MINERALS COUNCIL OF AUSTRALIA

SUBMISSION – INQUIRY INTO THE OPERATION AND ADEQUACY OF THE NATIONAL EMPLOYMENT STANDARDS

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS, SKILLS AND TRAINING

FEBRUARY 2026

TABLE OF CONTENTS

BACKGROUND

This is the submission of the Minerals Council of Australia (**MCA**) to the Inquiry into the operation and adequacy of the National Employment Standards (**NES**).

This inquiry was initiated by the House of Representatives Standing Committee on Employment, Workplace Relations, Skills and Training on 27 November 2025, following a referral from the Minister for Workplace Relations, the Hon Amanda Rishworth.

The terms of reference are as follows:[1]

> *the operation and adequacy of the National Employment Standards (NES) under the Fair Work Act with particular reference to:*
>
> *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 Fair Work Act set out in Section 3.*
> - *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 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.*
> - *any related matters.*

Several matters covered by the NES are excluded from the terms of reference:

- Request for Flexible Working Arrangements
- Casual Employment
- Parental Leave
- Family and Domestic Violence Leave.

[1] https://www.aph.gov.au/Parliamentary_Business/Committees/House/Employment_Workplace_Relations_Skills_and_Training/NESInquiry/Terms_of_Reference

SUMMARY AND RECOMMENDATIONS

The following amendments should be made to the NES, to improve clarity and workability for businesses and employees:

1. **Annual leave cash out:**
   - Amend section 92 of the Act to allow the cashing out of annual leave under the same rules for all employees, regardless of industrial instrument coverage, whilst retaining the current requirement to preserve the equivalent of at least 4 weeks' accrued leave.
2. **Payment of NES entitlements on termination:**
   - Amend s117 of the NES to not require immediate payment of accrued entitlements on termination, to instead be clear that termination pay (including payment in lieu of notice) can be paid in the next available pay cycle, or within 14 days of termination, reflecting the general practice under awards and agreements, where longer timeframes are allowed for.
3. **Leave accrual in days and hours:**
   - Amend the NES to confirm the decision of the High Court in *Mondelez* that the entitlement to 10 days personal/carer's leave means 10 days based on a 'notional day', consisting of one-tenth of the equivalent of an employee's ordinary hours of work in a two-week (fortnightly) period.
   - Amend the NES to confirm that all forms of leave, including annual leave, can be expressed in 'hours', subject to no reductions in employees' entitlements.
   - The Committee give consideration and seek submissions on the specific question of whether NES leave entitlements should be updated to be expressed as 'hours'.
4. **Clarify rules around requests to work on public holidays**
   - Amend section 114(4) of the Act to clarify that the 'request' to work on a public holiday is reasonable for those public holidays that fall as part of an employee's normal roster and for which they are already provided additional compensation for working the day.
5. **Public holidays and paid leave**
   - Amend sections 89(1) (annual leave) and 98(1) (personal/carer's leave) to provide that an employee is taken to be on annual leave on a public holiday that they would have otherwise been expected to work and for which they are receiving the additional compensation they would have received had they worked that day.
6. **National long service leave standard**
   - Consider as part of this inquiry how a national long service leave standard can be achieved, consistent with the original intent of the NES.
7. **'Ordinary' hours and maximum weekly hours**
   - Amend section 62(3) of the Act to expressly state that where an employee has agreed to work a full-time roster where the rostered hours exceed 38 hours per week, then those rostered hours worked are 'reasonable additional hours' for the purpose of the NES.
8. **Reforms that would facilitate Award simplification**
   - Consolidate certain common award terms in the NES in situations where a consistent standard is desirable and differences between awards have created unnecessary complexity.

EMPLOYMENT IN THE AUSTRALIAN MINING INDUSTRY

The MCA is proud that mining is Australia's highest-paying and most productive industry.

In 2024-25, total employment in the industry was 290,100.[2] In addition, The broader mining sector directly and indirectly supported 1.25 million full time equivalent jobs in 2023-24 (approximately 8.6 per cent of employment in Australia):

In 2024-25 average annual resources industry wages were $168,100. This is 57 per cent more than the all-industries average of $107,400.[3]

Mining stands out as an industry that provides secure, full-time jobs:

- 97 per cent of resources industry employees are full-time (not part time)[4]
- 91 per cent of mining workers are permanent (not casual)[5]
- 91.9 per cent of resources employees expect to remain in their current job for the next 12 months.[6]

THE ORIGINS AND PURPOSE OF THE NES

The National Employment Standards were introduced as part of the initial enactment of the *Fair Work Act 2009* (**the Act**). These standards were developed in 2008-09 and took effect from 1 January 2010.

In contrast to more recent attempts to amend the NES, the original enactment of the NES was an example of an orderly and considered Parliamentary process. This included the following features:[7]

1. The original policy to enact the NES was released in April 2007, seven months prior to the federal election in November 2007. This policy contained details of each proposed NES entitlement.
2. An exposure draft NES and discussion paper were released on 14 February 2008, inviting submissions, of which 129 were received.
3. Following consideration of these submissions, the government release the proposed NES on 16 June 2008.
4. The *Fair Work Bill* to introduce the NES was introduced to Parliament on 25 November 2008
5. The relevant Senate Committee process commenced on 25 November 2008 and reported on 27 February 2009. The Committee published 154 submissions and held eight hearings over a period of two months .[8]

[2] Australian Bureau of Statistics, Labour Force, Australia, Detailed, Table 6. Employed persons by Industry sub-division of main job (ANZSIC) and Sex, released 18 December 2025.
[3] Australian Bureau of Statistics, Average Weekly Earnings, Australia, Table 10H, released 14 August 2025.
[4] Australian Bureau of Statistics, Working Arrangements, Table 4, Form of employment by industry, occupation and educational qualification, released 12 December 2025.
[5] ABS Table Builder, Labour Statistics, Characteristics of Employment, 2025, Whether had paid leave entitlements in main job by Industry of main job, released 12 December 2025 (excludes oil and gas).
[6] ABS Table Builder, Labour Statistics, Characteristics of Employment, 2025, Expectations of future employment in main job (next 12 months) by Industry of main job, released 12 December 2025.
[7] The consultation process prior to the introduction of the Bill is set out in page viii of its Explanatory Memorandum
[8] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_Employment_and_Workplace_Relations/Completed_inquiries/2008-10/fair_work/index

6. The Bill was subject to detailed Parliamentary debate in both Houses and ultimately passed with bipartisan support by the House of Representatives on 4 December 2008 and the Senate on 20 March 2009.[9]

7. The NES commenced operation on 1 January 2010.

In the view of the MCA, the process to the development of the NES in 2008-2009 was a high point in transparency and balance in the development of workplace relations legislation. Regrettably, such standards have not been reached in more recent years.

This has, not surprisingly, resulted in poorer quality legislation, including where amendments have been made to the NES. This issue is explored in greater detail in section 4 of this submission below.

If further amendments to the NES are to be considered, then the original process followed between 2008 and 2009 should serve as a model for how such a task should be approached. The approaches adopted since 2022 should serve as examples of 'what not to do'.

What the NES is intended to be

The NES are intended to be a universal set of minimum terms and conditions that apply to all employees covered by the Act. They are intended to be 'generic' in that they can apply across all industries, in contrast to awards, which will contain distinctive conditions for particular industries and, where appropriate, build upon the minimum entitlements of the NES in certain respects.

The purpose of the NES, as stated in the Act, is to set *'minimum standards that apply to the employment of employees which cannot be displaced'*.[10] Its purpose was explained in the Explanatory Memorandum for the original *Fair Work Bill* as:[11]

> *'The NES is designed to 'lock in' to modern awards and enterprise agreements. It does this by including provisions that specifically allow awards and agreements to deal with specific issues. Modern awards and enterprise agreements can also 'build on' the NES by including terms that supplement, or are ancillary or incidental to, the NES.'*

This approach reflected the policy intent of the then-Rudd government that enacted the NES. This intent was first set out in the government's 2007 election policy which proposed that:

> *'…the safety net will be in two parts. Firstly, there will be 10 legislated national employment standards which will apply to all Australian employees.*
>
> *'Secondly, awards will provide a safety net of up to 10 additional conditions relevant to particular industries and enterprises.'*

The policy further stated that:

> *'Fair Work Australia will also conduct inquiries and may recommend adjustment to Labor's national employment standards.'* [12]

The policy intent of the NES was always that the Fair Work Commission (previously Fair Work Australia) would be the body responsible for instigating amendments to NES entitlements, as opposed to the Parliament.

[9] https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4016
[10] Section 61(1) of the Act
[11] Page 39
[12] Page 17

The majority of entitlements in the NES have been enacted to reflect pre-existing community standards that were set by independent industrial Commissions, rather than policy settings determined by the Parliament. Those NES terms based on Commission Test Case outcomes are:

- Maximum weekly hours
- Annual leave
- Personal/carer's leave
- Parental leave
- Family and domestic violence eave
- Community service leave
- Notice of termination
- Redundancy pay

What the NES is not intended to be

In considering whether the NES remains 'fit for purpose' as required by the Terms of Reference, it is important to be clear about what its purpose always was and continues to be.

Its purpose was to provide a set of minimum standards capable of being applied across all industries and act as a 'safety net' that can be improved upon through awards, collective bargaining or contracts of employment.

The purpose of the NES was not to reflect what is considered desirable or best practice in a particular industry. Nor is intended to provide additional entitlements above the minimum safety net that have not been able to be achieved through either awards or bargaining.

THE NEED FOR SIMPLICITY AND WORKABILITY

The Terms of Reference require the Committee to consider '*the effectiveness and application of the NES, including opportunities for technical improvements.'*

In contrast to other elements of the Act and Australia's workplace law framework more broadly, the NES are relatively clear and intelligible. This should be preserved as a matter of priority.

A case study in simplicity – taking annual leave under the NES

The NES provisions for taking annual leave are succinct and concise. This is in contrast to other elements of the Act:

> ***88 Taking paid annual leave***
>
> ***(1) [Leave period may be agreed between employee and employer]***
>
> *Paid annual leave may be taken for a period agreed between an employee and his or her employer*
>
> ***(2) [Employer must not unreasonably refuse paid annual leave]***
>
> *The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.*

A case study in complexity – employing a casual under the NES

Whilst the NES provisions relating to casual employment are excluded from the Terms of Reference of this inquiry, they are relevant as an example of 'what not to do' when considering amendments to the NES. They should serve as a warning to the Committee of the risks inherent in making reactive amendments to any term in the NES.

They also illustrate the poor outcomes that result when an ill-considered and rushed Parliamentary process is used to pass such amendments.

For many years, the definition of 'casual employee' was derived from standard wording in awards, which was typically a formulation such as:

> 'A casual employee is an employee engaged and paid as such.'

The most recent amendments to the NES included new rights for casual conversion, which in turn relied on a new definition of 'casual employee' that was included in the Act. The amendments were the product of a particularly poor legislative process. The intent was to overturn a decision by the High Court of Australia in which certain union parties did not get their way. The government considered it appropriate to overturn the decision by amending the Act to give effect to the unsuccessful union claims by inserting a new definition of 'casual employee' in the Act, where none was previously considered necessary, and also include this definition in the NES.

The level of complexity in this definition is not possible to express in the body of this submission. Instead, the new 12-point test is included as **Attachment B** to this submission. By way of contrast, the previous general award definition of a casual employee prior to the amendments is included as **Attachment A** to this submission.

A last-minute government amendment one day prior to the passage of the legislation was intended to 'clarify' the new test by stating that none of the 12 factors were determinative. This elements of the test states that various other factors in the test:[13]

> *'must all be considered but no single consideration is determinative and not all considerations necessarily need to be satisfied for an employee to be considered as other than a casual employee.'*

Absurdly, this provision appears under a sub-heading entitled '*To avoid doubt'*.

[13] Sub-section 15A(3)(b)

Whilst casual employment is excluded from the Terms of Reference of this inquiry, it is appropriate to draw attention to this case study. The current legislative complexity illustrates the dangers of what happens when legislation is used to undo the decisions of independent umpires. In this case, the umpire was the High Court, but the principle should apply equally to the other courts and the FWC.

RECOMMENDED IMPROVEMENTS TO THE NES

In accordance with the Terms of Reference invitation to consider '*opportunities for technical improvements'* to the NES, the MCA puts forward the following recommendations to improve the operation of the NES, for the benefit of both businesses and employees.

As outlined above, it is preferable that changes to substantive entitlements in the NES be the result of considered and evidence-based processes. This should take the form of test cases in the FWC, which are preferable to the partisan and less rigorous processes in the Parliament.

The Parliament should, however, continue to take an interest in the workability of its legislation and should act when necessary to address needless complexity or unintended consequences. In the 16 years since the NES commenced, it is inevitable that such issues will emerge.

The MCA respectfully submits that the Committee consider the following improvements to the NES to improve their practical operation:

1. Annual leave cash out

The issue:

The NES currently provides for two separate regimes under which employees may agree to cash out a portion of annual leave:[14]

- Cashing out terms in an award or agreement, the requirements for which are set out in section 93 of the Act; or
- An agreement between an employer and an award/agreement free employee, the requirements for which are set out separately in section 94 of the Act.

There is no apparent reason why the NES should provide two sets of rules that apply to the same concept. Each set of rules provides for the same process for achieving the same outcome, but prevents award or agreement covered employees from accessing this entitlement unless the relevant instrument allows for it.

Employees who are covered by an award or agreement should also have the same entitlement to cash out leave as those who are not. Awards and agreements can continue to provide for different conditions if need be.

Recommendation:

Amend section 92 of the Act to allow the cashing out of annual leave under the same rules for all employees, regardless of industrial instrument coverage, whilst retaining the current requirement to preserve the equivalent of at least 4 weeks' accrued leave.

2. Payment of NES entitlements on termination:

The issue:

A 2025 decision of the Federal Circuit and Family Court ruled that employers must pay out relevant termination payments under various NES entitlements (including annual leave, payment in lieu of notice and redundancy pay) on an employee's final date of employment. This approach is contrary to the rules under various industrial instruments, which can provide for a longer timeframe.

The decision in *Jewell v Magnium Australia Pty Ltd*[15] found that an employer had breached the NES by not paying out three NES entitlements - payment in lieu of notice (section 117); redundancy pay (section 119) and accrued annual leave (section 90) – on the final day of employment.

[14] Section 92
[15] [2025] FedCFamC2G 201 https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FedCFamC2G/2025/201.html

The NES does not prescribe that such payments must be made on the final day and such a requirement is inconsistent with the provisions of a number of awards, including the Mining Award, which allows for up to 7 days for such payments. The Fair Work Ombudsman's web site also includes advice on 'Final Pay', which states that:[16]

> *Rules may apply about when an employee's final pay must be paid.*
>
> *Most awards say that employers need to pay employees their final payment within 7 days after their last day of employment.*
>
> *Check your award, enterprise agreement, or employment contract for specific rules about final pay.*

A requirement to pay termination entitlements on the final day of employment is a significant administrative burden. It is also impractical or not possible in many cases, for example, if money owing to the employer is to be deducted, such as where an employee has taken leave in advance. Even large employers with sophisticated payroll systems struggle to apply such a requirement.

Recommendation:

Amend s117 of the NES to not require immediate payment of accrued entitlements on termination, to instead be clear that termination pay (including payment in lieu of notice) can be paid in the next available pay cycle, or within 14 days of termination, reflecting the general practice under awards and agreements, where longer timeframes are allowed for.

3. Annual leave and Personal leave accrual in days or hours

The issue:

The 2020 decision of the High Court in the *Mondelez* matter[17] clarified how personal/carer's leave should accrue under the NES, but not after significant legal uncertainty and litigation over a number of years.

The High Court confirmed that the NES entitlement to 10 days personal/carer's leave per year in section 96 of the Act is accrued based on the 'ordinary' hours of an employee, regardless of the shift patterns that make up those ordinary hours.

This decision overturned an alternative approach that had been adopted by a Full Court of the Federal Court.[18]

Under the Full Federal Court's approach, workers who worked their ordinary hours of work under certain shift rosters would be entitled to more leave than those who worked conventional rosters. If a shift included 12 hours in a certain day, then 10 'days' accrual would be equivalent to 120 hours. This would have resulted in inequitable outcomes. For example, employees who worked 36 ordinary hours across five shifts each week (7.2 hours per day) would get 10 x 7.2 hours leave (72 hours a year), whilst those who worked 36 hours across three 12-hour shifts would get 120 hours a year (10 x 12 hours).

This was inconsistent with the intent of the NES, in which the entitlement to 10 days leave per year was intended to apply to all workers, with no additional entitlement for continuous shift workers (unlike annual leave).

The High Court rejected the Full Federal Court's approach as '*not consistent with the purpose of s96 or the stated objectives of the* Fair Work Act *of fairness, flexibility, certainty and stability*'.

The intent of the NES was to provide a relatively simple set of minimum standards that can be applied by any employer and understood by any employee. No NES term should be so complex that it

[16] https://www.fairwork.gov.au/ending-employment/final-pay
[17] *Mondelez v AMWU* [2020] HCA 29 (13 August 2020)
[18] *Mondelez v AMWU* [2019] FCAFC 138 (21 August 2019)

requires litigation, let alone a High Court ruling, to interpret. Where an NES term is currently expressed in a way that gives rise to such ambiguity and uncertainty, it is appropriate for the Parliament to make suitable amendments to provide improve simplicity, without diminishing any substantive entitlement. The *Mondelez* matter serves as a warning of what can happen when NES terms are left ambiguous or are needlessly complex to begin with.

Recommendation:

Personal/carer's leave

Amend the NES to confirm the decision of the High Court in *Mondelez* that the entitlement to 10 days personal/carer's leave means 10 days based on a 'notional day', consisting of one-tenth of the equivalent of an employee's ordinary hours of work in a two-week (fortnightly) period.

The NES should also allow for the entitlement to be expressed in 'hours', as this is typically the way in which the entitlement will be dealt with in payroll systems, subject to employees' entitlements not being reduced in any way. The base entitlement would continue to be the 'notional day' based on the 'ordinary' working hours per week for full-time employment.

Other forms of leave

Amend the NES to confirm that other forms of leave, including annual leave, can be expressed in 'hours', subject to no reduction in employees' entitlements.

Given that payroll systems predominantly record leave entitlements as 'hours' rather than 'days', the MCA respectfully suggests that the Committee give consideration and seek submissions on the specific question of whether NES leave entitlements should be updated to be expressed as 'hours'.

4. Clarify rules around requests to work on public holidays

The issue:

Recent Federal Court decisions have ruled that an employer's right to request that employees work on public holidays are now different from longstanding custom and practice in the mining industry.

The relevant NES terms provide that:

> *'an employer may request an employee to work on a public holiday if the request is reasonable.'* [19]

They also provide grounds for employees to refuse such requests:

> *'If an employer requests an employee to work on a public holiday, the employee may refuse the request if:*
>
> *(a) the request is not reasonable; or*
> *(b) the refusal is not reasonable.'* [20]

The NES term also includes eight factors to determine whether a request is reasonable:[21]

> *(a) the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;*
>
> *(b) the employee's personal circumstances, including family responsibilities;*
>
> *(c) whether the employee could reasonably expect that the employer might request work on the public holiday;*
>
> *(d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, work on the public holiday;*
>
> *(e) the type of employment of the employee (for example, whether full - time, part - time, casual or shiftwork);*

[19] Section 114(2)
[20] Section 114(3)
[21] Section 114(4)

(f) the amount of notice in advance of the public holiday given by the employer when making the request;

(g) in relation to the refusal of a request--the amount of notice in advance of the public holiday given by the employee when refusing the request;

(h) any other relevant matter.

The Federal Court has previously ruled that this broad range of factors in the NES '*leaves room for negotiation and discussion between an employee and employer about the exercise of the entitlement'*.[22] This approach has allowed for employers in the mining industry to request that employees will work on particular public holidays in accordance with the rosters, which are set well in advance, and on the basis that the employees receive additional remuneration for doing so.

However, a more recent Full Federal Court decision adopted a more prescriptive approach and ruled that arrangements for such requests that were previously regarded as 'reasonable' will no longer be regarded as such.

In *CFMEU v OS MCAP Pty Ltd*[23] in 2023, the Full Court ruled that:

> *'Ultimately, after discussion or negotiation, the employer may require an employee to work on a public holiday if the request is reasonable and the employee's refusal is unreasonable.'* [24]

In this case, the Full Court found that the employer had breached the NES by setting rosters that included work on Christmas Day and Boxing Day, in circumstances where the rostering arrangements were consistent with longstanding practices and the existing expectations of the employer and employees that their rosters could require them to work on those days. This arrangement was deemed to not meet the 'reasonableness' requirement under the NES term.

The implication of the decision is that many longstanding rostering arrangements covering public holidays that have been commonplace in the mining industry are now open to challenge, notwithstanding that they had been considered 'reasonable' prior to the 2023 Full Court decision.

Recommendation:

Amend section 114(4) of the Act to clarify that the 'request' to work on a public holiday is reasonable for those public holidays that fall as part of an employee's normal roster and for which they are already provided additional compensation for working the day.

The expectation will be 'reasonable' in such circumstances where the employee is notified of the requirement at the commencement of their employment or before the commencement of a new roster arrangement, where the expectation has been part of the employer's operations in relation to the work performed.

5. Public holidays and paid leave

The issue:

The NES is currently uncertain on the question of how public holidays should be treated when they fall during a period of leave and the employee would have otherwise worked on the public holiday.

The NES terms dealing with public holidays require an employee to receive their 'base rate' of pay on a public holiday where they are not working. They provide that where an employee:

> '*is absent from her or her employment on a day or part day that is a public holiday, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work on the day or part-day*'.[25]

[22] *SDA v Woolworths* [2012] FCA 540, at paragraph [21]
[23] [2023] FCAFC 51
[24] At Paragraph [5]
[25] Section 116

However, this provision appears to assume that the employee would not have worked on the public holiday. It does not state how public holidays are to be treated if the employee is on paid leave on the day.

Separately, the NES provisions dealing with annual leave and personal/carer's leave state that an employee is 'taken not to be' on leave if a public holiday falls during a period of leave.[26] These provisions cover situations where the employee would not have worked on the public holiday if they were not on leave. They do not expressly deal with situations where the employee would have otherwise worked on the public holiday in accordance with their roster. Such situations are commonplace in the mining industry.

Within the mining industry, it has been commonplace for employers to treat public holidays as annual leave days if the employee is on leave and would have otherwise worked on that day. Under this practice, the employee is paid what they would have been paid had they worked on that day (including any applicable public holiday penalty rates) and a day of leave is debited from their accrued leave balance.

This practice is reflected in a number of enterprise agreements that include specific terms allowing for this and which have been approved by the Fair Work Commission on the basis that, implicitly, the Commission is satisfied that they are consistent with the NES. This practice also reflects the relevant term in the Mining Industry Award:[27]

> ***22.3 Payment for annual leave***
>
> *The amount to be paid to an employee prior to going on leave must be worked out on the basis of the greater of:*
>
> *(a) the amount the employee would have been paid for working ordinary hours during the period of annual leave including loadings, penalties and allowances paid for all purposes; but excluding payments in respect of overtime, or any other payment which might have been payable to the employee as a reimbursement for expenses incurred; or*
>
> *(b) the employee's minimum rate of pay for ordinary hours under clause 15—Minimum rates and classifications; plus an annual leave loading of 17.5%.*
>
> *NOTE: Where an employee is receiving over-award payments such that the employee's base rate of pay is higher than the rate specified under this award, the employee is entitled to receive the higher rate while on a period of paid annual leave (see sections 16 and 90 of the Act).*

The award term expressly allows for the practice by providing that public holidays falling on a rostered work day during a period of annual leave are included in the period of leave:[28]

> ***22.5 Arrangements for taking leave***
>
> *(a) Where an employee works in a remote location or on cycle work made up of working days and non-working days, a period of paid annual leave includes the working days and the non-working days during the period.*

In practice, the award terms (also reflected in agreements) are applied in such a way that employees on leave are paid what they would have received had they worked on any public holiday during the period of leave – i.e. they receive more than the 'base rate' that the public holiday provision of the NES requires. Under the Award, this is double time and half. In return for the additional remuneration, the public holiday is treated as a day of leave taken.

The wording in the award terms pre-dates the NES (reflecting long-standing industry practice) and was 're-made' when Modern Awards were first introduced, with the Commission implicitly determining that it was not contrary to the NES. The MCA believes this view is correct, as the additional compensation that employees received on public holidays means that are better off than if they simply

[26] Section 89(1) (annual leave); Section 98(1) (personal/carer's leave)
[27] Clause 22.3: https://awards.fairwork.gov.au/MA000011.html
[28] Clause 22.5

received the 'base rate' required by the NES. This is consistent with provisions of the Act that allow for award terms to depart from the NES if they are 'not detrimental' to employees.[29]

However, this practice, though allowed for under relevant awards and agreements, has, to our knowledge, never been subject to a judicial determination confirming that it complies with the NES. It is therefore open to differing interpretations, and an alternative view may be arguable.

Recommendation:

The MCA recommends that the NES be amended to expressly permit the deduction of leave (annual or personal/carers or long service leave) on public holidays. This should reflect the existing practice, where an employee receives additional compensation for the public holiday above the 'base rate' that the NES term requires.

This should be done by amending sections 89(1) (annual leave) and 98(1) (personal/carer's leave) to provide that an employee is taken to be on leave on a public holiday that they would have otherwise been expected to work and for which they are receiving the additional compensation they would have received had they worked that day.

6. National long service leave standard

The issue:

The entitlement to long service leave under the NES refers to 'legacy' entitlements in federal industrial instruments which provide for long service leave.[30] Where no such instrument applies to an employee, the relevant State or Territory legislation provides for the entitlement. However, this is not expressly stated in the NES itself. The State/Territory legislation applies by virtue of the Act not operating to exclude those laws.[31]

This is a complex approach, which creates a range of inconsistencies.

At the time of the NES was first introduced, the intention had been to work towards a single national long service leave standard that could be set out in the NES, which would address inefficiencies created by inconsistent State schemes. This commitment was first expressed in the 2007 ALP election policy that first outlined the proposal for the NES:[32]

> As part of its commitment to national industrial relations laws, Labor will work with the States to develop nationally consistent long service leave entitlements.
>
> In the transitional period, Labor's guaranteed entitlement to long service leave will reflect the long service leave arrangements currently contained in State laws or federal awards and federal agreements.

Whilst this objective has not been achieved, it remains a desirable goal. The current NES terms in the Act are 'transitional' arrangements that are still in place 16 years later.

Recommendation:

The MCA respectfully suggests that it would be a worthwhile use of the Committee's resources to consider as part of this inquiry how a national long service leave standard can be achieved, consistent with the original intent of the NES.

This process should also consider how such a national standard interacts with various statutory 'portable' leave schemes and how the interaction between various long service leave schemes can be streamlined.

[29] Section 55(4)
[30] Section 113
[31] Section 27(2)(g)
[32] ALP 'Forward with Fairness' election policy, 2007, page 9

7. ‘Ordinary’ hours and maximum weekly hours

The issue:

The NES allows for an employer to request or require an employee to work additional hours beyond their usual maximum weekly hours, provided this is ‘reasonable’.[33] Employees may refuse if the requirement or request is ‘unreasonable’.[34]

The Act also lists a number of non-exhaustive factors that may be considered in determining what is ‘reasonable’ or ‘unreasonable’. However, these do not include whether the employee has previously agreed to work such hours. Such arrangements are commonplace in the mining industry, where employees agree in advance to particular rosters that will require them to work greater than their ‘ordinary’ hours in certain weeks and they receive additional remuneration to reflect this.

The current wording of the NES has enabled employees to ‘refuse’ to work reasonable additional hours, notwithstanding that they had initially agreed to work such hours at the commencement of their employment and the relevant contracts of employment and rostering arrangements of the business reflected this agreement.

Recommendation:

Amend section 62(3) of the Act to expressly state that where an employee has agreed to work a full-time roster where the rostered hours exceed 38 hours per week, then those rostered hours worked are ’reasonable additional hours’ for the purpose of the NES.

8. Reforms that would facilitate Award simplification

The review of the NES also presents an opportunity to shift some matters from awards to the NES (i.e. expand the national safety net) to both simplify Awards and standardise arrangements nationally.

The MCA recommends that consideration be given to consolidating certain common award terms in the NES in situations where a consistent standard is desirable and differences between awards have created unnecessary complexity. For example:

- Standardise what it means to ‘regularly work Sundays and Public Holidays’. This could be done by including the typical Fair Work Commission formula under annual leave in the NES, eg. where a minimum of 34 weekend or public holidays are worked per year, this constitutes ‘regularly’ working such days.
- Allow for all leave types in the NES to be expressed in hours.
- Expressly provide that an employer can pay an annualised wage instead of hourly rates / penalty rates and reduce the record-keeping burden that is currently imposed by the range of awards that deal with annualised remuneration arrangements.
- Standardise time off in lieu (TOIL) arrangements to provide greater clarity as to how TOIL is accrued and paid out.
- Define ‘ordinary hours’ in the NES - i.e. hours worked in a defined span or within a roster, and that these hours do not attract penalty rates. For example, working ‘ordinary hours’ spread across shift rosters over a four week period where the equivalent of the maximum weekly hours of 35 per week is spread across the roster, as occurs under the *Black Coal Mining Industry Award*.

[33] Section 62(1)
[34] Section 62(2)

ATTACHMENT A

Standard definition of 'casual employee' prior to the new statutory definitions in the Act:

'A casual employee is an employee engaged and paid as such.'

ATTACHMENT B

Definition of a 'casual employee' created in relation to casual employment amendments to the NES in 2024:[35]

15A Meaning of casual employee

General rule

(1) An employee is a *casual employee* of an employer only if:

(a) the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work; and

(b) the employee would be entitled to a casual loading or a specific rate of pay for casual employees under the terms of a fair work instrument if the employee were a casual employee, or the employee is entitled to such a loading or rate of pay under the contract of employment.

Note: An employee who commences employment as a casual employee remains a casual employee until the occurrence of a specified event (see subsection (5)).

Indicia that apply for purposes of general rule

(2) For the purposes of paragraph (1)(a), whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work is to be assessed:

(a) on the basis of the real substance, practical reality and true nature of the employment relationship; and

(b) on the basis that a firm advance commitment can be in the form of the contract of employment or, in addition to the terms of that contract, in the form of a mutual understanding or expectation between the employer and employee not rising to the level of a term of that contract (or to a variation of any such term); and

(c) having regard to, but not limited to, the following considerations (which may indicate the presence, rather than an absence, of such a commitment):

(i) whether there is an inability of the employer to elect to offer, or not offer, work or an inability of the employee to elect to accept or reject work (and whether this occurs in practice);

(ii) whether, having regard to the nature of the employer's enterprise, it is reasonably likely that there will be future availability of continuing work in that enterprise of the kind usually performed by the employee;

(iii) whether there are full - time employees or part - time employees performing the same kind of work in the employer's enterprise that is usually performed by the employee;

(iv) whether there is a regular pattern of work for the employee.

Note: A regular pattern of work does not of itself indicate a firm advance commitment to continuing and indefinite work. An employee who has a regular pattern of work may still be a casual employee if there is no firm advance commitment to continuing and indefinite work.

(3) To avoid doubt:

[35] As stated in the body of this submission, whilst the 'casual employment' amendments to the NES are excluded from the Terms of Reference for this inquiry, this definition is included for illustrative purposes to demonstrate 'what not to do' when approaching possible amendments to the NES.

(a) for the purposes of paragraph (2)(b), a mutual understanding or expectation may be inferred from conduct of the employer and employee after entering into the contract of employment or from how the contract is performed; and

(b) the considerations referred to in paragraph (2)(c) must all be considered but no single consideration is determinative and not all considerations necessarily need to be satisfied for an employee to be considered as other than a casual employee; and

(c) a pattern of work is regular for the purposes of subparagraph (2)(c)(iv) even if it is not absolutely uniform and includes some fluctuation or variation over time (including for reasonable absences such as for illness, injury or recreation).

Exceptions to general rule

(4) Despite subsection (1), an employee is not a *casual employee* of an employer if:

(a) the contract of employment includes a term that provides the contract will terminate at the end of an identifiable period (whether or not the contract also includes other terms that provide for circumstances in which it may be terminated before the end of that period); and

(b) the employee is a member of the academic staff or teaching staff of a higher education institution; and

(c) the employee is covered by one of the following modern awards:

(i) the Higher Education Industry - Academic Staff - Award 2020 as in force from time to time;

(ii) the Higher Education Industry - General Staff - Award 2020 as in force from time to time ; and

(d) the employee is not a State public sector employee of a State within the meaning of subsection 30A(1).

Note 1: A modern award covers an employee if the award is expressed to cover the employee, even if the modern award does not apply to the employee because an enterprise agreement applies to the employee in relation to that particular employment (see subsection 57(1) which deals with interaction between modern awards and enterprise agreements).

Note 2: This means an employee on a fixed term contract who is not covered by paragraphs (4)(b) and (c) may be a casual employee or may be other than a casual employee, depending on whether the employee satisfies the requirements of subsections (1) to (3).

Employees engaged as casual employees remain so until the occurrence of a specified event

(5) A person who commences employment as a casual employee within the meaning of subsections (1) to (4) remains a *casual employee* of the employer until:

(a) the employee's employment status is changed to full - time employment or part - time employment under Division 4A of Part 2 - 2; or

(b) the employee's employment status is changed by order of the FWC under section 66MA or 739; or

(c) the employee's employment status is changed to full - time employment or part - time employment under the terms of a fair work instrument that applies to the employee; or

(d) the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis.