

18 December 2025

To whom it may concern,

Executive Summary

This submission is for the Inquiry into the Operation and Adequacy of the National Employment Standards (NES) and reflects personal circumstances that have happened to me as an individual.

The proposal focuses on gaps in the NES leave entitlements around the protections offered to employees under s341 of the Fair Work Act 2009 (Cth) ("the Act"). There are no clear statutory leave entitlements for employees who need time off work to genuinely participate in employment-related legal and workplace law processes, such as hearings, mediations, conferences, and court listings.

As an individual who was self-represented (briefed by barristers and solicitors) dealing with a matter under the Act in both the Fair Work Commission (FWC) and court, not having any statutory protections to take leave meant I was vulnerable to dismissal under my new employment - especially during a time when s387 Unfair Dismissal was unavailable.

My proposal is to add a new NES leave type, similar to existing community service leave, to allow employees to attend officially listed or ordered proceedings arising under the Fair Work Act, work health and safety legislation, and anti-discrimination legislation, including proceedings before courts, tribunals, and statutory agencies exercising functions under those laws.

Current NES Leave Entitlements

The National Employment Standards (NES) under the Fair Work Act 2009 provides a number of baseline leave entitlements for an employee. These include:

- Annual leave (minimum of four weeks paid per year for full-time employees)
- Personal/carer's leave and compassionate leave (10 days personal/carers leave per year for full time employees)
- Family and domestic violence leave (10 days paid per year)
- Community service leave, including jury duty, which is unpaid except for certain paid make-up provisions tied specifically to jury service.

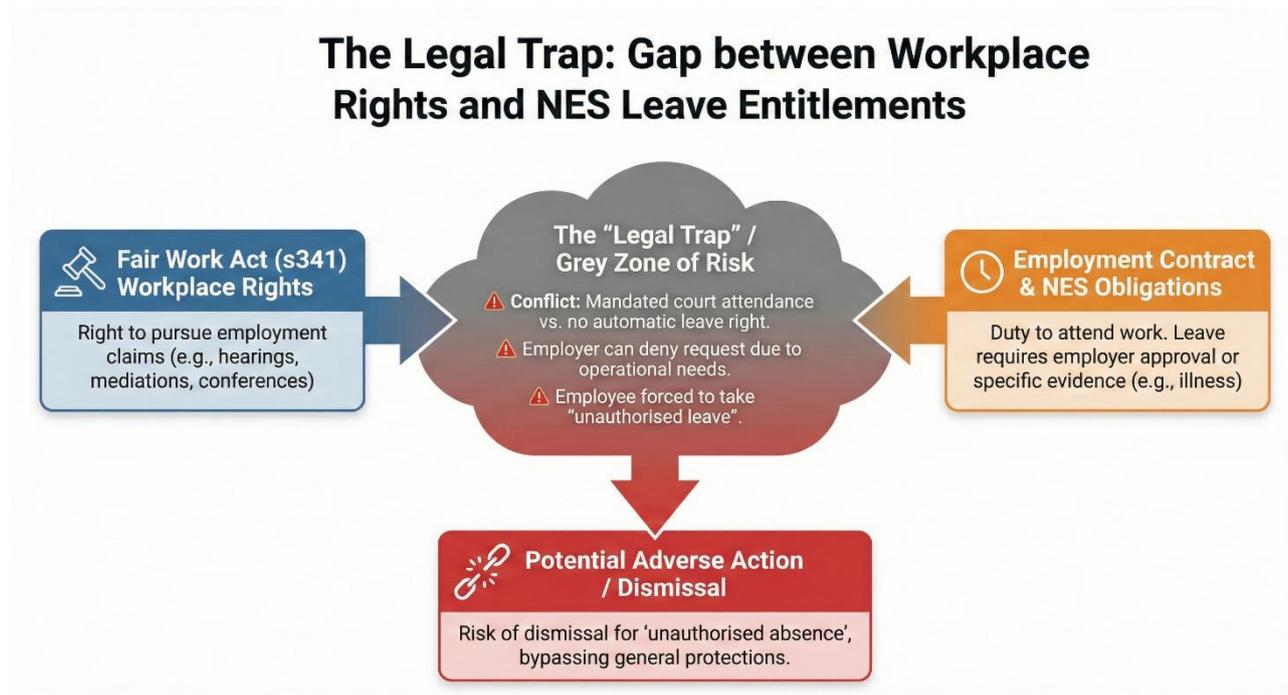
These entitlements are part of the minimum safety net that cannot be reduced by awards, enterprise agreements or contracts.

The Gap

In my circumstance I was attending the tribunal and court proceedings for a legal dispute with a former employer. My new employer was concerned with the leave I was taking. I rang the Fair Work Ombudsman who identified that there was no connection between the s341 provisions and the NES. I was attending interlocutory hearings, directions hearings, mediation conferences self-represented while I had a barrister and solicitor helping with document review in the background.

If I was dismissed due to unauthorised leave (having not accrued enough annual leave and not satisfying the s107 evidence requirements for Personal/Carer's leave) my only recourse under the law would be to pursue a general protections claim under ss340–341 of the Act, where s340 prohibits adverse action due to a general protection, and s341 identifying the workplace rights.

Under s361, the "reverse onus" requires an employer to prove that adverse action was not taken for a prohibited reason. An example, where an employee is forced to take "unauthorised leave" to attend a FWC mediation because they have no statutory right to leave, the employer can argue the dismissal was based on a breach of the employment contract (unauthorised leave) rather than the exercise of a workplace right.



Conceptually, this creates a 'legal trap/grey zone' where statutory workplace rights intersect with contractual attendance obligations, but without a corresponding NES leave entitlement.

1. The Act gives an employee the right to sue for a workplace grievance (s341).
2. The FWC or Court mandates attendance at a hearing or mediation.
3. The NES (Part 2-2) provides no guaranteed mechanism to attend that hearing.
4. The employer denies leave or requires s107 evidence (illness/injury) which the employee cannot provide.
5. The employee attends the hearing and is dismissed for "unauthorised absence."

So, in practice:

- Employees who need to take time off to attend court or FWC events such as FWC mediations, court hearings must rely on annual leave, personal leave, unpaid leave or negotiate leave arrangements with their employer.
- Annual leave is subject to employer approval, and employers may refuse requests on "operational needs" grounds similar to other discretionary leave.
- Using personal/carers leave is problematic, it's included for illness or caring for family, and

may not reasonably apply for an absence for legal participation.

- Unpaid again is at the employer’s discretion unless a specific contractual or agreement terms allow it.
- Community service leave does not currently extend to legal proceedings that involve employment law rights (other than jury service).
- As a result, employees face a real risk that exercising workplace rights will be recorded as unauthorised absence, leading to adverse records, disciplinary action, or dismissal, particularly where a new employer becomes concerned about repeated absences.

Proposal

To bridge the gap, the NES should be amended to include a clear statutory leave entitlement for employees to participate in employment law events through tribunal or court processes. I would propose as follows:

1. A new leave category, such as “Legal Proceedings Leave”, that entitles the employee to take time off to attend employment law processes where their attendance is officially required and is officially listed.
2. That the entitlement be unpaid by default, aligning with other statutory leave types, and where the employee has an option to substitute with paid annual leave instead.
3. The employer having the ability to manage workplace operations should be protected through a reasonable obligation (like requests for flexible working arrangements), focusing on scheduling cooperation but not allowing employers to arbitrarily refuse necessary attendance.
4. Employees should be provided on request acceptable evidence of requirement to attend that a reasonable person would accept. Acceptable evidence should include formal listing notices or orders issued by courts, tribunals, or statutory agencies, whether provided in hard copy or electronically (including emails or registry-issued digital notices).
5. Employees should be required to notify their employer of the need to take this leave as soon as practicable after receiving the official listing notice or order, recognising that some tribunals and courts may provide short notice.
6. The NES should explicitly provide that taking leave under this entitlement constitutes the exercise of a workplace right for the purposes of Part 3-1 of the Fair Work Act, and that such absence cannot be treated as misconduct, unapproved absence, or a basis for adverse action.
7. To prevent “scope creep”, for example people wanting to fight a speeding ticket, limit the leave for use with the Fair Work Act, Health and Safety Acts and Anti-Discrimination Acts.

Leave Type	Purpose	Paid/Unpaid	Discretionary?
Annual Leave	Rest/Recreation	Paid	Yes (Employer can refuse)
Personal Leave	Illness/Injury	Paid	No (Requires s107 evidence)

Community Service	Jury Duty/Emergency	Unpaid*	No
Proposed: Legal Leave	Mandated Legal Attendance	Unpaid	No (Requires Listing Notice)

Vexatious participation concerns

While the introduction of a new leave category must be robust, potential concerns regarding abuse of this leave are mitigated by several existing structural safeguards:

- The FWC and Courts retain existing powers under s587 of the Act to dismiss frivolous or vexatious claims; the NES amendment focuses strictly on procedural fairness for matters that have reached a formal listing stage.
- The entitlement is strictly triggered only by an official court event, such as a listing notice or signed order, which acts as a natural filter excluding time for preparation, research, or document drafting.
- By aligning evidence requirements with the "reasonable person" threshold found in s107 or s110, employers retain the right to demand official tribunal or court-issued proof, precluding the use of self-generated materials.
- As the proposed leave is unpaid by default, there is a natural economic disincentive for misuse, ensuring employees only exercise the right for matters of high importance.

Benefit for Reform & Conclusion

The current NES framework lacks a clear statutory mechanism for employees to attend official workplace law proceedings. This "legal trap" forces employees to choose between exercising their rights under the Fair Work Act and maintaining their current employment security.

I acknowledge that employee absences can have a proportionally greater operational impact on small businesses. However, this proposal balances those concerns through its unpaid default, evidence requirements, and notice obligations, while ensuring that employees are not forced to choose between compliance with mandated legal processes and job security.

Amending the NES to include Legal Proceedings Leave would:

- Make General Protections (ss340-342) meaningful for mobile workers and those in the "minimum employment period."
- Prevent employers from using "unauthorised absence" as a valid reason for dismissal when the absence was mandated by a Court or Tribunal.
- By defaulting to unpaid leave and requiring official Listing Notices as evidence, the risk of "litigation for the sake of leave" or vexatious claims is mitigated.
- If introduced, targeted education and guidance by the Fair Work Ombudsman would assist both employers and employees to understand the scope, evidence requirements, and limits of this entitlement, reducing the risk of misunderstanding or unnecessary disputes.

In conclusion, this amendment is a low-cost, high-impact fix that aligns the National Employment Standards with the broader objectives of the Fair Work Act -ensuring that the right to seek justice is not a luxury afforded only to those with enough accrued annual leave.