

# **Submission to the House of Representatives Standing Committee on Employment, Workplace Relations, Skills and Training**

## **Inquiry into the Operation and Adequacy of the National Employment Standards (NES)**

**27 February 2026**

To the Committee,

I wish to make a brief submission to the Committee regarding a structural issue affecting the practical enforceability of the National Employment Standards (NES).

I refer the Committee to my current application before the Fair Work Commission, AM2024/35, which seeks to vary the Road Transport (Long Distance Operations) Award 2020. As outlined in my 12 December 2025 document, the dispute-resolution clause in this award prevents the Commission from arbitrating an NES matter unless both parties' consent. This means an employer may simply refuse consent, leaving the Commission unable to determine a dispute about a statutory minimum entitlement unless the FW Act authorises it.

This raises a fundamental concern for the adequacy of the NES:

If the Fair Work Commission cannot hear or determine a dispute about an NES entitlement, then the NES cannot operate as a guaranteed minimum safety net.

A minimum standard that depends on employer permission to enforce is not a minimum standard in practice. The issue identified in AM2024/35 demonstrates that this is not a theoretical or marginal problem, but a structural gap that undermines the purpose of the NES as the non-derogable minimum floor of employment conditions.

This issue is not only structural but has practical consequences. I have previously experienced this limitation in an earlier workplace dispute, where the Fair Work Commission was unable to determine whether I was correctly classified as an oil distribution worker or a general distribution worker, and whether the 35-hour or 38-hour week applied, because my employer refused consent for arbitration. As a result, the Commission could not resolve an NES-related dispute, despite the matter directly affecting minimum entitlements.

I ask the Committee to consider whether the NES can be said to remain "fit for purpose" when their enforcement can be blocked by an employer withholding consent under an award dispute-resolution clause.

I respectfully submit that the Committee consider whether legislative amendment is required to ensure that the dispute-settling procedure mandated by s.146 includes access to binding arbitration for NES disputes, or alternatively, whether consent can be recognised as embedded within modern awards.

Below are the links to the Hines Application and to the 12<sup>th</sup> December submission it is listed for preliminary hearing on the 13<sup>th</sup> March 2026. I have also pasted the relevant section on “Dispute Resolution”

[Road Transport \(Long Distance Operations\) Award variation \(AM2024/35\)](#)

[NES Contraventions and Inconsistencies 12th December 2025](#)

## **Section 146 – Dispute Resolution and NES Inequality**

### **20.1 FW Act text**

Terms about settling disputes

Without limiting paragraph 139(1)(j), a modern award must include a term that provides a procedure for settling disputes:

- (a) about any matters arising under the award; and
- (b) in relation to the National Employment Standards.

### **The Structural Inconsistency**

20.2 Section 146 is unequivocal: modern awards must contain a procedure for settling disputes about both award matters and the NES. Yet in practice, the Commission's powers are constrained.

20.3 Conciliation and mediation are always available by agreement.

20.4 Arbitration is only available in two NES carve-outs (s.65C flexible work and s.66MA parental leave) or where both parties consent under s.595. This creates a structural gap: the Act mandates settlement, but the Commission cannot fully deliver settlement in most NES disputes. The statutory promise of Section 146 is undermined by the procedural limits of Section 595.

20.5 A dispute procedure that cannot culminate in a binding outcome is not a dispute-settling procedure in any meaningful sense.

### **Inequality Before the Law**

20.6 The consequence is inequality between workers.

20.7 EBA-covered employees have access to binding arbitration that can genuinely resolve NES disputes.

20.8 Award-covered employees are left with a hollow process: a clause that cannot deliver binding outcomes unless the employer consents or the matter falls within narrow carve-outs.

20.9 By contrast, workers under proposed Minimum Standards Orders (MSOs) would enjoy enforceable mechanisms once they are made binding. Award-covered workers remain procedurally disadvantaged until such binding standards are in place.

### **Consent by Instrument**

20.10 Section 739(4) requires consent for arbitration. However, the concept of “consent” is satisfied by the industrial instrument itself. Clause 28.6 states: “If the dispute remains unresolved, the Fair Work Commission may use any method of dispute resolution that it is permitted by the Act to use and that it considers appropriate for resolving the dispute.”

20.11 Operating under an award is an act of agreement by the employer.

20.12 Commencing employment under an award is an act of agreement by the employee.

20.13 Awards operate as binding agreements; by analogy with enterprise agreements where consent is inferred from the instrument itself, clause 28.6 embeds the parties’ consent to Commission arbitration. Consent is not required afresh in each case; it is embedded in the instrument.

20.14 The Act does not require consent to be given afresh in each dispute. Section 595(3) recognises consent as a valid authorising mechanism but does not prescribe its form. Enterprise agreements routinely supply consent through the instrument itself; awards operate in the same way. Clause 28.6 therefore satisfies the statutory precondition for arbitration.

### **Why It Matters**

20.15 Section 146 sets a statutory requirement that is not being met in practice.

20.16 The Act promises settlement of NES disputes, but award-covered workers are denied that safeguard.

20.17 Enterprise agreements and, prospectively, MSOs deliver binding arbitration; awards deliver only hollow conciliation.

20.18 This is not a technical quibble — it is systemic inequality entrenched in the statute itself.

20.19 That inequality is structural, not incidental, and corrodes confidence in the fairness of the system.

### **Conclusion on Dispute Resolution**

20.20 Section 146 requires settlement; on the prevailing interpretation of s.595, that requirement cannot presently be met. The contradiction is structural, not incidental.

20.21 If clause 28.6 supplies the consent required by s.595(3), then arbitration is “permitted by the Act” and the dispute-settling procedure mandated by s.146 becomes fully operative. The Commission would no longer be confined to conciliation and certificates; it would possess jurisdiction to determine NES disputes. The current practice reflects a narrow reading of consent, not a statutory limitation

20.22 The Commission cannot fully settle NES disputes, leaving award-covered workers procedurally disarmed.

20.23 This gap entrenches inequality between classes of workers and hollows out the NES itself.

20.24 Clause 28.6 provides a doctrinal pathway to consent; if the Commission accepts that reading, arbitration becomes available and the dispute-settling procedure required by s.146 can operate as intended. If the Commission rejects that reading, arbitration remains unavailable and the clause cannot satisfy s.146.

20.25 In that alternative scenario, award-covered workers are denied both substantive NES safeguards and a meaningful avenue to enforce them; that outcome is not ancillary or supplementary under s.55(4) but a direct exclusion of NES entitlements

20.26 If the Commission declines to recognise clause 28.6 as supplying consent, then by operation of s.56 the dispute resolution clause must be treated as void to the extent of that inconsistency.

20.27 The record must reflect this structural failure. Whether the Commission accepts clause 28.6 as supplying consent or rejects that interpretation, the tension between s.146 and s.595 must be acknowledged so that higher courts or Parliament can resolve the inconsistency.

20.28 The legislative purpose of s.146 is to ensure that workers have a practical, accessible mechanism for resolving disputes about their minimum statutory entitlements. Parliament did not intend a merely procedural step or a symbolic process; it required a mechanism capable of producing resolution.

20.29 The current practice—conciliation followed by a certificate—does not achieve that purpose. A certificate is not a settlement mechanism; it is a jurisdictional hand-off. It

transfers the dispute to a court rather than resolving it within the statutory framework that governs modern awards.

20.30 This approach imposes disproportionate burdens on award-covered workers. They must navigate litigation, filing fees, delay, and evidentiary complexity simply to enforce minimum entitlements. The NES were designed to be universal and accessible, not contingent on a worker's capacity to litigate.

20.31 The result is a structural contradiction: the Act mandates a dispute-settling procedure, yet the procedure provided to award-covered workers does not settle disputes. This undermines the legislative purpose of s.146 and entrenches a two-tier enforcement system within the NES.

20.32 The Commission's current approach also creates institutional inconsistency. Modern awards are intended to provide a complete and accessible safety net, yet the dispute-settling mechanism for NES matters is functionally incomplete. This undermines the coherence of the award system itself.

20.33 The absence of binding resolution within the Commission shifts enforcement pressure onto the courts, contrary to the Act's design that the Commission be the primary forum for resolving workplace disputes. This displacement is not incidental; it is a direct consequence of the narrow reading of consent under s.595.

20.34 Restoring a workable dispute-settling procedure within the Commission—whether through acceptance of clause 28.6 as supplying consent or through legislative amendment—would realign the system with its statutory purpose and ensure that award-covered workers are not left with inferior enforcement pathways.

**Legislative Intent – Supplementary Explanatory Memorandum (Fair Work Bill 2008)**

To assist the Committee, I note that Item 14 of the Supplementary Explanatory Memorandum to the Fair Work Bill 2008 confirms that Parliament intended the Commission to be able to deal with NES disputes wherever the parties have agreed in writing, including “via any other written agreement”. This supports the interpretation that consent may be embedded within an industrial instrument such as a modern award, consistent with the reasoning outlined above.

Yours sincerely,

Lawrence Hines