

Inquiry into the National Employment Standards

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

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INTRODUCTION

AREEA welcomes the opportunity to contribute 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**) under the *Fair Work Act 2009* (**FW Act**).

Given significant changes to Australia's industrial relations framework, business models and economic conditions, it is timely to assess whether the NES remains fit for purpose as the minimum safety net for contemporary workplaces and whether it continues to promote the objects set out in s.3 of the FW Act.

This submission addresses the objective and purpose of the NES, the adequacy, relevance and coherence of individual NES entitlements, and the effectiveness and practical application of the NES in the modern workplace. It identifies targeted opportunities for technical improvement, including in the interaction between the NES, modern awards, enterprise agreements and individual flexibility arrangements.

Informed by consultation with AREEA members across the mining, energy and resources sectors, the submission highlights areas where the NES and modern award system are:

- unclear in their application,
- misaligned with the objects of the FW Act, or
- impose unnecessary and disproportionate compliance and operational burdens.

It also considers the experience of different categories of workers covered by the NES and notes gaps in available data relevant to the Inquiry's considerations.

This submission does not seek additional regulation. Rather, it is directed toward simplifying and modernising the industrial relations framework to ensure the NES operates as an effective, coherent and practical safety net for the modern Australian workplace.

Importantly, this review should not become a vehicle for the immediate adoption of proposals to expand or alter the National Employment Standards. Its purpose is to assess whether the NES remain fit-for-purpose and coherent — not to pre-emptively implement substantive changes in response to particular stakeholder proposals.

If the Government was to progress any recommendations from this review into legislative or regulatory proposals, those changes must follow the proper policy process.

This should include circulation of exposure draft legislation and consultation through the National Workplace Relations Consultative Committee before any Bill is introduced to Parliament. Any amendment Bill should then be referred to a Parliamentary Committee for a full public inquiry to ensure careful, transparent and evidence-based scrutiny of the proposed changes and their system-wide impacts.

EXECUTIVE SUMMARY

Core proposition

2. AREEA does not contend that the NES entitlements are inadequate. The central problem is coherence and workability.
3. NES provisions and their interaction with modern awards and enterprise agreements have not kept pace with contemporary rostering, shift work, annualised remuneration and payroll systems. This misalignment drives disputes, litigation risk and manual compliance processes that add cost without improving employee outcomes.
4. This is inconsistent with the NES's intended role as a clear, accessible and enforceable minimum safety net, and undermines the objects of the FW Act, including certainty, productivity and "simple and flexible" workplace arrangements.

Key Recommendations

5. AREEA makes the case for 10 key NES changes:
 - a) **Maximum weekly hours (ss.62–64)**

Remove unnecessary constraints on hours of work that no longer reflect modern workplaces or industry practice.
 - b) **Personal leave (s.96)**

Resolve the uncertainty surrounding what constitutes a "day" of personal/carer's leave.
 - c) **Public holiday rostering (s.114)**

End the requirement for employers in continuous, FIFO and shift-based operations to repeatedly "request" work on public holidays.
 - d) **Public holiday payments (s.114)**

Eliminate double payment for public holidays.
 - e) **Annual leave**

Make annual leave cash-out available to all employees. Separately, allow employers to direct employees with excessive annual leave balances to take leave
 - f) **Timing of termination payments (s.90(2))**

Remove the requirement to pay accrued entitlements on the day of termination.
 - g) **Long service leave**

Address the excessive complexity and inconsistency of state and territory long service leave regimes.
 - h) **Redundancy and LSL overlap**

Prevent the duplication of service-based termination entitlements.
 - i) **Award complexity**

Reduce award complexity that no longer reflects how work is performed.

j) **Annualised salaries and award compliance:**

Wind back disproportionate record-keeping obligations for annualised salaries.

NB: AREEA's recommendations are provided in tabular form in full and include detailed rationale under 'Recommendations' at paragraph 152, page 28.

The National Employment Standards

AREEA supports the object and purpose of “ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders”.¹ Of equal importance is the need to balance that safety net with flexibility for businesses, and with the promotion of productivity and economic growth, as reflected in s.3(a) of the FW Act.

More than 15 years have passed since the FW Act commenced and over that period, significant changes in industry structure, technology and social expectations have occurred. Further, judicial and tribunal decisions have also shaped (and/or departed from) its original intended operation.

Australia's mining and resources sector is a key driver of national economic growth and has been subject to rapid legislative change, significant technological advancement, evolving work practices and the emerging impacts of artificial intelligence. These developments place increasing strain on an industrial relations framework that has not kept pace with the realities of modern work.

The Explanatory Memorandum to the Fair Work Bill 2009 makes clear that Parliament intended the NES and the modern award system to operate together, rather than in opposition, in a manner that supports both businesses and workers:

“The intention of the new award system and the NES is to provide a safety net in two parts that is economically sustainable, promotes flexible modern work practices and efficient and productive performance of work.”²

Modern awards were intended to supplement the NES, by providing a limited number of additional minimum standards tailored to particular industries and occupations, rather than requiring the NES itself to accommodate all forms of work.

In AREEA's view, this framework has been progressively undermined by judicial interpretation that seeks to shoe-horn modern, flexible and salaried work arrangements into rigid NES concepts that were never designed for that purpose.

This approach has eroded the intended role of the modern award system, increased regulatory complexity and uncertainty, and caused the NES to operate as a blunt and impractical constraint rather than a facilitative safety net. These outcomes are inconsistent with the objects of the FW Act, including the promotion of productivity, flexibility and economic prosperity.

This submission identifies targeted areas of the NES that warrant modernisation to:

- better reflect contemporary workplace practices,
- enable more efficient business operations,
- reduce inadvertent non-compliance, and
- maintain the integrity of the safety net for employees.

¹ Section 3(b) of the *Fair Work Act 2009* (Cth).

² Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) [85]-[87].

Part 1: Key NES matters

A. Maximum weekly hours of work

Issue

1. The NES provisions imposing maximum weekly hours of work lack coherence with contemporary industry practices of rostering and shift work in the mining and energy sector.
2. In their current form, ss.62–64 of the FW Act are not fit for purpose, lack relevance to modern fly in fly out (FIFO) 24/7 operations, and require technical amendment to improve clarity and ensure appropriate interaction with enterprise agreements and modern awards.
3. The maximum weekly hours provisions are not compatible with FIFO rosters or 24/7 operations, which rely on averaged and extended shifts.
4. The ongoing requirement to assess reasonableness for hours exceeding 38 per week creates a purely administrative burden that complicates accepted and lawful industry practice (for example, in refining, the working of a 40-hour week is standard).
5. The provisions fail to reflect what happens in practice in capital-intensive, remote and continuous operations where employees work long hours and enjoy the provision of meals, laundry and accommodation and long periods of time off.

Legislative framework and intent

6. Three separate NES provisions regulate maximum weekly hours of work, with particular relevance to the resources and energy industry:
 - a) Section 62 permits full-time employees to work in excess of 38 hours per week where those additional hours are reasonable, subject to the employee's right to refuse.
 - b) Section 63 allows hours to be averaged but provides that average weekly hours must not exceed 38 for a full-time employee.
 - c) Section 64 permits an employer and employee to agree in writing to an averaging arrangement over a period of up to 26 weeks, again capped at an average of 38 hours per week.
7. Collectively, these provisions are intended to prevent unreasonable additional hours. It is noted that award and enterprise agreement terms must not exclude or detract from the NES (s.55(1)).
8. The Explanatory Memorandum to the Fair Work Bill 2009 confirms that the NES was intended to preserve the existing quantum of maximum ordinary hours of work, while accommodating flexible arrangements such as part-time work and averaging. Importantly, averaging arrangements — longstanding and essential features of mining and energy sector rostering — were clearly contemplated by Parliament and expressly provided for in ss. 63 and 64 of the FW Act.

Practical difficulties and lack of coherence

9. Despite this intent, s. 62 uses mandatory language, providing that an employer “must not request or require” an employee to work more than 38 hours per week unless the additional hours are reasonable. As a result, even where hours are lawfully averaged under ss.63 or 64, hours worked in excess of 38 hours in any given week remain subject to an ongoing statutory reasonableness assessment.

10. AREEA submits that this approach is outdated and misaligned with the realities of modern mining and energy operations, where extended and averaged rosters are essential to FIFO arrangements and continuous production. The reasonableness test in s.62(3), which applies equally to award-covered and enterprise agreement-covered employees, no longer serves a meaningful protective function in this context.

Effectiveness and interaction with enterprise bargaining

11. For enterprise agreement-covered employees, the NES reasonableness requirement overlay creates an unnecessary and duplicative regulatory burden. Employee protections in relation to hours of work are already comprehensively assessed through the Better Off Overall Test (**BOOT**) at the time an agreement is approved by the Fair Work Commission (**FWC**). The BOOT process evaluates hours, rostering, remuneration and overall employee outcomes, against the relevant award, rendering an additional statutory “reasonableness” filter ineffective and administratively burdensome.
12. This duplication undermines the coherent interaction between the NES and enterprise agreements contemplated by the FW Act framework. It also contributes to legal uncertainty, as reflected in inconsistent judicial authority, including *Macpherson v Coal & Allied Mining Services Pty Ltd*³ and *Australasian Meat Industry Employees Union v Dick Stone Pty Ltd*.⁴

Recommendations

13. The FW Act should be amended to modernise the operation of the NES in relation to maximum weekly hours of work, particularly for enterprise agreement-covered employees in the mining and energy sector.
14. Specifically, AREEA recommends:
 - a) Removal or modification of the reasonableness test in s.62(3) for enterprise agreement-covered employees where hours of work and rostering arrangements are subject to the BOOT at the time of agreement approval.
 - b) Clarification that averaging arrangements under ss.63 and 64 of the FW Act, when agreed through an enterprise agreement and approved by the FWC, may operate without a separate and ongoing “reasonableness” assessment under s.62, provided the agreement specifies:
 - the averaging period;
 - applicable rostering arrangements; and
 - appropriate employee safeguards.
 - c) Alignment of the NES with contemporary industry practices, recognising that extended and averaged rostering arrangements are longstanding, necessary and were expressly contemplated by the Fair Work Bill.
 - d) Reduction of unnecessary regulatory duplication, ensuring that employee protections are delivered primarily through the enterprise bargaining and approval framework rather than overlapping statutory tests that add complexity without improving outcomes.

³ (No 2) (2009) 189 IR 50: where a change to an electrical worker’s roster adding an additional four hours per week of work (with additional RDOs to compensate) was considered not unreasonable.

⁴ [2022] FCA 512: where an employer was penalised for unreasonably requiring a meat dicer to work 50-hour work week, which included around 12 hours of overtime per week.

B. Personal/Carer's Leave

Issue

15. The drafting of s 96 (personal/carers' leave) has led to misinterpretation and inconsistent application, particularly in accrual, deduction and payment.
16. While the High Court in *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Known as the Australian Manufacturing Workers Union*⁵ (**Mondelez**) resolved the meaning of "10 days" it did not address the structural tension between 'days' and 'ordinary hours' drafting. Ongoing litigation confirms continued uncertainty in practice.
17. As a result, personal/carers' leave no longer operates as a simple and clear minimum entitlement, especially in sectors with shift work, compressed rosters, variable hours and annualised salaries.
18. The core problem is that s 96 expresses leave in "days" but requires accrual by reference to "ordinary hours of work", creating inconsistency across workplace instruments.
19. Employers remain uncertain about accrual, deduction and payment where rosters vary, with enterprise agreements often compounding the conflict.
20. The cumulative effect is disproportionate complexity and compliance risk, with payroll systems and annualised salary arrangements strained by roster-specific, day-by-day calculations.

High Court guidance: judicial interpretation post-*Mondelez*

21. Mondelez Australia Pty Ltd operated a chocolate manufacturing plant at Claremont, Tasmania. Employees covered by an enterprise agreement worked compressed rosters consisting of 12-hour shifts, averaging 36 ordinary hours per week across a four-week cycle. Under the enterprise agreement, employees were credited with a fixed annual allocation of paid personal/carers' leave expressed in hours.
22. When an employee took personal/carers' leave for a rostered shift, Mondelez deducted the ordinary hours rostered for that shift from the employee's accrued leave balance. Because shifts were 12 hours in length, some employees exhausted their annual personal/carers' leave entitlement after fewer than 10 separate absences from work. The dispute concerned whether this approach complied with the NES personal leave entitlement under s.96.
23. The High Court held that the entitlement in s.96(1) to "10 days' paid personal/carers' leave" is to be understood as an entitlement to a quantum of leave calculated by reference to an employee's ordinary hours of work, rather than as an entitlement to 10 separate calendar days of absence.
24. The Court confirmed that personal/carers' leave accrues progressively according to ordinary hours worked, and that when leave is taken, the amount deducted from an employee's leave balance corresponds to the ordinary hours the employee would have worked during the period of absence. The Court rejected an interpretation that treated "10 days" as a fixed number of absences regardless of roster patterns or shift length.
25. Since the High Court's decision in *Mondelez*, courts and tribunals have consistently applied an ordinary-hours-based approach to the accrual and deduction of leave entitlements across a range of statutory and industrial contexts.

⁵ [2020] HCA 29, per Kiefel CJ, Nettle and Gordon JJ.

26. Decisions of the FWC have extended the principle in *Mondelez* beyond personal/carer's leave to annual leave (*Cleanaway*⁶), required enterprise agreement provisions to be construed consistently with the NES notwithstanding historic practice (*Serco, Primo Foods, Virgin Australia, DP World*⁷), and confirmed that leave expressed in "days" must be translated into hours unless an agreement clearly provides otherwise.
27. The Queensland Industrial Relations Commission has applied the same reasoning by analogy to long service leave (*Berry*⁸). Collectively, these cases confirm that *Mondelez* has become settled doctrine, while also demonstrating that its application requires detailed technical analysis of ordinary hours, rosters and payroll systems.
28. Taken together, post-*Mondelez* authorities confirm that ordinary hours of work are now the controlling metric for leave accrual and deduction across workplace instruments. At the same time, they illustrate that the current legislative framework requires repeated judicial intervention to reconcile abstract statutory concepts with modern rostering, payroll systems and enterprise agreement drafting.
29. This supports the case for legislative clarification focused on workability and coherence, rather than further reliance on case-by-case adjudication.

Current illustration: *CFMMEU v DP World Brisbane Pty Ltd* (on appeal)

30. In *Construction, Forestry and Maritime Employees Union v DP World Brisbane Pty Ltd*⁹ the Commission was required to arbitrate how NES personal leave accrual applied to employees transitioning from variable rosters to fixed-salary, fixed-roster arrangements.
31. The dispute arose when personal leave balances were recalculated using different "day" divisors (from 7-hour to 12-hour standards), with the union asserting this constituted a reduction in accrued entitlements.
32. Deputy President Lake held in favour of DP World to the extent that personal leave accrual must be determined by reference to "ordinary hours", not a literal concept of a "day", requiring enterprise agreement leave expressed in "days" to be re-interpreted through the lens of s.96 of the FW Act.
33. For the employees concerned, "ordinary hours" were the hours actually worked, excluding hours beyond 35 per week. This equated to one twentieth of their rostered hours in a year, provided hours beyond 35 worked per week were excluded. Once the employees moved to the 12-hour standards, they accrue 91 hours personal leave in a year or 3.5 hours per fortnight.
34. The decision, which is now being appealed by the CFMEU, illustrates the growing tendency for judicial interpretation to retrofit modern, salaried and roster-based work arrangements into

⁶ *The Australian Workers' Union, Queensland Branch v Cleanaway Operations Pty Ltd T/A Cleanaway* [2020] FWC 6907 where the FWC confirmed that the reasoning in *Mondelez* is not confined to personal/carer's leave but extends to other NES leave entitlements, including annual leave.

⁷ *The Community and Public Sector Union v Serco Australia Pty Ltd* [2021] FWC 5087; and *Australasian Meat Industry Employees Union, v Primo Foods Pty Ltd* [2024] FWC 165 where the FWC held that agreements reflecting the NES must be construed consistently with an hours-based accrual model unless they clearly and expressly provide a more generous entitlement. Agreement wording referring to "days" or rostered shifts could not displace the NES methodology. In *Jeffrey Ian Wood v Virgin Australia Airlines Pty Ltd* [2025] FWC 285 and *Australian Maritime Officers' Union v DP World* [2025] FWC 2264 the FWC was required to undertake detailed analysis of roster patterns, ordinary hours and leave deduction methods to determine compliance with the NES.

⁸ In *Berry v Babcock Mission Critical Services Australasia Pty Ltd* [2023] QIRC 246 the Queensland Industrial Relations Commission applied *Mondelez* by analogy to long service leave legislation, holding that leave accrues by reference to ordinary hours rather than calendar days or rostered shifts. This demonstrates the broader systemic reach of the decision and its implications across multiple statutory schemes.

⁹ [2025] FWC 2150.

rigid NES concepts, generating complexity, uncertainty and outcomes never contemplated by Parliament.

Recommendation

35. Section 96 of the FW Act should be amended so that it clearly and expressly distinguishes:
 - a) the **accrual** of personal/carer's leave; and
 - b) the **payment** of personal/carer's leave when taken.
36. Further, AREEA recommends targeted amendment to s. 96 to remove ambiguity and better align the provision with modern working arrangements, payroll systems and enterprise agreements, by either:
 - a) providing that leave accrues based on agreed weekly ordinary hours (with averaging across a roster cycle where applicable) and is paid based on average ordinary hours across that cycle, rather than the specific rostered day;
 - b) maintaining deduction as a "day", but requiring any shortfall between the deduction and the employee's ordinary shift pay to be made up; or
 - c) clarifying and codifying the current Mondelez approach to ensure consistent application.
37. These options would preserve the High Court's outcome in *Mondelez*, ensure fairness across working patterns, and improve compliance certainty.

Reasons

38. AREEA submits that the difficulties with s. 96 arise from drafting mechanics and internal inconsistency — not from the quantum of the entitlement.
39. The entitlement to 10 days of paid personal/carer's leave — historically equivalent to two weeks' leave and properly referable to ordinary hours of work — is not in dispute and should be retained.
40. Reform should focus on clarity, coherence and workability so the NES can be readily understood and consistently applied.
41. Targeted amendment would reduce reliance on litigation, minimise administrative burden, and restore personal/carer's leave as a clear and practical minimum safety-net entitlement.

C. Public holiday entitlement

Issue

42. In considering the effectiveness, application and fitness for purpose of the NES, the public holiday provisions present ongoing challenges for employers operating continuous or shift-based workplaces. Employers must request, rather than require, employees to work on public holidays and assess refusals on an individual basis, while still meeting operational requirements.
43. The 2023 Full Federal Court landmark ruling against BHP subsidiary OS MCAP¹⁰ (**BHP decision**) has created widespread confusion. With public holidays often arising mid-roster, the BHP decision creates uncertainty and detracts from the NES objective of providing a

¹⁰ Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP [2023] FCAFC 51.

clear, workable and enforceable minimum safety net. Indeed, the NES public holiday entitlement post-BHP decision has limited practical application for many mining employees working continuous shift and FIFO rosters and creates a serious compliance and administrative burden on employers – with little to no benefit for employees.

44. In practice, resources sector operations cannot accommodate employee absences, particularly for FIFO arrangements where employees are unable to leave site without notice being provided well in advance and incurring additional costly travel arrangements. In such settings, any request from an employee to be absent on a public holiday when rostered on would be considered unreasonable.
45. Further, where an employer can accommodate the employee being absent on that public holiday, there is no mechanism in the NES to recognise the common circumstance where that employee has already been paid to work on that day via annualised salary or enterprise agreement arrangements. The additional payment where the public holiday is not worked is a windfall gain at the employer's expense.

Problem

46. The BHP decision created confusion and uncertainty for all employers with 24/7 operations – not just those in mining and energy. The BHP decision and its practical application are one of the most frequently misunderstood for mining and energy employers and features heavily in AREEA's member consultations for this submission, indicating continued confusion and uncertainty for businesses.
47. The confusion created by the Federal Court's decision cannot be understated. Despite the decision confirming that employers can only *request*, rather than *require*, employees to work on a public holiday, and that any refusal must be genuinely considered by reference to the reasonableness factors in s.114 of the FW Act, the application of this interpretation is not straightforward.
48. In continuous-operation industries such as mining, the distinction between request and require has limited practical effect. Employees are commonly rostered to work on public holidays as part of long-term shift and operational requirements mean that the work must ultimately be performed regardless of any refusal. The cost and logistics ramifications for offshore employers faced with an employee who requests not to work on a public holiday that falls during their offshore swing are plainly obvious.
49. In addition, where public holidays fall on rostered days off, the entitlement to be absent is not enlivened at all. These features reduce the clarity and effectiveness of the NES public holiday entitlement demonstrate that the term is not fit for modern, shift-based work arrangements.

Specific issues to address

50. AREEA directs the Inquiry's attention to three major issues for employers resulting from the Federal Court's interpretation of s.114 of the FW Act:

The "request" versus "require" distinction

51. The Court's construction of s.114 creates ongoing practical difficulties for employers in managing public holiday work arrangements, including unresolved questions as to:
 - a) how frequently an employer must make a request for an employee to work on a particular public holiday in order to remain NES compliant;

- b) whether such requests may be made prospectively or in grouped form (for example, covering Christmas Day, Boxing Day and New Year's Day through a single request); and
- c) the consequences of refusal in FIFO and remote work contexts, including whether a refusal obliges an employer to remove an employee from site, transport them offsite, or alternatively allow them to remain accommodated without working.
 - There is also uncertainty as to whether repeated refusal to work public holidays — despite an express contractual commitment to do so — may lawfully ground disciplinary action, including termination of employment.

Shift commencement and alignment with public holidays

52. Where a shift does not align with the conventional 12:00am to 11:59pm period, uncertainty arises as to:
- a) whether an employee may cease work part-way through a shift in order to be absent for the portion of the shift falling on the public holiday; and
 - b) whether an employer may deduct annual leave (especially in circumstances an employer only provides the NES minimum entitlement to leave) for the part of a shift that coincides with a public holiday.

Interaction with annualised salaries, enterprise agreements and leave entitlements

53. In industries characterised by shift work, continuous operations and FIFO arrangements, annualised salary structures and enterprise agreements often expressly incorporate a specified number of public holidays into remuneration. Public holidays are treated as an assumed, quantified and paid-for component of the working year, with salaries calibrated to compensate employees in advance for working, or being rostered across, those days.
54. In the resources and energy industry, where an employee seeks to exercise their NES right to refuse work where that refusal is not unreasonable, they typically fall into two groups:
- a) Site-based employees
 - In many workplaces, employees reside on site including in remote locations such as offshore, and it is neither operationally feasible nor practically meaningful to permit employees to be absent in the ordinary sense.
 - Employees cannot simply leave site. In an offshore setting access is constrained by limited helicopter, charter flights and vessel movements; travel is organised around roster cycles; and accommodation and safety arrangements assume full crew presence. In practice, the only alternative is that the employee remains in on-site or offshore accommodation while declining to perform work, leaving the employer with no meaningful recourse and no capacity to redeploy labour or adjust operations.
 - b) Office-based employees, employees not on-site or who drive-in and out on a shift basis:
 - By contrast, for employees who are office-based, not working a lengthy swing at site and/or who drive-in and drive-out to site on shift-by-shift basis, it might be deemed a reasonable request that they not attend for work on a public holiday.
 - However, it is often the case that those employees have been simultaneously compensated through an annualised salary structure that assumes public holiday work, for having to work a set number of public holidays in a year.

- The NES framework does not accommodate this distinction. Despite the fundamentally different practical circumstances, the employee continues to receive their full annualised salary — even where that salary already includes compensation for a fixed number of public holidays — and the employer is prohibited from making any corresponding adjustment to leave balances or remuneration.
55. The practical effect is that an employee may retain the public holiday component embedded in their salary while also receiving the benefit of a paid public holiday absence.
 56. The FW Act provides no mechanism to reconcile or offset this duplication. Employers cannot deduct annual leave (though it is debatable if leave provided in excess of the NES minimum can be clawed back) or make any salary adjustment without risking contravention of the NES.
 57. This exposes employers to compulsory outcomes that exceed minimum standards in an arbitrary manner, disconnected from both the structure of annualised remuneration and the policy intent of the public holiday provisions.
 58. These outcomes demonstrate that the NES public holiday framework is not fit for purpose in workplaces operating with annualised salary arrangements in continuous operations including FIFO or remote operations. The provisions assume a traditional five-day week workplace in which an employee can meaningfully be absent from work on a public holiday and where public holidays are not already priced into remuneration.
 59. In modern industrial settings—where public holidays are expressly compensated in advance and operational realities prevent genuine absence—the NES produces arbitrary outcomes that exceed minimum standards, distort bargained arrangements and undermine the objective of a simple, clear and enforceable safety net.

Recommendations

60. AREEA recommends that the NES public holiday provisions in s.114 of the FW Act be amended to improve clarity, workability and fitness for purpose in continuous and shift-based workplaces, while maintaining appropriate employee protections.
 - a) Clarify the request / require framework
 - The FW Act should expressly confirm that, in continuous or roster-based operations, an employer may satisfy (in lieu of requiring) the obligation to “request” employees to work a public holiday through advance roster-based or written notifications, including block notifications covering multiple public holidays within a defined period. This would reduce administrative burden and compliance risk while preserving the requirement to genuinely consider individual refusals.
 - b) Provide guidance on refusals in continuous operations
 - The FW Act should include clearer statutory guidance on how refusals are to be assessed in 24/7 workplaces, including explicit recognition of operational requirements, advance notice through rosters, and the practical constraints of FIFO and remote work arrangements. This would support more consistent and predictable application of the reasonableness factors in s.114.
 - c) Clarify interaction between leave entitlements and salaries / enterprise agreements
 - The FW Act should be amended to clarify the interaction between the NES public holiday entitlement, leave entitlements and annualised salary or enterprise agreement arrangements by:

- confirming that where an annualised salary or enterprise agreement expressly incorporates compensation for a specified number of public holidays, an employee who elects not to work on a public holiday may have an equivalent amount of leave deducted from leave entitlements.
 - providing a clear statutory mechanism to prevent duplication of payment where public holidays are already priced into remuneration, while preserving the employee's NES right to refuse unreasonable public holiday work.
 - Such clarification would restore coherence between the NES and bargained remuneration structures, reduce compliance risk, and ensure that public holiday provisions operate as a genuine minimum safety net rather than generating unintended "double payment" outcomes.
- d) Address partial public holidays and shift commencement
- The Act should clarify how public holidays apply where shifts span part of a public holiday, including whether employees are entitled to be absent mid-shift and how payment and leave entitlements are to be treated. Clear statutory rules would significantly reduce disputes and inconsistent practices.

D. Annual Leave

D.1: Annual leave cash out

Issue

61. The FW Act NES provisions only allow certain employees under certain circumstances the ability to cash out annual leave. These limitations are inequitable and cannot be justified. It is administratively burdensome and complex for employers to manage and can require legal advice to correctly interpret rights and obligations.

Recommendation

62. It is recommended that the NES be amended to allow the cashing out of annual leave for all employees, regardless of award or enterprise agreement coverage and irrespective of whether an industrial instrument contains a specific cash-out clause.

Effectiveness and opportunities for technical improvement

63. Allowing cash-out at the NES level would:
- a) simplify administration and compliance,
 - b) reduce disputes arising from enterprise agreement drafting omissions,
 - c) improve the practical effectiveness of the entitlement and provide a benefit to all employees without diminishing minimum protections.

Interaction with other workplace instruments

64. An NES-based entitlement would operate alongside awards, enterprise agreements and individual flexibility arrangements, rather than being constrained by them, while still allowing instruments to include additional safeguards if desired.

Coverage and differing worker experiences

65. Employees covered by enterprise agreements without cash-out clauses — often in remote or project-based industries — are disproportionately affected. Greater NES consistency would also benefit:
- Older workers seeking income flexibility,
 - Workers managing caring responsibilities,
 - Workers in remote or regional locations with limited alternative income opportunities.

Data gaps

66. There is limited publicly available data on:
- The number of enterprise agreements that exclude cash-out provisions, and
 - The demographic impact of restricted access to cash-out.
- Improved data collection would support evidence-based policy development.

D.2: Direction to Take Annual Leave – Excessive Accrual

Issue

67. The current framework governing directions to take annual leave does not adequately address the operational and financial risks associated with excessive leave accruals.
68. Excessive accrual of annual leave creates material liabilities for employers, distorts workforce planning, and undermines the health and wellbeing objective of annual leave as a genuine period of rest and recuperation.

Problem

69. Annual leave is not intended to be stockpiled indefinitely. It is a statutory entitlement designed to ensure regular rest. Where employees accumulate excessive balances, that purpose is frustrated.
70. While the Fair Work Act permits employers to require award- and agreement-free employees to take annual leave where the requirement is reasonable, and modern awards commonly define “excessive leave” as more than eight weeks (10 weeks for shiftworkers), the broader statutory and award framework is fragmented, technical and inconsistent.
71. There is no clear, consistent and enforceable NES-level mechanism that applies uniformly to all employees for managing excessive leave accruals.
72. The current approach relies heavily on award-specific prescription and procedural requirements, creating unnecessary complexity and regulatory risk.
73. A more coherent framework should ensure employees retain a meaningful buffer of accrued leave while preventing indefinite accumulation and unmanaged financial exposure.

Recommendation

74. The Act should be amended to provide a clear and consistent NES-level right for employers to direct employees to take annual leave where excessive leave has accrued, subject to reasonable notice and consultation.

75. Any such direction should require that a reasonable residual balance be maintained in the employee's leave account to allow for contingencies, including unforeseen personal circumstances or operational disruption.
76. The test of "reasonableness" should be clarified to confirm that excessive accrual is, of itself, a sufficient basis for a lawful direction, provided the employee retains an appropriate minimum balance.

E. Timing of Payment of Entitlements on Termination

Issue

77. The decision in *Jewell v Magnum Australia Pty Ltd (No 2)*¹¹ highlights a deficiency in the practical operation of the NES and raises issues directly relevant to the Review's consideration of the effectiveness and application of the NES, including opportunities for technical improvement.
78. This Federal Circuit Court interpretation of s.90(2) FW Act, requiring payment of accrued annual leave on the final day of employment, departs from long-standing industrial practice and creates an unworkable compliance obligation.
79. Requiring same-day payment of termination entitlements demonstrates that the NES, in its current form, is not fit for purpose having regard to the changing nature of work and modern payroll systems. Payroll processes are designed around scheduled pay cycles and post-termination verification.
80. Even sophisticated employers cannot reliably calculate and process final entitlements within a single day, resulting in heightened compliance risk without delivering any additional substantive benefit to employees. This undermines the adequacy, relevance and coherence of existing NES entitlements.

Recommendation

81. A legislative amendment is required to address this issue, consistent with the Review's focus on technical improvements to the NES. Section 90(2) should be amended to expressly permit payment of accrued annual leave within a reasonable period following termination, such as within seven days or the employer's next payroll cycle where practicable.
82. This reform would improve the effectiveness and application of the NES, promote certainty in its interaction with payroll systems and workplace instruments, and better advance the objects of the FW Act by balancing employee protection with practical compliance.

¹¹ [2025] FedCFamC2G 676.

Part 2: Structural Reform of Long Service Leave

A. Structural problems with state-based Long Service Leave frameworks

Issue

83. Long service leave (LSL) remains one of the most fragmented and outdated components of Australia's workplace relations framework. Despite repeated acknowledgement of its complexity since the introduction of the Fair Work Bill, the underlying structural problems associated with state and territory LSL legislation have never been resolved.
84. When the Fair Work Bill 2009 was introduced, Parliament expressly acknowledged that reliance on state and territory LSL arrangements was transitional rather than settled policy.¹²
85. More than 15 years later, that foreshadowed reform has not occurred. Instead, LSL entitlements continue to be governed by a patchwork of state and territory statutes, overlaid in some cases by modern awards, enterprise agreements and portable leave schemes.
86. This outcome reflects an unresolved structural flaw in the national workplace relations framework, rather than a considered or contemporary policy choice.
87. The persistence of multiple, uncoordinated LSL regimes is increasingly untenable in industries characterised by workforce mobility, project-based employment, fly-in fly-out arrangements and multi-jurisdictional operations.

Complexity and Regulatory Burden

88. State and territory-based LSL schemes differ materially in:
 - qualifying service; (including overseas service)
 - accrual rates and methods;
 - termination triggers and pro-rata entitlements;
 - treatment of absences, secondments and overseas service; and
 - record-keeping and compliance obligations.
89. Employers operating nationally must administer multiple parallel systems, track service under different legislative tests, and manage materially different outcomes for employees performing identical roles.
90. This complexity generates substantial compliance cost, legal risk and administrative burden that is entirely disconnected from employee protection outcomes.

Overlap and Incoherence with the *Fair Work Act 2009*

91. State-based LSL entitlements increasingly overlap with federal minimum standards, including:
 - NES redundancy pay;
 - notice of termination; and

¹² Explanatory Memorandum to the *Fair Work Bill 2008* (Cth), [26]: 'initially, the NES will draw on current state and territory arrangements for long service leave in providing this entitlement. **Meanwhile, the Government is working with state and territory governments to develop nationally consistent long service leave entitlements.**'

- modern award and enterprise agreement termination provisions.

92. The lack of integration between state LSL laws and the FW Act has resulted in inflated termination entitlements, undermining the coherence of the NES safety net.

Case Example – Infosys (Queensland)

93. The practical consequences of this fragmentation are illustrated by the Queensland Industrial Relations Commission decision involving Infosys.¹³ In that matter, an employee was found entitled to long service leave under Queensland legislation despite spending a substantial portion of the relevant service period working outside Queensland.

94. The decision turned on technical and highly jurisdiction-specific concepts of “continuous service” and “connection” to the state, rather than on where work was actually performed or where economic value was generated.

95. This outcome highlights a core defect of state-based LSL systems: employees may accrue substantial statutory entitlements in a jurisdiction with only a limited and attenuated connection to their actual work, while employers face liabilities that are difficult to predict, manage or contest.

96. Such outcomes are particularly problematic for:

- multinational employers;
- employers with nationally or globally mobile workforces;
- project-based and professional services businesses; and
- employers operating under fly-in fly-out or rotational workforce models.

Barriers to labour mobility and modern work practices

97. State-based LSL schemes were designed for an era of lifetime employment with a single employer in a single jurisdiction. That model no longer reflects contemporary labour markets.

98. The current framework discourages mobility, complicates secondments and cross-border work, and creates inequitable outcomes that depend on jurisdictional technicalities rather than service or contribution.

Relevance to the Terms of Reference

99. This issue directly engages the Review’s consideration of whether the NES is fit for purpose in light of the changing nature of work, the coherence and effectiveness of minimum entitlements, the interaction between the NES and other workplace instruments, and opportunities for structural reform to simplify and modernise the safety net.

Recommendation

100. AREEA recommends that the Review expressly recognise state and territory long service leave legislation as a source of structural complexity, incoherence and regulatory burden within Australia’s workplace relations system.

101. It is recommended that the Review:

- a) acknowledge that the current LSL framework reflects an unresolved transitional arrangement identified at the commencement of the FW Act;

¹³ [Infosys Technologies Limited v Fox \[2025\] QCA 45](#).

- b) identify the interaction between state-based LSL schemes and the NES as a priority area of concern; and
- c) consider options to improve coherence, predictability and alignment between long service leave entitlements and the national workplace relations framework, without increasing overall regulatory burden.

B. Redundancy Pay – Interaction with state Long Service Leave

Issue

102. The NES redundancy pay provisions in Division 11 of Part 2-2 of the FW Act permit cumulative termination entitlements when combined with state and territory long service leave (LSL) legislation.
103. In most jurisdictions¹⁴ employees accrue a pro-rata LSL entitlement after approximately seven years' continuous service, payable on termination including redundancy. As a result, employees made redundant after extended service may receive both NES redundancy pay (up to 16 weeks) and a lump-sum LSL payment referable to the same service period and triggered by the same termination event.
104. By around 10 years' service, this layering can result in statutory payments of six to seven months' pay, before notice or accrued annual leave, materially exceeding the intended protective purpose of redundancy pay and reflecting unintended duplication rather than a coherent safety-net design.
105. This outcome is inconsistent with the structure of s 119, which deliberately reduces redundancy pay from 16 to 12 weeks at 10 years' service on the assumption that LSL would then be payable. That coordination has been undermined by changes to state LSL regimes, which now trigger pro-rata LSL well before 10 years.
106. The issue is therefore not a failure to recognise LSL, but reliance on an outdated assumption about when LSL entitlements arise. Updating the NES to align redundancy pay with contemporary LSL thresholds would restore internal coherence and give effect to the original policy logic underpinning s 119.

Relevance to the Terms of Reference

107. This issue directly engages the Review's consideration of the objective and purpose of the NES as a clear and proportionate minimum safety net, the coherence and adequacy of NES entitlements, the interaction between the NES and other workplace instruments (including state-based statutory entitlements), and opportunities for targeted technical and structural improvements to improve clarity, consistency and workability. The current overlap undermines the integrity of the NES safety net and inflates termination liabilities in a way that is disconnected from productivity, labour mobility, or business sustainability, contrary to the objects of the FW Act.¹⁵

¹⁴ NSW – pro-rata LSL payable after 5 years on termination (including redundancy) (*Long Service Leave Act 1955* (NSW) s4(2)(a)).

Victoria – pro-rata LSL payable after 7 years on termination (*Long Service Leave Act 2018* (Vic) s6).

Queensland – pro-rata LSL payable after 7 years on termination (*Industrial Relations Act 2016* (Qld) s95).

South Australia – pro-rata LSL payable after 7 years on termination (*Long Service Leave Act 1987* (SA) s5.)

Tasmania – pro-rata LSL payable after 7 years on termination. (*Long Service Leave Act 1976* (Tas) s8.)

ACT – pro-rata LSL payable after 7 years on termination. (*Long Service Leave Act 1976* (ACT) s3.)

Northern Territory – pro-rata LSL payable after 7 years on termination. (*Long Service Leave Act 1981* (NT) s8.)

Western Australia – LSL generally payable after 10 years, with pro-rata access at 7 years. (*Long Service Leave Act 1958* (WA) s8.)

¹⁵ Section 3 of the *Fair Work Act 2009* (Cth).

Comparative Approaches

108. Comparable jurisdictions do not permit the cumulative layering of redundancy pay and long-service-style termination benefits in the manner currently allowed under Australia's framework. For example:
- a) In the United Kingdom, statutory redundancy pay is tightly capped, calculated by reference to age and length of service, and operates in isolation from other accrued entitlements, such as statutory holiday pay. There is no equivalent concept of long service leave accruing alongside redundancy pay.
 - b) In New Zealand, redundancy pay is not mandated by statute. Any redundancy compensation arises through contractual or collectively bargained arrangements, ensuring termination costs reflect enterprise-level agreement rather than inflexible statutory duplication.
 - c) In Canada, while some provinces provide statutory severance pay, it typically operates as a single termination entitlement, with long-service-based severance replacing, rather than supplementing, other redundancy-style payments.
109. Australia's system is therefore an outlier in permitting multiple termination-triggered payments derived from the same period of service, resulting in redundancy liabilities that materially exceed international norms.

Impact on Employers and Workforce Management

110. Redundancy pay was never intended to operate as a reward for long service. Its purpose is to provide short-term income support and transition assistance following the loss of employment, not to duplicate deferred service-based entitlements already compensated through long service leave schemes.
111. The compounding of redundancy pay and LSL increases the cost of workforce restructuring, discourages the retention of long-serving employees, and inhibits necessary operational change — particularly in industries exposed to commodity cycles, project-based employment and global competition.
112. These outcomes are inconsistent with a modern safety net framework that should support both fair treatment of employees and sustainable, productive enterprises.

Recommendation

113. Redundancy pay should operate as genuine transition assistance, and that where long service leave is payable on redundancy by reference to the same period of service, the NES should coordinate those entitlements to prevent cumulative duplication and restore coherence to the safety net.
114. The NES redundancy pay provisions should be amended so that redundancy pay performs only its core transitional function where long service leave is payable on termination under a state or territory law.
115. In practical terms, this would require s.119 of the FW Act to be amended so that, where an employee is entitled to a payment of long service leave on redundancy by reference to the same period of service, the employee's NES redundancy pay entitlement is limited to a fixed transitional amount, such as four weeks' pay, regardless of length of service.
116. This approach preserves redundancy pay as a genuine form of short-term income support and transition assistance, while avoiding the cumulative layering of service-based termination entitlements arising from the same service history.

117. It is also consistent with the structure of the NES, including the capacity to reduce redundancy pay where the impact of termination is mitigated (s 120), and with the approach adopted in the 1984 *Termination, Change and Redundancy Case*¹⁶ (TCR Case), which treated redundancy pay as transitional assistance and expressly distinguished it from service-based benefits such as long service leave.

Equity considerations

118. AREEA acknowledges that a coordinated approach to redundancy pay and long service leave may give rise to a perception of different outcomes for employees with the same length of service, depending on whether long service leave has been taken during employment or is paid as a lump sum on termination. In particular, it may be suggested that employees who defer taking long service leave are disadvantaged on redundancy.
119. In AREEA's view, this perception does not reflect an inequitable outcome in substance. Employees receive the same long service leave entitlement over the course of their employment, with any difference reflecting the timing of when that entitlement is accessed, rather than its existence or value. An employee who takes long service leave during employment receives that entitlement as paid time away from work, while an employee who receives long service leave on redundancy receives the same entitlement in monetary form at termination.
120. The purpose of coordinating redundancy pay with long service leave is not to discourage employees from deferring leave, but to recognise that where a substantial service-based payment is made on termination, the immediate financial impact of job loss is materially mitigated.
121. In those circumstances, redundancy pay can appropriately operate as a fixed transition payment, while continuing to perform its full transition function where long service leave has already been taken during employment. Viewed across the employment lifecycle, this approach preserves equity while restoring coherence and proportionality to termination entitlements.

¹⁶ *Termination, Change and Redundancy Case* (1984) 294 CAR 175.

Part 3: Award Issues

A. Award complexity out of step with industry reality

Issue

122. Modern awards were designed for stable, single-industry workplaces and no longer reflect integrated resource, energy and remote operations.
123. Employees often perform mixed duties that could fall across multiple awards (e.g. hospitality, maintenance, logistics within one site) yet must be covered by only one. This creates artificial classification disputes and compliance risk.
124. Conflicting case law on award coverage exacerbates uncertainty, undermining enterprise bargaining by obscuring the applicable safety net.
125. Many classification structures are based on outdated trade distinctions and do not reflect multi-skilled, cross-functional roles—particularly in FIFO and project environments. In sectors such as hydrocarbons, inconsistent classifications produce materially different rates for similar work, distorting labour markets and weakening productivity.

Overly prescriptive award content

126. Many awards remain unnecessarily prescriptive—for example, requiring formal written variations for temporary, agreed changes to part-time hours—discouraging flexibility and increasing administrative burden.
127. Divergent rules across awards for similar work further increase compliance costs and risk.

Inconsistent terminology

128. Terminology is also inconsistent. The definition of “shiftworker” and “continuous shiftworker” differs across modern awards. For example:
 - a) The **Mining Industry Award 2020** defines a shiftworker as an employee engaged to work afternoon or night shifts (or both), or as a continuous shiftworker.
 - b) The **Hydrocarbons Upstream Processing Award 2020** extends the definition to include day shifts and any combination of shifts.
 - c) The **Building and Construction General On-site Award 2020** defines a continuous shiftworker as working consecutive shifts covering 24 hours per day for at least six consecutive days.
 - d) The **Electrical, Electronic and Communications Contracting Award 2020** adopts a similar definition, but requires only five consecutive days.
 - e) The **Manufacturing and Associated Industries Award 2020** again adopts a six-day model, with comparable but not identical wording.
 - f) The **Dredging Industry Award 2020** takes a simpler approach, defining a shiftworker by reference to working a two- or three-shift system under the award.
129. These differences produce materially different outcomes for comparable roster arrangements, affecting access to penalties, leave accrual rules and other entitlements linked to shiftworker status.

130. The inconsistent treatment of “continuous” shiftwork is particularly problematic in FIFO and remote 24/7 operations, where roster cycles do not neatly align with traditional shift models.
131. A consistent, modern definition across awards would improve clarity, ensure equitable treatment of similar working arrangements, and reduce avoidable compliance risk. Absent such reform, the award system will remain misaligned with contemporary work practices and continue to undermine the objectives of the FW Act.

Recommendations

132. The Review should recommend:
- a) simplification and modernisation of award coverage and classifications, particularly for multi-skilled roles;
 - b) clearer statutory guidance on award coverage to reduce reliance on contested case law;
 - c) removal of unnecessarily prescriptive rules that do not advance genuine minimum standards; and
 - d) a consistent definition of “shiftworker” across modern awards.

B. Annualised Salaries and Award compliance

133. This item addresses the effectiveness and application of the NES, including the operation of award-based record-keeping requirements, its interaction with modern awards, and opportunities for targeted technical improvements that would better align the framework with the objects of the Fair Work Act.

Issue

134. Recent litigation concerning annualised salary arrangements in the Coles/Woolworths proceedings¹⁷ demonstrates that the modern award system — particularly its prescriptive record-keeping and reconciliation requirements — has become a significant source of technical non-compliance within the statutory safety net.
135. Although not arising directly from the NES, this misalignment between the NES, modern awards and contemporary salaried work practices has shifted compliance risk from underpayment to process failure, undermining the effectiveness of the safety net and the Fair Work Act’s objective of a balanced and productive system.

The problem in detail: Record keeping requirements in the resources and energy sector

136. Highly prescriptive award-based record-keeping requirements attached to annualised and “all-in” salary arrangements have become a major source of compliance risk, even where employees are paid well above minimum rates and are plainly better off overall.
137. Following the 2019 Fair Work Commission’s Annualised Wage Arrangements decisions¹⁸, employers are required to maintain granular, pay-period-based time records, obtain repeated employee acknowledgements and retain data for hypothetical award reconciliations. In practice, compliance risk is now driven by process failures rather than underpayment, with the system prioritising paperwork mechanics over pay outcomes.

¹⁷ Fair Work Ombudsman v Woolworths Group Limited; Fair Work Ombudsman v Coles Supermarkets Australia Pty Ltd; Baker v Woolworths Group Limited; Pabalan v Coles Supermarkets Australia Pty Ltd [\[2025\] FCA 1092](#).

¹⁸ 4 Yearly review of modern Awards – Annualised Wage Arrangements: PR716601.

138. In the resources and energy sector, these obligations are particularly unworkable and disconnected from operational reality. Continuous 24/7 operations, long-cycle FIFO rosters and high-income salaried roles are not structured around hours worked or discrete award entitlements, yet employers are required to operate parallel time-recording systems solely to satisfy award technicalities. When combined with the FW Act's reverse onus provisions, minor record-keeping defects are elevated into serious compliance exposure despite clear over-award remuneration.
139. Once employees are paid guaranteed annual earnings materially above award rates, these record-keeping requirements cease to perform any safety-net function and should no longer apply.
140. Critically, the record-keeping obligation becomes an end in itself. Employers must track hours that do not affect pay outcomes, retain signed acknowledgements that serve no industrial purpose, and operate parallel systems solely to satisfy award technicalities.
141. This is inconsistent with the NES objective of a simple, accessible and enforceable safety net and diverts resources away from productive activity in capital-intensive industries.

Example: The Mining Industry Award

- The variation of the *Mining Industry Award 2010* from 1 March 2020¹⁹ in clause 17 now requires employers paying annualised salaries to keep detailed records of start and finish times and unpaid breaks for each salaried employee, with those records acknowledged each pay period or roster cycle, solely to enable a hypothetical reconciliation against award entitlements.
142. In practice, compliance requires employers to implement parallel time-and-attendance systems for salaried employees, upgrade payroll software, vary employment contracts, obtain repeated employee acknowledgements, and conduct ongoing reconciliation exercises — despite those processes having no impact on remuneration outcomes for high-earning employees.

Recommendations

143. AREEA recommends the following changes to how annualised salaries are dealt with in awards:
- a) Enable 'set off' pay over multiple pay periods if explicitly agreed in employment contracts.
 - b) Enable agreed set-off of annualised remuneration against award entitlements over defined reconciliation periods.
 - c) Moderate award-based record-keeping obligations for annualised salary arrangements. Award-imposed time recording, pay-period acknowledgement and reconciliation requirements should be moderated for annualised salary arrangements, and should cease to apply once an employee is paid guaranteed annual earnings of at least 1.5 times the relevant award comparison rate.
 - d) Permit bonuses and incentive payments to be taken into account in assessing compliance with award minimums, provided employees are not disadvantaged overall.

¹⁹ 4 Yearly review of modern Awards – Annualised Wage Arrangements: PR716601 (12 February 2020).

RECOMMENDATIONS

144. The following table sets out AREEA's summary of recommendations to the Inquiry on all issues set out in the above submission.

ISSUE	RECOMMENDATION	DETAIL
A. Maximum weekly hours of work	Remove unnecessary constraints on hours of work that no longer reflect modern workplaces or industry practice.	Clarify that enterprise agreement-approved averaging arrangements can operate without an ongoing "reasonableness" overlay, provided the agreement specifies averaging periods, rostering arrangements and safeguards.
B. Personal/carers leave	Resolve the uncertainty surrounding what constitutes a "day" of personal/carers' leave.	Amend s 96 to separate accrual mechanics from payment when leave is taken, and to provide a clearer method suited to roster-cycle averaging while preserving the 10-day quantum.
C. Public holiday rostering	End the requirement for employers in continuous, FIFO and shift-based operations to repeatedly "request" work on public holidays.	Permit roster-based and block "requests" over reasonable periods of time (e.g. quarterly or annually), and provide clearer statutory guidance on refusals in 24/7 and FIFO contexts
D. Public holiday payments	Eliminate double payment for public holidays.	Permit offsetting where public holidays are already compensated through annualised salaries or enterprise agreements, ensuring employees are not paid twice for the same entitlement.
E. Annual leave cash out and excessive accrual	Cashing out annual leave should be available to all employees. Permit employers to direct employees to take annual leave where an excessive balance has accrued.	Establish an NES-based right to cash out annual leave for all employees, subject to safeguards, without reliance on award or enterprise agreement permission. Amend the NES right to direct employees with excessive annual leave balances to take leave, provided notice and a reasonable contingency balance is maintained.
F. Timing of payments of entitlements on termination	Remove the requirement to pay accrued entitlements on the day of termination.	Amend s 90(2) FW Act to allow payment of accrued annual leave within a defined reasonable period after termination (e.g. within 7 days or the next practicable payroll cycle).
G. State-based long service leave	Address the excessive complexity and inconsistency of state and territory long service leave regimes.	Rationalise and better harmonise key features of state and territory long service leave schemes, including qualifying periods, portability and termination entitlements, to

		reduce compliance burden and distorted outcomes for nationally operating employers, and to restore long service leave as a genuine reward for service rather than a termination-driven entitlement.
H. Redundancy pay and LSL overlap	Prevent the duplication of service-based termination entitlements.	Amend the FW Act to ensure redundancy pay does not layer on top of long service leave payable for the same period of service, and that combined termination payments remain proportionate to the transitional purpose of redundancy pay.
I. Award complexity	Reduce award complexity that no longer reflects how work is performed, ensure consistent terminology used across Awards.	Simplify award coverage and classifications for multi-skilled roles, provide clearer guidance to reduce coverage disputes, and remove prescriptive award rules that do not advance genuine minimum standards.
J. Annualised Salaries and Award compliance	Wind back disproportionate record-keeping obligations for annualised salaries.	Permit agreed reconciliation over defined periods; moderate award-based record-keeping requirements; provide clear exemptions for higher-paid employees; and allow bonuses and incentives to count toward minimum compliance where employees are not disadvantaged overall.

CONCLUDING REMARKS

145. The National Employment Standards are no longer operating in a manner that is coherent, accessible or fit for purpose for large sections of the modern Australian workforce.
146. The evidence set out in this submission demonstrates that several NES provisions — particularly those dealing with hours of work, leave accrual and payment, public holidays, and the interaction with awards and enterprise agreements — have been interpreted and applied in a manner contrary to the original policy intent. In practice, they now operate through technical legal constructs that require judicial interpretation, generate inconsistent outcomes, and impose unnecessary compliance risk on employers without delivering commensurate benefit to employees.
147. This misalignment is most acute in industries characterised by continuous operations, FIFO arrangements, compressed rosters²⁰, variable hours and annualised salary structures. In those environments, the NES no longer functions as a simple safety net, but instead as a source of complexity, duplication and disputation — often cutting across bargained outcomes and established remuneration models.
148. Many of the problems identified do not arise from deliberate non-compliance, but from structural drafting deficiencies and poor interaction between the NES and other workplace instruments. Post-the High Court decision in *Mondelez*, conflicting interpretations of core concepts such as “ordinary hours” and “days”, and rigid statutory timeframes illustrate a framework that has not kept pace with contemporary work practices or payroll realities.
149. The NES review presents a critical opportunity to reset the system. Targeted, technical amendments — focused on clarity, internal consistency and proper interaction with awards and enterprise agreements — can restore the NES to its intended role as a clear, enforceable baseline, while preserving flexibility, supporting productivity and reducing unnecessary regulatory burden.
150. Without such reform, the NES will continue to undermine confidence in the workplace relations system, encourage further litigation, and detract from the objects of the FW Act, including the promotion of productive, cooperative and economically sustainable workplaces.
151. The Review Panel must recommend practical legislative corrections that modernise the NES, address identified red-line issues, and ensure the framework remains relevant, effective and workable for both employers and employees in a changing economy.

²⁰ The working of longer hours over a shorter period.

ABOUT AREEA

The Australian Resources and Energy Employer Association (AREEA) is the national employer association representing Australia's mining, oil and gas industries, as well as the associated servicing and contracting sectors.

AREEA is the largest and most diverse representative body of the resources and energy industry and serves as the sector's specialist industrial relations organisation. AREEA is a member of the National Workplace Relations Consultative Committee (NWRCC) and the Council on Industrial Legislation (COIL) and has played a significant role in the development of Australia's industrial relations framework since Federation.

AREEA is Australia's resources and energy industry group and has provided a unified voice for employers on workforce and other industry matters for more than 103 years.

AREEA's membership spans the entire resources and energy industry supply chain, including exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to these sectors.

AREEA works to ensure Australia's resources and energy industry is an attractive and competitive place to invest and do business, employ people and contribute to our national well-being and living standards.

AREEA members across the resources and energy industry are responsible for a significant level of Australian employment, with an estimated 10% of our national workforce, or 1.1 million Australians, employed directly and indirectly as a result of the resources industry.

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Australian Resources and Energy Employer Association (AREEA)

Email: policy@areea.com.au

Phone: (07) 3210 0313

Website: www.areea.com.au

ABN: 32 004 078 237

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