in relation to the performance of work” encompasses amounts accrued under an award or the NES upon termination such as payment in lieu of annual leave (FW Act s.90(2)) and redundancy pay (s.119(1)). There does not appear to be anything else in the FW Act that addresses the timing of termination payments generally. Consequently, if s.323 does not encompass all termination payments, there would seem to be a legislative gap.

2. The uncertainty associated with s 117(2)(b) of the FW Act

In the above FWC Statement, the Full Bench proceeded to discuss s 117(2)(b) of the FW Act, which deals with payments in lieu of notice of termination. The FWC noted the lack of clarity that arises from the provision:

[16] One provision of the FW Act that does deal expressly with the timing of a termination payment is s.117. Specifically, s.117(2)(b) appears to require, where employment is terminated with payment in lieu of the statutory notice period, that the payment in lieu be made prior to or upon the termination of employment:



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[17] How s.117(2)(b) sits with current award provisions in relation to payment on termination is unclear.

Section 117(2) of the FW Act states:

- (2) The employer must not terminate the employee's employment unless:
- (a) the time between giving the notice and the day of the termination is at least the period (the minimum period of notice) worked out under subsection (3); or
 - (b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.

If interpreted literally, the words “*has paid*” in s 117(2)(b) indicate that payments in lieu of notice of termination must have been paid before the employment ends. This approach is often unworkable in practice and conflicts with widespread industry practice (as discussed in section 5 of this letter).

In its subsequent *Four Yearly Review – Payment of Wages Decision* [\[2016\] FWCFB 8463](#), the Full Bench determined that a model Award term for Payment on Termination of Employment would be created and would include a Note drawing attention to s 117(2)(b). The FWC did not at that time form a concluded view on the construction of s.117(2)(b):

[105] We are also satisfied that the provisional default term requires qualification to deal with the interaction with s.117(2)(b).

[106] As we have mentioned, on a literal reading s.117(2) prohibits an employer terminating the employment of an employee without (relevantly) making payment in lieu of notice before, or at the time of, termination of employment.

[110] If the literal meaning of s.117(2) is the correct construction then, absent a variation to the provisional default term, employers may be inadvertently misled into a contravention of s.117(2)(b).

[111] Ai Group and ABI support the inclusion of a note to ensure that employers are not inadvertently misled into a contravention of s.117(2)(b). ABI proposed a note in the following terms:

‘Note: Employers who do not provide written notice of termination but instead provide a payment in lieu of notice must comply with s.117(2)(b) of the Fair Work Act, which requires payments in lieu of notice to be made at or before the time of termination.’

[112] ABI submits that such a note will serve as an important contextual guide which confirms that the provisional default term is not intended to operate in a manner inconsistent with s.117(2)(b) and will ensure no person is misled as to their payment obligations in respect of the termination of an employee's employment.



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[113] Ai Group expressed some reservations about the breadth of the note proposed by ABI. Others expressed reservations about the inclusion of a note, in whatever form.

[114] Of course, s.117(2)(b) only applies to payments in lieu of notice and hence it regulates a narrower range of entitlements than those covered by the default term. A model term would also cover, for example, payments for accrued leave, wages for time actually worked and redundancy pay.

[115] We think the provisional default term should be amended to make clear that it is subject to s.117(2)(b) and to include a note drawing attention to that statutory provision. The note will be phrased so as to avoid the need to form a concluded view about the proper construction of s.117(2)(b).

The Note referred to in paragraph [111] in the above extract is now Note 1 in the model award term. The wording of the Note was refined before the model term was settled.

The model term was settled by the FWC in a 2018 decision ([\[2018\] FWCFB 3566](#) at [119]), as follows:

X. Payment on termination of employment

- (a) The employer must pay an employee no later than 7 days after the day on which the employee's employment terminates:
 - (i) the employee's wages under this award for any complete or incomplete pay period up to the end of the day of termination; and
 - (ii) all other amounts that are due to the employee under this award and the NES.
- (b) The requirement to pay wages and other amounts under paragraph (a) is subject to further order of the Commission and the employer making deductions authorised by this award or the Act.

Note 1: Section 117(2) of the Act provides that an employer must not terminate an employee's employment unless the employer has given the employee the required minimum period of notice or "has paid" to the employee payment instead of giving notice.

Note 2: Paragraph (b) allows the Commission to make an order delaying the requirement to make a payment under clause X. For example, the Commission could make an order delaying the requirement to pay redundancy pay if an employer makes an application under section 120 of the Act for the Commission to reduce the amount of redundancy pay an employee is entitled to under the NES.

Note 3: State and Territory long service leave laws or long service leave entitlements under s.113 of the Act, may require an employer to pay an employee for accrued long service leave on the day on which the employee's employment terminates or shortly after.

It can be seen from the above model Award term, that the default monthly payment requirement in s 323 of the FW Act is altered in the following ways for employers and employees to whom the model Award term applies:

1. Wages for any complete or incomplete pay periods must be paid within seven days of the termination date (clause X.(a)(i));



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2. NES payments in lieu of notice of termination must be paid within seven days of the termination date, subject to any more onerous requirements in s 117(2) (clause X.(a)(ii)) and Note 1);
3. NES payments for accrued annual leave must be paid within seven days of the termination date (clause X.(a)(ii));
4. NES redundancy payments must be paid within seven days of the termination date unless the FWC makes an order under s 120 of the FW Act delaying the requirement to make the payment (clause X.(a)(ii) and Note 2);
5. NES long service leave entitlements under s 113 of the FW Act must be paid within seven days of the termination date, unless the relevant 'applicable award derived long service leave terms' require payment at an earlier time (clause X.(a)(ii) and Note 3).

4. The Court's judgments in *Jewell*

The [Jewell](#) Penalty Judgment concerned the quantum of penalties to be imposed on Magnum Australia Pty Ltd for breaching the FW Act due to the late payment of pay in lieu of notice of termination, accrued annual leave, and redundancy pay, to an employee (Dr Jewell) who had been dismissed.

Judge Champion of the Federal Circuit and Family Court of Australia imposed the following penalties on the employer:

1. a penalty of \$6,200 for not complying with the requirement in s 117(2)(b) to make a payment in lieu of notice by no later than the date of dismissal;
2. a penalty of \$6,200 for not paying accrued annual leave on the date of dismissal; and
3. a penalty of \$6,200 for not paying the redundancy entitlement on the date of dismissal.

The dismissal of Dr Jewell by Magnum occurred on Friday 21 April 2023. On Tuesday 2 May 2023 (9 days later), the employer paid the notice and accrued annual leave. On 18 July 2023, the employer paid the redundancy pay.

In the earlier Jewell Liability Judgment, Judge Champion:

1. determined that the employer had not breached the FW Act by paying Dr Jewell his salary for the final week of his employment (i.e. 17-21 April 2023) on 2 May 2023, because the payment was made within the monthly window required by s 323 of the FW Act (see paragraphs [177] to [192]);



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2. noted (at paragraph [205]) that: *“Magnium had to make payments as to notice, redundancy pay and accrued and unused annual leave as at the date of the dismissal of Dr Jewell. It did not do so. It late paid these entitlements”*; and
3. noted (at paragraph [204]) that the employer *“admitted that it contravened provisions of the National Employment Standards as to non-payment to Dr Jewell of notice (s. 117), redundancy pay (s. 119) and unpaid accrued and unused annual leave (s. 90)”*.

Judge Champion’s liability and penalty judgments in *Jewell* interpret s 117(2)(b) as requiring a payment in lieu of notice to be made no later than the date of dismissal.

The judgments also interpret the annual leave and redundancy provisions of the NES as requiring payments for accrued annual leave and redundancy pay to be made no later than the date of dismissal, rather than within the one-month time window in s 323. In the *Jewell* Liability Judgement, Judge Champion held that:

“[205] Magnium had to make payments as to notice, redundancy pay and accrued and unused annual leave as at the date of the dismissal of Dr Jewell. It did not do so. It late paid these entitlements.”

The *Jewell* Liability Judgment indicates that Magnium had made admissions as to various contraventions of the NES, including in relation to late payment of redundancy pay and accrued and unused annual leave, and that Judge Champion determined to *“make declarations as to its admissions”* (see [10]). The judgments do not otherwise identify any particular basis for this interpretation.

In the Australian Industry Group’s view, the interpretation is not correct. It is directly inconsistent with the finding of the Full Bench in the *Four Yearly Review – Payment of Wages Decision* [2016] FWCFB 8463, where it stated at [114] that *“Of course, s.117(2)(b) only applies to payments in lieu of notice.”*

The FWC’s model Payment on Termination of Employment clause has clearly been drafted and implemented on the assumption that it is open for the FWC to prescribe a seven day deadline for the payment of NES entitlements on termination of employment, for employees to whom an Award applies (with the possible exception of payments in lieu of notice of termination by the employer). If Judge Champion’s interpretation of the NES annual leave and redundancy provisions is correct, aspects of the FWC’s model term would be of no effect due to inconsistency with the NES.

In addition, the *Jewell* judgments are inconsistent with the longstanding advice that the Fair Work Ombudsman has provided to employers and employees (and continues to provide) that there *may* be rules about the timing of termination payments in the relevant Award, enterprise agreement or employment: [link](#). There is nothing in the



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FWO guidance which refers to statutory requirements under the FW Act to process final payments within a particular period.

5. Problems, risks and unfairness for employers

The Australian Industry Group has been approached by various member companies since the Court's judgments in *Jewell* were handed down, expressing major concerns about the workability, risks and unfairness that result from the interpretations of the law reflected in the judgments.

Some of the concerns raised by member companies are identified in the following table.

Scenario	Issue
Termination of employment on weekends and public holidays	When an employee's employment ends on a weekend or public holiday, the employer cannot process payments on the date of termination due to banking limitations.
Late lodgement of timesheets by an employee	An employee's entitlements on termination are typically based on their working hours. When an employee submits their timesheet for the final week of employment late, or at the last minute on the final day of employment, there is insufficient time to calculate and pay the entitlements before the employment ends. This includes employees working in remote locations.
The need to accurately calculate accrued annual leave and long service leave entitlements	The amount of accrued annual leave that an employee is entitled to on termination depends upon the amount and type of absences and leave that an employee has taken. Unauthorised absences and most types of unpaid leave and unpaid authorised absences do not count as 'service' for the purposes of NES annual leave and long service leave accruals (see s 22 of the FW Act). If any of these types of leave or absence occur in the final days of employment, there is often insufficient time to calculate and pay the entitlements before the employment ends.
The need to accurately calculate accrued personal/carer's leave entitlements, where such leave is paid out on	Many enterprise agreements give an employee an entitlement to be paid for any untaken personal/carer's leave on termination, if the employee is made redundant. Also, clause 29.3 in the <i>Timber Industry Award 2020</i> requires that an employer pay a relevant employee (or their estate) any excess accrued personal/carer's leave if the employee: retires due to age or incapacity; has more than 10 years' service; or dies while an employee of the business. If any personal/carer's leave occurs



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Scenario	Issue
termination.	in the final days of employment, there is insufficient time to calculate and pay the entitlements before the employment ends.
Death of an employee	In this unfortunate scenario, the employer cannot pay the termination payments until it has instructions from the estate as to where the payments are to be directed. Section 117 may have no application in this context but any regulation of final payments should deal with such a contingency.
Redundancy	<p>Employers have an obligation to redeploy employees whose positions are redundant, whenever it is reasonable to do so (see s 389(2) of the FW Act). This obligation continues until the termination date. Locking-in or scheduling termination payments ahead of the termination date may be inconsistent with an employer's redeployment obligations.</p> <p>In contexts where an employer obtains acceptable alternate employment for an employee, there should be time for an employer to make an application seeking reduction of their liability for redundancy pay, as contemplated by s.120 of the FW Act.</p>
Calculation of entitlements for flexible part-time and casual employees	The calculation of NES annual leave and long service leave entitlements for flexible part-time employees and the calculation of NES long service leave entitlements for long term casuals can be extremely complex given the variable hours that these employees work. Given the complexity of the calculations and the variability of the working hours (including in the last week of employment) there is often insufficient time to pay the employee for accrued NES annual leave and long service leave entitlements on the date of termination.
Summary dismissal or immediate resignation	When an employee is summarily dismissed, or resigns with immediate effect (ie. without providing the applicable notice), there is often insufficient time to pay the employee for accrued NES annual leave and long service leave entitlements on the date of termination. Section 117 would not have application in this context, but any regulation of final payments should deal with such a contingency.

6. Legislative reform proposal



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To address the above problems, we propose that the FW Act is amended to implement a standard requirement that employees are to be paid for any applicable NES entitlements and any amounts contemplated by s 117(2)(b) within seven days of an employee's termination date, or on the employee's next regular pay day following termination, whichever is later (other than when an employee has died and the payments must be made to the estate).

We also contend that there should be a capacity for Awards and enterprise agreements to set a longer period, or for a longer period to be agreed between an employer and an Award / agreement free employee. Although, we do propose that in all instances the time for payment should not exceed one month, in order to align the potential outer limit of the period for payment with the period contemplated by s 323 of the FW Act.

There should be a clear exception for redundancy pay applicable under s 119 of the FW Act. This exception should apply in circumstances where an employer has made an application pursuant to s 120 to vary the amount of redundancy pay applicable under s 119 of the FW Act. In such a context the employer should instead be required to pay redundancy pay on a date determined by the FWC, provided that such a date cannot be earlier than either seven days from the date any such determination is issued or seven days of the employer's application being discontinued.

We also suggest that there should be transitional arrangements to give employers time to prepare for the change and adjust their employment separation and payroll processes as necessary to achieve compliance. This should include a delayed operative date for the new provisions to enable parties to prepare for their commencement.

This approach will provide the following benefits to employers and employees:

- It would provide certainty for all parties;
- It would address the unworkability of the legislation effectively requiring payment in lieu of notice of termination and other NES payments to be made on the last day of employment;
- It adopts, by default, the seven-day timeframe in the FWC's model term, but allows capacity for parties to *agree* to a longer arrangement where this may suit their circumstances (subject to appropriate safeguards);
- Employees would benefit from an earlier payment date for NES annual leave, long service leave and redundancy payments than the default one month period in s 323 of the FW Act (assuming that the judgments in *Jewell* are not correct on these matters);



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- It would close the potential 'regulatory gap' regarding the regulation of payment times for redundancy pay in a manner that aligns with the capacity for employers to seek, pursuant to s 120, a modification to the amount of redundancy pay applicable under s 119.

We would be happy to provide any additional information that you may require to facilitate consideration of the proposal outlined in this correspondence. This could include our suggestions as to the drafting of suitable legislative amendments.

It is our view that this proposal would address an unwarranted and outdated compliance burden on industry while also providing enhanced protections for employees.

Should you have any questions about this or require any further information, please reach out to Brent Ferguson, Australian Industry Group's Head of National Workplace Relations Policy. Brent would be pleased to arrange a time to discuss the matter further and can be contacted directly on 02 9466 5530 or via Brent.Ferguson@aigroup.com.au

Yours sincerely



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