

Thursday, 26 February 2026

Committee Members  
Standing Committee on Employment, Workplace Relations, Skills and Training  
Submitted Online

Dear Committee Members,

**RE: Inquiry into the operation and adequacy of the National Employment Standards**

We welcome the opportunity to provide insights from the small business community we work with who each rely on our services to help fill the “don’t know what you don’t know” gaps, so they can engage their people compliantly.

Our submission is based on the views of our business (a SMB), an outsourced human resources (HR) business, combined with feedback from SMBs to whom we provide HR support services.

As a background to our response; our business has been operating more than six years, with our team holding various levels of experience and exposure to both corporate and SMB businesses across a range of industries. As the Founder, I have been working in HR for more than 25 years and have been exposed to businesses from 1 employee to 5500 employees and have seen the interaction between the NES, Awards, Enterprise Agreements, and common law contracts, as they apply from an operational employee management perspective.

Currently, we support between 40-50 organisations (both SMBs and NFPs) each year across the gambit of generalist HR activities, including the development and issuance of employment contracts, position descriptions, policies, performance management, payroll and classification advice, and termination and redundancy. Through this experience, we have a clear understanding of the importance of clarifying expectations of how the NES will be applied in each business via policy and consistent custom and practice.

We submit that the provisions which pose the most challenge for small businesses to manage, administer and communicate are around personal/carer’s leave, public holidays, maximum weekly hours, notice of termination and redundancy pay, and absences related to leave-taking.

We are not advocates of over-policing businesses and agree that provisions should be broader, rather than too prescriptive; however, improved definitions around the intent of provisions, clarity about eligibility and a greater number of examples to help small businesses work out how to apply the provisions across the myriad of real-life variations will be very helpful.

Further, any changes to the NES should be made to ease application and compliance, not to increase costs, via increased entitlements or administrative burden.

Sincerely



**Martha Travis**  
Founder | Director  
Martha Travis People Innovators

## Introduction

According to the ASBFEO<sup>1</sup>, as of 2023, SMBs engaged around 67% of private sector workers.

Two-thirds of non-government workers rely on SMBs for their livelihood and career prospects.

This employment sector is a significant contributor to the Australian economy, tax income generation, unemployment statistics, productivity, and local area engagement.

Considering the impact SMBs can have on the economy, the health, well-being and living wages of a significant proportion of the private sector workforce, finding a balance between what is fair for workers, but operationally and financially sustainable for SMBs is very important.

## Context

Since the advent of the National Employment Standards in 2009 and with the subsequent updates and amendments; in a bid to help businesses obtain/retain flexibility for them and their workers, custom and practice in Australian workplaces has seen the application of several NES provisions vary to what may have been intended when the legislation was first written and agreed.

We will provide examples of these below; however, moving to NES and Modern Award (Award) coverage meant many employers sought creative ways to provide employment and rostering flexibility while trying to accrue, provision and administer leave types that are designed to fit a rigid picture of each employment type.

## Client Feedback

Feedback from our clients indicates that the top 5 NES provisions that cause confusion and administrative burden are:

1. Personal/Carer's Leave
2. Public Holidays
3. Maximum weekly hours
4. Notice of termination and redundancy pay
5. Absences related to leave-taking (across multiple provisions, including personal/carers' leave, annual leave, parental leave, and FDVL).

One said: "Not easy in the real-world struggles of running a business. After all the business must make a profit to employ people. If employing people is made difficult then business will simply not employ Australians but look elsewhere".

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In relation to each of the clauses under review, we respond as follows:

## Maximum weekly hours

For many of our clients, trying to provide permanent employment that benefits both the worker and the company while ensuring they have sufficient flexibility to respond to client needs can be very challenging.

While most Awards have an averaging provision, this is often limited via outer limits of averaging, e.g. over 4 weeks.

Maximum weekly hours also does not allow for agreement between the employer and employee for the employee to work additional hours at their ordinary rate (often above Award), without an Individual Flexibility Agreement (IFA) and even then, must pass a “better off overall test” (BOOT) when compared to the underpinning Award.

Greater flexibility could be afforded by adjusting the maximum weekly hours provision to allow for more flexibility of when hours are worked, and how they will be paid.

### For example:

An employer must not request or require an employee to work more than *an average of* the following hours of work in a week, unless the additional hours are *agreed to without duress for either party*.

- for a full-time employee, 38 hours (unless their award or enterprise agreement specifies different hours) or
- for an employee other than a full-time employee, the lesser of: – 38 hours – the employee’s agreed ordinary hours of work in a week.

An employee and employer may agree to the employee working any number of hours per week at no less than their minimum ordinary rate for their role classification under an Award or other industrial instrument; providing the employee is not adversely affected by their refusal to work more than 38 hours in any 7-day period, unless otherwise compensated.

By accepting a roster and/or submitting a timesheet with additional hours, the employee is accepting the terms of payment for any hours over 38 in a week and cannot make a claim at a later date for the underpayment of wages.

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## Annual Leave

While most of our clients do not struggle greatly with understanding or applying this provision, there are challenges regarding:

- Managing Excessive Leave Balances – the minimum of 8 weeks’ accrual before an employer can direct an employee to take annual leave is too high a liability for many SMBs to carry and many are frustrated that they cannot direct an employee to take leave after 6 weeks’ accrual.
- Automatic expectation of employees that they can use their annual leave accrual once they exhaust their personal leave balance; meaning that employers have less control over absences without notice.

### Increase to 5 weeks

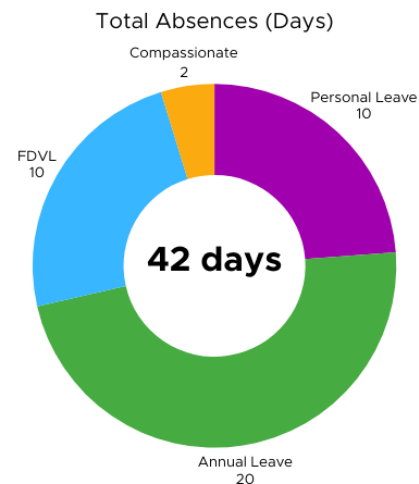
We **strongly oppose** the discussed proposal to increase the minimum annual leave entitlement to 5 weeks.

Already for small businesses, covering absent employees is a challenge.

Currently if every employee used their entitlements every year; for every ~6.2 employees, an employer would need to engage another employee to cover the workforce absences. If this increased to 47 days, it would mean adding additional employee for every ~5.5 employees.

When considering oncosts and replacement costs, this becomes a significant financial burden for SMBs.

SMBs are already struggling to cover absences and carry the liability of excessive leave. Mandating an increase to this entitlement would only increase the financial and operational burden for SMBs.



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## Personal/Carer's Leave

For our clients, this is the area that is most challenging and where we spend considerable time supporting our clients with situational advice, managing attendance issues and provide advice and support to clients' employees regarding their rights and responsibilities surrounding the taking and payment for personal leave.

Some of the issues faced by our clients include:

- Whether personal leave can be taken for all medical-related leave.

Our template leave policy states:

### ***When personal leave does NOT apply***

*Personal Leave is not applicable to be used in all medical-related instances, below are some examples where personal leave cannot be used, and another type of leave should be taken:*

- *Pre-planned absence to attend a medical appointment (e.g. a specialist appointment) for yourself or a member of your immediate family or household.*
- *Pregnancy or adoption-related appointments (e.g. scans, check-ups, consultations) unless the absence is a result of a personal or immediate family or household member illness or emergency.*
- *Medical attention or care for a non-human (a pet), whether planned or an emergency.*
- *To care for anyone who does not meet the definition of a member of your immediate family or household.*

Despite this applying in many of our client workplaces, we are constantly facing push-back from client employees who have reasons why they are eligible, such as:

- The specialist appointment is for my child who received a diagnosis (ADHD), so it is relating to the illness of an immediate household member.
- I need to drive my boyfriend to the Doctor, as he has injured his knee and can't drive at the moment, so I need to provide support to him due to his injury.
- I need to have blood tests done, as my Doctor thinks I have an illness, but we won't know for sure until the tests are done, so I need to take personal leave, because of my potential illness.

We also **recommend** strengthening the information and guidance around reasonable evidence. With the increase in access by employees to online and telehealth services, and certificates from pharmacies, guidance as to whether this is 'reasonable' evidence, or if the employer has a right to refuse evidence, would be helpful.

Our template leave policy currently states:

***Acceptable Evidence***

*The Company will accept only the following:*

1. *Medical Certificate provided by a registered Doctor after an in-person consultation.*
2. *Statutory Declaration witnessed by a registered Justice of the Peace who is neither a work colleague or a close relative or household member.*

*Evidence that will not be accepted includes:*

1. *Certificates issued by a chemist or other health practitioner who is not a registered practicing Doctor.*
2. *Certificates obtained via an online/telehealth provider or is located overseas.*

This section is customised to meet the needs of our client – for example in regional areas, it is not always practical to expect an employee to have an in-person consultation; however, we may state that the certificate must be signed by a registered, practicing doctor.

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## **Excessive absences**

While not a provision of the NES, reg 3.01 of the FW Regulations stipulates that an employee must be absent for a period/s in excess of 12 weeks on unpaid leave within a 12-month period before they are deemed to fall outside the protection against termination due to short term illness or injury.

We **recommend** that for small businesses, this could be reduced to 6 weeks. Many small businesses struggle for coverage when employees take excessive personal leave, as the first 10 days are paid, they would still need to take another 30 days' of unpaid leave (assuming a 5-day week) before the employer could move to dismiss on the basis of excessive absence.

## Community service leave

We do not have any suggestions relating to material changes to this provision.

It may be useful to note in the provision that at any time, employers can agree to pay an employee for part or all of their Community service leave that otherwise would not be paid (e.g. during a bushfire emergency when a worker is a member of the RFS).

Also, we **object** to any suggestion that Community Service Leave should be extended (or another type of leave created) to include attendance at FWC, or other jurisdictional hearings related to current or past employment.

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## Long service leave

It may be worth considering how the various state provisions could be harmonised to make it easier for businesses operating in multiple states to correctly accrue and administer Long service leave (LSL) for all employees.

Additionally, information could be added to the FWO website to assist employees and employers understand the implications for the LSL entitlement by changing employment status, particularly for those transitioning to retirement and change their employment status from full time to part time.

Mention of portable LSL and how this interacts with the state legislation would also be helpful. Some of our clients had not registered for or complied with portable LSL requirements, as they were unaware that it applied to their industry.

We would **support** a mechanism for employees to cash out LSL after the service period for entitlement is achieved, and may go some way to support employees planning to transition to reduced hours after an entitlement milestone is reached, providing that the amount payable equals what the employee would be entitled to be paid if they took the LSL as leave, rather than paid out.

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## Public Holidays

This is a provision that creates confusion, financial and administrative burden and compliance challenges for many of our clients.

The public holiday provision of the NES is skewed towards knowledge/office workers who are engaged during daytime hours, Monday to Friday. Additional and substitute public holidays gazetted on weekdays to compensate Monday to Friday workers for those public holidays that fall on a weekend, negatively impact SMBs both operationally and financially.

Any business that operates 7 days per week, with rotating, averaging, or flexible roster arrangements can find covering shifts and complying with the correct payment for public holidays a challenge.

Employees often assume they have a right to take a public holiday off, regardless of whether it is a rostered workday or whether the nature of the workplace means it is likely they will be required to work.

We support our clients to provide education and information to employees within their business relating to:

- When and why it is reasonable for their employer to require them to work on a public holiday.
- How they will be paid/compensated when they work the public holiday.
- What will happen if they don't attend their rostered shift.

We do this via a leave policy, and/or in employment contracts, and via communications leading up to public holidays. However, the communications from the FWO lean towards most employees having a right to be absent on a public holiday encouraging the employees to believe that whether they work a public holiday or not is their choice, and if they don't work they will still be paid.

This was further enforced by case law in 2019 where the agency acting for BHP were found to have demanded employees to work on public holidays by rostering them on these days, without seeking their agreement beforehand, and thereby breaching the FW Act. While the circumstances surrounding this case were a little different, in that the agency was not in an industry that necessarily would be required to work public holidays, it has meant that employers must be more direct about managing expectations around public holidays to prevent the need to seek agreement from employees each public holiday when rostered.

The standard content of our template leave policy, which is customised to suit the industry and nature of the organisation, is as follows:

*Public Holiday entitlements are provided in the National Employment Standards (NES), which includes information relating to what are reasonable grounds for requesting or refusing to work a public holiday. These considerations include:*

- *the nature of the employer's workplace (including its operational requirements) and the nature of the work performed by the employee*
- *the employee's personal circumstances, including family responsibilities*
- *whether the employee could reasonably expect that the employer might request work on the public holiday*
- *whether the employee is entitled to receive overtime payments, penalty rates, or other extra payments*
- *the type of employment (for example, full-time, part-time, casual or shiftwork)*
- *the amount of notice in advance of the public holiday given by the employer when making the request*
- *the amount of notice in advance of the public holiday given by the employee in refusing the request*
- *any other relevant matter.*

*[Organisation Name] provides support services to its clients at suitable times for them, at any of the 24-hours on any of the 7 days of the week. As such, those employees who are*



*rostered to provide services on a day that is a gazetted public holiday should expect that they will be required to work all or part of their rostered shift. All work performed on a public holiday will be paid at public holiday rates, or taken as time in lieu, depending on the arrangements in place for the individual employee.*

*If an employee wants to request approval to be absent on a public holiday where they are rostered to work, they must provide notice before the issuance of the published roster that will cover the period containing the public holiday. The application should be submitted two weeks or more before the Public Holiday.*

*This leave application must be approved, before the employee is deemed to be absent on authorised leave.*

*Any employee who is absent from a rostered shift that is a public holiday without an approved leave application, the provision of a medical certificate, or other evidence to support a valid leave type, will be considered to be on unauthorised leave and the shift will not be paid.*

*For permanent employees (full-time and part-time), adjusting your availability in [system] to indicate your intent to be unavailable on a rostered Public Holiday is not a valid leave application and any Public Holiday shift that should have been worked will not be paid (unless reasonable evidence to support the absence is provided).*

This policy clause is very prescriptive and needs to be clear, to limit disputes arising from non-approval to be absent on a public holiday and/or the payment for work performed on the public holiday. These communications do not mitigate the issue of employees failing to attend their rostered shifts, often taking the day off as personal leave, even after socialising their intent to be absent, prior to the public holiday.

We **submit** that public holidays are a hindrance to businesses who provide essential and auxiliary services across a 24/7 roster, with many businesses resorting to above-Award salaries to smooth out the bumps created by public holidays and to ensure contractually, employees have expectations of working on their rostered days where public holidays fall.

This could be partially addressed by the NES specifying industries/Awards where it is reasonable for employees to be required to work a rostered shift:

- Aged Care Award 2010
- Air Pilots Award 2020
- Aircraft Cabin Crew Award 2020
- Airline Operations-Ground Staff Award 2020
- Airport Employees Award 2020
- Airservices Australia Enterprise Award 2016
- Ambulance and Patient Transport Industry Award 2020
- Amusement, Events and Recreation Award 2020
- Aquaculture Industry Award 2020
- Broadcasting, Recorded Entertainment and Cinemas Award 2020
- Cleaning Services Award 2020
- Contract Call Centres Award 2020
- Corrections and Detention (Private Sector) Award 2020
- General Retail Industry Award 2020
- Health Professionals and Support Services Award 2020
- Hospitality Industry (General) Award 2020
- Live Performance Award 2020



- Marine Tourism and Charter Vessels Award 2020
- Marine Towage Award 2020
- Medical Practitioners Award 2020
- Nurses Award 2020
- Passenger Vehicle Transportation Award 2020
- Port Authorities Award 2020
- Ports, Harbours and Enclosed Water Vessels Award 2020
- Racing Clubs Events Award 2020
- Racing Industry Ground Maintenance Award 2020
- Registered and Licensed Clubs Award 2020
- Restaurant Industry Award 2020
- Security Services Industry Award 2020
- Social, Community, Home Care and Disability Services Industry Award 2010
- Waste Management Award 2020
- Wine Industry Award 2020

Further, working out payment for non-worked public holidays can be challenging where employees work flexibly across a 7-day roster and do not work consistent hours on the day where the public holiday occurs.

The NES entitlements assume that employees work the same hours/days each week and/or on consistent rotating rosters; however, in service-based industries, where flexible rostering occurs, this may not be the case. Employees can state when they are not available due to family or caring responsibilities; however, can be rostered around this unavailability.

### Examples

1. A part time employee works in the NDIS/Support Services industry and is contractually guaranteed a minimum of 20 hours per week and can work up to an average of 75 hours per pay fortnight at their ordinary rate. They are rostered a fortnight in advance. Some rosters they work Mondays and in others they don't, depending on the client service requests and availability of other employees. So, whether or not the employee is entitled to payment for a non-worked Monday public holiday can be confusing, and requires manual assessment and calculations.

Our advice to clients is that as per the FW Act they must not change a roster to avoid paying an employee for a public holiday. We also advise that to best establish how many ordinary hours (if any) an employee should be paid for being absent on a public holiday is to work out the higher of the average ordinary hours worked on this weekday over the past 4 weeks or over the past 12 weeks. This then becomes the public holiday payment.

This is an arduous process for SMBs in calculating payroll in each period where a public holiday falls.

2. A full time employee in a café is rostered to meet the varying operational demands and their rostered days off vary week to week to suit them and the business. The employee is rostered off on a day that is a public holiday; however, will need to be provided with another day off, as compensation for the fact that their RDO fell on a public holiday, so that week they would receive three days off, or need to be compensated via TOIL/additional annual leave).

The NES could be improved by simplifying the provision whereby employees are entitled to the minimum number of ordinary hours they are guaranteed, by their Award, employment contract or other industrial instrument, on that day, or in the pay period in which one or more public holiday falls. This means that the employee in example 1 above will be paid a minimum of 40 ordinary hours in the pay fortnight, where no hours were rostered on the public holiday, plus any additional ordinary hours they worked in that pay period. Or, if they had rostered ordinary hours on the public holiday, for those hours.

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## Superannuation contributions

Generally, our feedback is that this provision is easily understood and applied. Our clients are aware of the coming of Payday Super requirements and for some, they feel it will assist them with cashflow; however, for others that rely on payment via government agencies (NDIS, DEWR, or other large corporates that are notoriously late-payers), there is concern that they may find it difficult to meet their obligations in time, due to invoice payment delays.

One of our clients also noted the disparity between the Annual Wage Review increase in the first full period on or after 1 July, compared to superannuation increases applying from 1 July, regardless of when the hours that attracted the super were worked. In 2025, this meant that employers who had a fortnight pay period that ended on Sunday, 29 June, but paid their employees on 1 July had to pay the increased superannuation rate for the last period of FY 2024/25, however did not have to process the wage increase until the period commencing 14 July 2025.

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## Notice of termination and redundancy pay

This provision is generally clear; however, the circumstances where an employee resigns and the employer agrees to a longer notice period than provided in the NES, can create a payment in lieu of notice liability if the employer decides to reduce the period to the NES standard.

While our advice to clients is to not agree to extend notice periods, especially if there have been any performance or conduct issues leading up to the resignation; however, the NES could be improved by stipulating that while the employer and employee can reach agreement for a longer notice period, if either party wishes to shorten the period after agreement has been reached, they will need to pay or forfeit the earnings that would have applied to the longer period.

We **object** to increasing the redundancy entitlement after 10 years to any amount over 12 weeks; however, also agree that an employee being made redundant after 9 years' employment (in most states) will be entitled to pro-rata LSL as well as redundancy pay and therefore be eligible for some 23.5 weeks' pay, compared to an employee who has completed 10 years continuous service and is eligible 20.3 weeks' pay.

We also **object** to the recommendation that the term "ordinary and customary turnover of labour" be removed from s.119 of the FW Act. For contracting businesses with slim margins, limited control over the deployment of their team at client sites and facing the risk of losing contracts for non-service-related reasons, this provision allows for employees to be re-deployed or terminated with notice only.

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## Fair Work Information Statement (the FWIS) and Casual Employment Information Statement (the CEIS).

Our clients have no challenge complying with these provision; however, we recommend that the requirement to provide casual employees with the CEIS at commencement, after 6 months, then each subsequent 12 months (for non-small business) is an unnecessary administrative burden for employers, when employees have equal access to online information via the FWO and can easily research their rights to a permanent pathway.

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## Parental Leave and related entitlements.

While the inquiry is not addressing this provision specifically, the feedback from our clients is that the interaction between the rights of parents to return to their pre-leave role and their right to seek a flexible work arrangement becomes problematic and confusing.

### Example

The CEO of a small NFP organisation (8 x FTE) takes unpaid parental leave in accordance with the NES provisions. They advise 8 weeks prior to their scheduled return date that they wish to return to part time employment for the first six months after their return to work.

The CEO role cannot be effectively performed on a part time basis, and it is operationally impractical for the role to be job-shared.

The client offers an alternate role for which they were seeking a full time incumbent but can accommodate as part time for six months. The returning employee requests to be paid at the same rate of pay as the CEO. This is not financially possible or sustainable for the organisation, so they refuse.

While, in this case, the employee accepted the terms without dispute, it was time-consuming and delicate process.

We **recommend** that greater clarity be provided as to the right of an employee to return to the same role if they are unable through choice and/or family and caring responsibilities to fulfil the role in same capacity as prior to their period of leave.

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## Conclusion

Our business works with other SMBs to assist them to navigate the minefield of legislative burden they are required to understand and comply with when they employ people.

When it becomes too hard, scary, or burdensome for employers to employ people, they will look for other ways to circumvent the red-tape – leading to cash wages, sham contracting, modern slavery, and other dubious employment practices, or they will offshore all possible roles.

It is important to consider the impacts any changes will have on SMBs and how these impacts can affect the economy.

In relation to the NES, SMBs have had to manage approximately a 13% increase in Award-based gross wages and super over the past three years, the addition of 10 days' paid leave per employee per annum for FDVL and are shortly to face the cashflow challenges posed by Payday Super.

On top of this, NSW has added an additional public holiday for ANZAC day in 2026 because the public holiday falls on a weekend. This is another day SMBs will need to pay employees who are absent and/or pay penalty rates if they need to operate, without any productivity or other or benefits to offset the costs.

Any changes to the NES should be in an effort to simplify terms and application; not to add administrative and/or financial burden to the SMB sector.