



THE LAW SOCIETY
OF NEW SOUTH WALES

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Dr James Popple
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Dear Dr Popple,

INQUIRY INTO THE OPERATION AND ADEQUACY OF THE NATIONAL EMPLOYMENT STANDARDS

Thank you for the opportunity to contribute to the Law Council of Australia's submission in response to the inquiry of the House of Representatives Standing Committee on Employment, Workplace Relations, Skills and Training into the operation and adequacy of the National Employment Standards (**NES**) under the *Fair Work Act 2009* (**Act**). The Law Society's Employment Law Committee contributed to this submission.

We provide our comments on select NES below.

Long service leave – Part 2.2, Division 9 of the Act

Under the NES, if there is an applicable long service leave term derived from a pre-modernised award or preserved transitional instrument (and, in limited cases, agreement-derived entitlements preserved by a Fair Work Commission order), then the employee is entitled to long service leave in accordance with those terms. These terms apply theoretically as if the employee were in their current role before 1 January 2010. The NES otherwise does not set a national standard for long service leave.

At the time of its introduction, the Commonwealth Government intended for NES long service leave arrangements to be transitional, pending the development of a national long service leave scheme.¹ The NES long service leave provisions exclude the operation of state and territory long service leave laws. Many of the NES-related long service leave entitlements exclude casuals from long service leave and have entitlements that are less generous compared with state and territory long service leave laws.

The Act does not otherwise exclude, and in fact relies upon, state and territory laws that deal with long service leave for the many employers who do not have access to long service leave terms derived from pre-modernised awards or transitional instruments. It is therefore common for employees to have their long

¹ Commonwealth of Australia, *Fair Work Bill 2008* Supplementary Explanatory Memorandum, 49:
https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4016_ems_dd180eb6-386c-45ee-b5bd-8d4a6a2e5942%22.

service leave entitlements determined by state or territory laws, which are not homogeneous across jurisdictions.

In our view, it would be beneficial for the Commonwealth Government to now develop the intended national standard for long service leave. This would create greater certainty for employers who operate nationally, and for employees who move interstate or even overseas while serving the same employer. We note that the Fair Work Act Review Panel's final report in 2012 included the following recommendation:

The Panel recommends that the Commonwealth, state and territory governments should expedite the development of a national long service leave standard with a view to introducing it by 1 January 2015.²

In doing so, careful consultation will be required to ensure that the benefits of a national standard are balanced with the need to preserve beneficial long service leave entitlements available under state and territory, award, and industry schemes, so that employees are not disadvantaged.

Redundancy – Part 2.2, Division 11, Subdivision B of the Act

If the Commonwealth Government were to consider developing a national long service leave standard, we suggest that the redundancy pay scale (section 119(2) of the Act) also be reviewed.

When the redundancy scale was set by the Australian Industrial Relations Commission (**AIRC**), redundancy payments were reduced after an employee's 10 years or more of service.³ The reason provided by the AIRC at that time was that after 10 years of service, federal award employees often become entitled to or are paid out long service leave around that point, depending on the jurisdiction or instrument. It reasoned that increasing the scale after 10 years' service would allow "double dipping" by employees. It was not adequately explained how accessing long service leave and a redundancy entitlement would be "dipping" from the same entitlement.

We consider that it may be opportune for the review to consider whether that reduction after 10 years' service remains a valid policy consideration, and whether it should continue to apply.

Notice of termination – Part 2.2, Division 11, Subdivision A of the Act

Currently an employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination. We consider that it would be useful for the NES to require the written notice of termination or payment in lieu (subject to exclusions such as casuals and serious misconduct) to also include a reason, or reasons, for termination. Providing the reason for termination would provide greater clarity to the employee regarding the basis of their termination and could, among other benefits, potentially reduce the number of unmeritorious claims lodged in the Fair Work Commission (**FWC**) challenging dismissals.

² Department of Employment and Workplace Relations, *Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation Final report* (2012) 22: <https://www.dewr.gov.au/download/14529/towards-more-productive-and-equitable-workplaces-evaluation-fair-work-legislation-final-report/29762/towards-more-productive-and-equitable-workplaces-evaluation-fair-work-legislation-final-report/pdf>.

³ Redundancy Case, PR032004, [2004] AIRC 287.



In this context we note the increased lodgments of general protections dismissal applications at the FWC. There were 6,209 general protections dismissal applications made in the 2024–25 financial year, an increase of 13% on the previous year and 27% above the 5-year average.⁴ In a statement issued in November 2025, the President of the FWC, Justice Hatcher, noted:

Over half of applications are made by applicants who do not meet the qualifying period for making an unfair dismissal application. I infer from this many general protections dismissal applications are being used as a substitute for an unfair dismissal application rather than raising a genuine allegation of unlawful dismissal.⁵

By requiring an employer to provide a reason, there is greater potential for employees to better understand the employer's position and to be able to better assess whether they should contest that decision.

Public holidays – Part 2.2, Division 10 of the Act

Currently, section 114(1) of the Act provides employees with an entitlement to be absent from work on public holidays.

Employers may request an employee to work on a public holiday if the request is reasonable (s 114(2)), and employees may refuse the reasonable request if their refusal is reasonable (s 114(3)(b)).

Section 114(4) then sets out the factors relevant to whether an employer's request for an employee to work on a public holiday, or the employee's refusal of that request, is reasonable.

We suggest that the Commonwealth Government publish further guidance materials, such as case examples of reasonable requests to work on a public holiday, either by way of a note under the section, or by requesting that the Fair Work Ombudsman publish them on its website. This would assist employers, especially small business employers.

Currently, there are no specific examples on its website.⁶ This guidance material should include reference to the Full Federal Court decision in *Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd* [2023] FCAFC 51, which concerned the meaning of request under section 114.

Coverage of the NES

We note that the NES currently provides minimum terms and conditions of employment for permanent, part-time and casual employees, and does not cover other types of workers (such as gig economy workers). Those other workers potentially have access to Fair Work Commission minimum standards orders (for employee-like workers or regulated road transport contractors) or road transport contractual chain orders. In our view, it is not within the scope of this inquiry to review whether the NES should be extended to these "new" categories of workers. However, we would welcome any opportunity to contribute to this issue of minimum standards for

⁴ Fair Work Commission, President's statement, "Reforms to general protections dismissal application processes" (12 November 2025): <https://www.fwc.gov.au/documents/consultation/presidents-statement-gp-changes-2025-11-12.pdf>.

⁵ Ibid 3.

⁶ Fair Work Ombudsman, "Not working on public holidays": <https://www.fairwork.gov.au/employment-conditions/public-holidays/not-working-on-public-holidays>.



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workers in future reviews of the NES, including what minimum standards should be relevant across categories.

If you have any queries about the items above, or would like further information, please contact Mimi Lee, Policy Lawyer, on 02 9926 0174 or mimi.lee@lawsociety.com.au.

Yours sincerely

Ronan MacSweeney

President