

**Senate Standing Committee on Education Employment and Workplace
Relations**

**QUESTIONS ON NOTICE
Budget Estimates 2011-2012**

Agency - Fair Work Ombudsman

DEEWR Question No.EW0263_12

Senator Abetz asked on 30/05/2011, Hansard page 59.

Question

NES

Mr Campbell:Where an enterprise agreement had been certified by Fair Work Australia and it included a clause which was inconsistent with the NES, we would argue that the NES survives and that therefore annual leave loading on termination was payable, where it is otherwise payable on annual leave taking during employment.

...

Senator ABETZ: It just seems to me that this aspect is an important one: that you believe the NES et cetera comes into play. That is fine. But what if there has been a substantially accrued period where the agreement said that there would be no leave loading payable and an employer is told, 'As of now it has changed and it is payable,' and there is the issue of reaching back and retrospectivity?

Answer

The Fair Work Ombudsman provided the following response.

The application of the National Employment Standards entitlement to be paid leave loading on untaken accrued annual leave on termination is tested at the date of the termination, not over the course of the accrual of the annual leave.

It is the Fair Work Ombudsman's view that as the entitlement under the NES to be paid leave loading on untaken accrued annual leave falls due upon the termination of employment, it is payable for the whole of the untaken annual leave, regardless of when the leave accrued or under which industrial instrument.