



# Submission to the National Employment Standards Inquiry

Submission by the Australian Council of Trade Unions 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

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## Introduction

### About the ACTU

The Australian Council of Trade Unions (ACTU) is Australia's peak national body of unions, founded in 1927. Our 37 affiliated unions and trades and labour councils represent nearly 2 million members across all industries and occupations. With this movement, the ACTU has a long and proud history of winning for working people that it continues to build upon.

The ACTU has played the leading role in advocating for, and winning the improvement of working conditions, including on almost every Commonwealth legislative measure concerning employment conditions and trade union regulation. The ACTU has also appeared regularly before the Fair Work Commission and its statutory predecessors, in numerous high-profile test cases, as well as annual national minimum and award wage reviews.

## Overview

The ACTU welcomes the opportunity to make this submission 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**). We have argued that the NES should be reviewed to ensure that its provisions are operating as intended,<sup>1</sup> and we are pleased that the Parliament has instigated this process.

The NES provisions in Part 2-2 of the *Fair Work Act 2009* (Cth) (**FW Act**) are an important foundational component of Australia's safety net of minimum employment protections. Since they commenced operation on 1 January 2010, the NES have not been the subject of dedicated review. They were considered as part of the 2012 Post-implementation Review of the FW Act, and the 2015 Productivity Commission Review of the Workplace Relations Framework (see further below).

While the range of NES entitlements has expanded over time, problems have arisen in the application and interpretation of some NES entitlements by the Fair Work Commission (**FWC**) and the courts, creating confusion and obstructing their intended operation. In the case of Long Service Leave, plans to replace the fragmented and confusing system with a simple national standard in the early days of the FW Act never eventuated. The world of work has also changed significantly since the NES was first introduced, adding weight to the case for a review to ensure it is fit for purpose.

For this submission the ACTU has closely consulted its affiliated unions on the operation of the NES, and technical difficulties which have arisen in relation to specific NES provisions. The recommendations the ACTU provides are mostly of a technical nature, directed at improving the effective operation of the laws or bringing them closer to their original policy intent. In addition, we raise for consideration five areas where the NES should be expanded to reflect increasingly accepted norms for minimum labour standards: reproductive health leave, cultural and kinship leave, five weeks of annual leave, and minimum standards for predictable hours of work, and improved entitlements to carer's leave.

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<sup>1</sup> ACTU, 2024 Congress Policy, Industrial Relations, page 3.

The Terms of Reference<sup>2</sup> indicate that the Inquiry will consider the operation and adequacy of the NES 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 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.

The Terms of Reference excluded from the scope of this Inquiry the following NES provisions, on the basis that separate statutory reviews either have occurred or will occur (although noting that this does not prevent broader consideration of the interaction of these provisions with other NES entitlements):

1. Division 4 – Request for Flexible Working Arrangements
2. Division 4A – Casual Employment
3. Division 5, Subdivision B – Parental Leave
4. Division 7, Subdivision CA – Family and Domestic Violence Leave.

### The NES in Summary and Previous Reviews/Literature

The stated purpose of the then Labor Government in introducing the NES as part of the FW Act was as follows: “The Government's key objective is to address public concern about the

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<sup>2</sup> Parliament of Australia, Standing Committee on Employment, Workplace Relations, Skills and Training, [Inquiry into the operation and adequacy of the National Employment Standards](#), Terms of Reference, 27 November 2025.

adequacy of the safety net under the current workplace relations system by providing a safety net which is fair for employers and employees and supports productive workplaces.”<sup>3</sup> This was a reference to the former Australian Fair Pay and Conditions Standard introduced by the Coalition Government through the 2005 Work Choices legislation, which provided for only five basic employment conditions.

All employees of national system employers covered by the federal workplace relations system have access to NES entitlements (s.60).

As originally enacted, Part 2-2 of the FW Act provided for the following NES entitlements:

- Maximum weekly hours of work (Division 3)
- Requests for flexible working arrangements (Division 4)
- Parental leave and related entitlements (Division 5)
- Annual leave (Division 6)
- Personal/carer’s leave and compassionate leave (Division 7)
- Community service leave (Division 8)
- Long service leave (Division 9)
- Public holidays (Division 10)
- Notice of termination and redundancy pay (Division 11)
- Fair Work Information Statement (Division 12).

The following entitlements have since been added to the NES:

- Casual employment (Division 4A, providing a pathway for casuals to permanent employment)
- Family and domestic violence leave (Division 7, Subdivision CA)
- Superannuation contributions (Division 10A)
- Casual Employment Information Statement (Division 12, ss.125A-125B).

The 2012 Post-implementation Review of the FW Act found that the NES (along with modern awards) were: “largely meeting their legislative intention, which was to establish a safety net of employment terms and conditions that would ensure basic rights and entitlements for workers in the national system and protect the most vulnerable members of the workforce from exploitation.”<sup>4</sup> The Review Panel then focused on certain specific NES entitlements. For example,

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<sup>3</sup> *Explanatory Memorandum for the Fair Work Bill 2008 (Regulatory Analysis)*, para [25].

<sup>4</sup> R McCallum, M Moore and J Edwards, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, Department of Education, Employment and Workplace Relations, Canberra, 2012, page 86.

it recommended extension of the right to request flexible work arrangements to a wider range of employees (implemented through the *Fair Work Amendment Act 2013* (Cth)) and expedition of the development of a national long service leave standard.

The Productivity Commission 2015 Report found that: “The NES as a whole have attracted little controversy. There are some concerns about the details of particular entitlements and some suggestions for new entitlements.”<sup>5</sup> The absence of controversy was considered to be “mainly because [the NES’s] prime aspects (like annual leave) have a long and accepted role by all stakeholders and accord with community norms.”<sup>6</sup> The Report considered possible changes to the NES in relation to long service leave, public holidays and annual leave, making several recommendations which were not implemented.

The Productivity Commission also observed that: “The NES is not just an economic instrument, but one that also seeks to establish or shape social norms (for example, that working and caring for children are compatible).”<sup>7</sup> It considered two areas in which the NES could be enlarged: family and domestic violence leave (since included in the NES, initially unpaid but since 2022 as a paid entitlement) and rights relating to breastfeeding in the workplace. The view that “the NES can be expected to adapt as social norms evolve”<sup>8</sup> is equally apposite in relation to reproductive health leave and cultural and kinship leave, which we advocate should be included in the NES, along with five weeks of annual leave, minimum standards for predictable hours of work, improved carer’s leave entitlements.

Some other changes have been made over the years to particular NES entitlements, including amendments made by the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* (Cth) to provide stronger dispute resolution mechanisms for the rights to request flexible work and unpaid parental leave.

The NES as a whole have not been the subject of extensive academic consideration.<sup>9</sup> In a 2020 article, Campbell and Charlesworth identified four crucial weaknesses of the NES:<sup>10</sup>

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<sup>5</sup> Productivity Commission, *Workplace Relations Framework: Report No. 76*, Volume 1, 30 November 2015, page 513.

<sup>6</sup> *Ibid*, 20.

<sup>7</sup> *Ibid*, 519.

<sup>8</sup> *Ibid*, 541.

<sup>9</sup> Specific NES entitlements have been more closely examined in scholarly contributions, see e.g. A Chapman, “Is the Right to Request Flexibility under the Fair Work Act Enforceable?” (2013) 26 *Australian Journal of Labour Law* 118.

<sup>10</sup> I Campbell and S Charlesworth, “The National Employment Standards: An Assessment” (2020) 33 *Australian Journal of Labour Law* 36.

- The narrow range of entitlements, deriving mostly from the Australian Fair Pay and Conditions Standard and test cases in the award sphere, but “falling short of what could be expected in a floor of minimum standards for employees in a modern employment system”.<sup>11</sup>
- The existence of major gaps which leave significant groups of workers unprotected or only partially protected – especially non-employees (genuine and bogus self-employed workers) and casual employees “who, either in total or in part, are excluded from many of the NES provisions” (e.g. paid annual leave, paid personal/carer’s leave, notice of termination and redundancy pay).<sup>12</sup>
- A “lack of substance” in several NES provisions “with the result that their value as protective regulation is diminished. A particular “example of a hollow NES provision” identified by the authors is that relating to maximum weekly working hours (s.62), because of the possibility of averaging the standard weekly ordinary hours (38) over a longer period (up to 6 months for award/agreement-free employees); and the ability of employers to require employees to work reasonable additional hours.<sup>13</sup>
- The lack of a mechanism for review and adjustment of NES entitlements, as compared to the test case mechanism in the traditional award system, “raising a risk that the standards might not be updated and might become ossified”.<sup>14</sup>

In a subsequent paper (in 2023) Campbell and Charlesworth argued that despite the limitations they had previously identified: “the NES are a particularly important platform for innovative proposals” and “the most appropriate regulatory level for reform initiatives [in particular] to promote secure work.<sup>15</sup> Articulating this position further:

Partly as a result of their origins and weaknesses, the NES have, until recently, been overlooked in discussion of regulatory reform. Nevertheless, if they can be strengthened, for example, by removing or narrowing exclusions, firming up existing provisions and extending the range via additional standards, they can be a robust platform for promoting more secure work.<sup>16</sup>

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<sup>11</sup> Ibid, 41.

<sup>12</sup> Ibid, 42.

<sup>13</sup> Ibid, 43, arguing further that: “Far from protecting employees, the provision seems oriented more to buttressing the power of employers to impose schedules that suit their interests”.

<sup>14</sup> Ibid, 44-45.

<sup>15</sup> I Campbell and S Charlesworth, “Promoting Secure Work: Two Proposals for Strengthening the National Employment Standards” (2023) 36 *Australian Journal of Labour Law* 232, 233.

<sup>16</sup> Ibid, 242.

As examples of the capacity of the NES to advance new employment protections, the authors highlighted the addition in recent years of family and domestic violence leave and the right to employer superannuation contributions as new NES entitlements, and improvements to the right to request flexible work.<sup>17</sup> On this basis, they argued for two further reforms of the NES aimed at tackling insecure work: extending paid annual and personal/carer’s leave entitlements to casual employees (as has occurred with family and domestic violence leave), and replacing the Fair Work Information Statement and Casual Employment Information Statement with a right of employees to receive a more comprehensive “Statement of Terms and Working Conditions” relating to their job.<sup>18</sup>

## Recommendations

<p><b>1. Annual leave – definition of shiftworkers</b></p>	<p><b>Recommendation 1</b></p> <p>A baseline needs to be established in s.87(b)(i) for which shiftworkers are entitled to 5 weeks of annual leave under an award, which would also apply as the minimum for enterprise agreements by virtue of s.196.</p> <p>This baseline could provide that an employee qualifies for the shiftworker annual leave entitlement if:</p> <ul style="list-style-type: none"> <li>(a) the employee works hours classified as shiftwork under the modern award they are covered by; and</li> <li>(b) the employee: <ul style="list-style-type: none"> <li>(i) regularly works on Sundays and public holidays - “regularly” means at least half of the Sundays and public holidays in the year (31, based on 26 Sundays + 5 public holidays); or</li> <li>(ii) is a permanent night shift employee; or</li> <li>(iii) works a compressed roster for at least 40% of the year including working every Sunday and public holiday within that roster.</li> </ul> </li> </ul> <p>The same baseline could then be applied through amendments to s.87(3) for award/agreement free employees.</p> <p>This recommendation is framed around the present entitlement to 5 weeks’ annual leave for shiftworkers in s.87. This would increase to 6 weeks based on our proposal in Recommendation 13 below.</p>
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<sup>17</sup> Ibid, 245.

<sup>18</sup> Ibid, 246-260.

<p><b>2. Annual leave and personal leave – deductions on public holidays</b></p>	<p><b>Recommendation 2</b></p> <p>Amend ss.89 and 98 to clarify that, where annual and/or personal leave entitlements in an enterprise agreement are above NES minima, the rule in those provisions that the employee is taken not to be on leave when it falls on a public holiday, also applies to the proportion of leave above the minima.</p>
<p><b>3. Annual leave and personal leave – accrual during period of workers’ compensation</b></p>	<p><b>Recommendation 3</b></p> <p>Provide a true national standard by amending s.130 to provide that employees accrue annual leave and personal leave while on workers’ compensation in all states, territories and the Commonwealth.</p>
<p><b>4. Annual leave and personal leave – accrual during lockouts and other PIA</b></p>	<p><b>Recommendation 4</b></p> <p>Amend s.87(2), s.96(2) and/or the s.22 definition of “service” to clarify that periods of protected industrial action including lockouts (employer response action) are considered periods of service, during which employees accrue annual leave and personal/carer’s leave.</p>
<p><b>5. Personal/carer’s leave – calculation of entitlements (Mondelez decision)</b></p>	<p><b>Recommendation 5</b></p> <p>Amend s. 96(1) to clarify that the word “day” is referring to “the portion of a 24 hour period that would otherwise be allotted to work”; and that a “day of paid personal/carer’s leave” under s.96(1) is an authorised absence from work for a working day for a reason set out in s.97.</p>
<p><b>6. Personal/carer’s leave – rate of pay</b></p>	<p><b>Recommendation 6</b></p> <p>Amend s.99 to provide that an employee is entitled to be paid while on personal/carer’s leave without any loss of ordinary pay they would have received if they had worked (i.e. payment should include penalty rates, bonuses, loadings, allowances and other separately identifiable amounts, rather than being at the base rate of pay for ordinary hours of work). This could be formulated as an entitlement of the employee to receive their “full rate of pay” as now applies for family and domestic violence leave under s.106BA(1) (see also s.18).</p>
<p><b>7. Personal/carer’s leave – medical certificates</b></p>	<p><b>Recommendation 7</b></p> <p>Section 107(3) should be amended such that “evidence that would satisfy a reasonable person” is only required after an absence from work on paid personal/carer’s leave on more than two consecutive days. Further, the section should be amended to provide that workers have the ability to use enduring forms of evidence for enduring illness, injury or caring responsibilities, rather than being required to produce evidence on each separate occasion such leave is requested.</p>
<p><b>8. Redundancy pay - “ordinary and customary turnover of labour” exception</b></p>	<p><b>Recommendation 8</b></p> <p>Remove the words “except where this is due to the ordinary and customary turnover of labour” from s.119(1)(a).</p>
<p><b>9. Redundancy pay after at least 10 years of service</b></p>	<p><b>Recommendation 9</b></p> <p>Row 10 in the table at s.119(2) should be amended as follows:</p>

	At least 10 years ... 20 weeks
<p><b>10. Long service leave</b></p> <p><b>National long service leave standard</b></p> <p><b>Award-derived and agreement-derived long service leave terms</b></p>	<p><b>Recommendation 10.1</b></p> <p>The ACTU believes there is merit in exploring the development of a national standard for long service leave but recognises the challenges in building the intergovernmental consensus required to make this happen. As a next step, Commonwealth and State Governments could develop an options paper for reform to help with building such consensus. This could include an audit of current entitlements – including award-derived and agreement-derived long service leave terms (see below) – to better understand their application, different options for the national standard and recommendations on next steps. The paper should also recognise and protect the portable long service leave schemes operating in many jurisdictions.</p> <p><b>Recommendation 10.2</b></p> <p>Amend FW Act s.113, which was intended only as a transitional provision for the shift to the Fair Work system, with the objective of ensuring that outdated inferior award and agreement provisions no longer play a role in setting long service leave standards for employees. The amendment would preclude the operation of award-derived or agreement-derived long service leave terms that provide for lesser entitlements than the applicable state or territory legislation.</p>
<p><b>11. Paid reproductive health leave</b></p>	<p><b>Recommendation 11.1:</b></p> <p>The NES should be expanded to provide universal access to 10 days’ paid reproductive health leave, an entitlement that provides leave and flexibility for workers to address reproductive health issues that impact on their capacity to work or take preventative measures like health screening.</p> <p><b>Recommendation 11.2:</b></p> <p>Include reproductive health as a protected attribute in the FW Act in all relevant sections.</p>
<p><b>12. Cultural and kinship leave</b></p>	<p><b>Recommendation 12.1</b></p> <p>The unique caring responsibilities that Aboriginal and Torres Strait Islander workers hold under kinship should be recognised within the NES. This is most appropriately achieved by updating the definition of “immediate family” in the NES to the following:</p> <p><i>“immediate family” of a person means:</i></p> <p><i>(a) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the person; or</i></p> <p><i>(b) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the person; or</i></p> <p><i>(c) a person with whom there is a connection, relationship or obligation arising under Aboriginal or Torres Strait Islander kinship customs, traditions or cultures of communities, groups, or families to which the first person belongs.</i></p> <p><b>Recommendation 12.2</b></p>

	<p>The ACTU proposes the NES be amended to introduce a new form of leave, “Aboriginal and Torres Strait Islander Cultural Leave”, available to Aboriginal and Torres Strait Islander employees as detailed in section 12 of this submission.</p>
<p><b>13. Increasing annual leave entitlements</b></p>	<p><b>Recommendation 13</b></p> <p>Amend s.87(1) to increase the quantum of paid annual leave for employees covered by the NES from 4 to 5 weeks; and from 5 to 6 weeks for shiftworkers who qualify for an additional week of annual leave.</p> <p>Require the FWC to vary modern awards to lift the casual loading from 25% to 27.5% to compensate casual employees for not being entitled to this additional week of annual leave.</p>
<p><b>14. Improvements to personal/carer’s leave</b></p>	<p><b>Recommendation 14</b></p> <p>There should be an additional and standalone amount of paid carer’s leave available, which can only be taken for caring purposes. The Government should further investigate the case for this new entitlement, and the quantum of additional paid carer’s leave that should be provided.</p> <p>Make paid personal/carer’s leave additionally available to:</p> <ul style="list-style-type: none"> <li>• employees who care or expect to care for a dependent or any other person significant to the employee to whom the employee provides regular care or is in palliative care (in line with Recommendation 17 of the Work and Care Final Report);</li> <li>• employees who have kinship relationships and kinship care obligations;</li> <li>• foster parents to ensure they have access to entitlements to provide the necessary care and support to foster children in their care; and</li> <li>• casual employees.</li> </ul> <p>Extend the entitlement to include a broader range of circumstances and carer responsibilities including attending medical appointments, medical conditions that render the employee unfit for work, and attending to other caring activities (such as organising formal care arrangements, attending medical and other appointments with the person being cared for, and palliative care).</p>
<p><b>15. Roster justice</b></p>	<p><b>Recommendation 15</b></p> <p>Amend s.62 (dealing with maximum weekly hours) by adding the following sub-sections:</p> <p style="padding-left: 40px;"><b>Arrangements for working hours</b></p> <p style="padding-left: 80px;">(5) An employer must provide an employee (other than a casual employee) predictable hours of work.</p> <p style="padding-left: 80px;">(6) In determining whether hours of work are predictable for the purpose of sub-section (5), the following must be taken into account:</p> <p style="padding-left: 120px;">(a) whether the employer has provided a regular pattern of work in writing, including the days of work and start and finish times;</p> <p style="padding-left: 120px;">(b) changes to the regular pattern of work are made on at least two weeks’ notice and following genuine</p>

	<p>consultation of at least two weeks, including taking into account the employee's personal circumstances (including family responsibilities and caring arrangements);</p> <p>(c) overtime payments are payable for all work performed outside the regular pattern of work; and</p> <p>(d) an employee may refuse a roster change if it is unreasonable regarding their personal circumstances.</p> <p>(7) In the case of a dispute about sub-section (5), the status quo remains until the dispute is determined.</p>
<b>16. Giving workers back time</b>	<p><b>Recommendation 16</b></p> <p>As the next step towards a 4-day week, the Australian Government should examine the option of:</p> <ul style="list-style-type: none"> <li>• reducing maximum weekly hours in the NES from 38 down to 35; and</li> <li>• flowing that through to the modern awards, with no loss of pay and a clear right to request to work reduced days, tailored to industry or occupational circumstances.</li> </ul> <p>The Australian Government should also actively support and promote those employers and unions that have moved to, or are considering moving to, a 4-day week and other approaches to give workers back their time.</p>
<b>17. Taking paid annual leave</b>	<p><b>Recommendation 17</b></p> <p>The ACTU supports amending s.88 to:</p> <ul style="list-style-type: none"> <li>• allow an employee to request that an already approved period of leave be varied or cancelled, with such a request not to be unreasonably refused by the employer;</li> <li>• clarify that an annual leave request, once approved by the employer, cannot be cancelled unilaterally by the employer.</li> </ul>
<b>18. Enforcing NES entitlements in state/territory jurisdictions</b>	<p><b>Recommendation 18</b></p> <p>An amendment is sought to enable eligible state and territory courts to have the same powers as federal courts under s.545(1) to "make any order the court considers appropriate", once satisfied that a person has contravened or proposes to contravene the NES.</p>
<b>19. Exclusion of service as a casual from calculation of entitlements to notice of termination and redundancy pay</b>	<p><b>Recommendation 19</b></p> <p>The ACTU supports the repeal of ss.117(4) and 119(3).</p>
<b>20. Definition of "service" for accrual of annual leave and personal/carer's leave under portable long service leave schemes</b>	<p><b>Recommendation 20</b></p> <p>Amend s.22 to include periods of unpaid authorised absence, where a worker is taking long service leave under a portable scheme, as periods of service. This would ensure that periods of absence under such a scheme are counted towards annual leave and personal leave entitlement calculations.</p>

## Specific NES Entitlements

### 1. Annual leave – definition of shiftworkers

#### *Issue/problem*

Section 87 of the FW Act provides employees with an entitlement to 4 weeks' paid annual leave, or 5 weeks for shiftworkers who meet the requirements of s.87(1)(b), i.e. if:

- (i) a modern award applies to the employee and defines or describes them as a shiftworker for the purposes of the [NES]; or
- (ii) an enterprise agreement applies to the employee and defines or describes them as a shiftworker for the purposes of the [NES]; or
- (iii) the employee qualifies for the shiftworker annual leave entitlement under subsection (3) (this relates to award/agreement free employees)".

Section 87(3) provides that:

An award/agreement free employee qualifies for the shiftworker annual leave entitlement if:

- (a) the employee:
  - (i) is employed in an enterprise in which shifts are continuously rostered 24 hours a day for 7 days a week; and
  - (ii) is regularly rostered to work those shifts; and
  - (iii) regularly works on Sundays and public holidays; ...

Section 196 provides that (when approving an enterprise agreement) the FWC must be satisfied that the agreement defines or describes an employee as a shiftworker, where a modern award is in operation and covers an employee and defines or describes the employee as a shiftworker for purposes of the NES. In effect, s.196 means that "an agreement may not adopt a narrower definition [of shiftworker] than in any award that would otherwise apply".<sup>19</sup>

Various FWC and court decisions have interpreted these provisions to deny certain types of shiftworkers the right to the additional week of annual leave. Unions have also reported

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<sup>19</sup> A Stewart et al, *Creighton and Stewart's Labour Law*, Federation Press, 7th edition, 2025, [16.32].

examples of employers applying these provisions in a way that is detrimental to employees, at times in reliance on these decisions.

#### The “34 Sundays, 6 public holidays” formula

The FWC has interpreted the s.87(3)(a)(iii) requirement that an award/agreement free employee “regularly works on Sundays and public holidays” as requiring that the employee work at least 34 Sundays and 6 public holidays within a year: *O’Neill v Roy Hill Holdings Pty Ltd*.<sup>20</sup> This meant that an employee working on average 31.35 Sundays and 6 public holidays in a year did not qualify for the additional week’s leave. Employers have relied on this interpretation in applying the NES provisions, as well as applicable award and enterprise agreement provisions.

However in another decision, the FWC rejected an employer organisation’s application to adopt the 34 Sundays and 6 public holidays formula in the *Registered and Licensed Clubs Award*.<sup>21</sup> The Full Bench considered that formula inapplicable outside work contexts based on a continuous shift work system (e.g. engineering, manufacturing) where a continuous level of output is sought to be maintained, and where it is assumed that a shiftworker works an equal number of shifts on each of the seven days of the week. In clubs, workers are often rostered more in busier periods towards the end of the week and weekends; and while they may work many Sundays, might work less than 6 public holidays.<sup>22</sup>

In *HSU v DPG Services Pty Ltd*<sup>23</sup> a Full Bench stated that: “We do not accept that the clauses in question [in the *Aged Care Award* and the applicable enterprise agreement] are to be properly construed by adopting a particular metal trades industry standard in the context of a fundamentally different clause within the aged care industry, where such a standard has not previously applied.” The Full Bench considered that *O’Neill v Roy Hill*, while relevant to the entitlement for seven-day shiftworkers who regularly work on Sundays and public holidays, “[is] not a useful guide to understanding the equivalent entitlement in the aged care industry, and given the significant differences between the shiftworker terms in the relevant awards.”

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<sup>20</sup> [2015] FWC 2461.

<sup>21</sup> *4-Yearly Review of Modern Awards - Registered and Licensed Clubs Award 2010* [2020] FWCFB 4762.

<sup>22</sup> *Ibid* at [17]-[18]. See also *Fair Work Ombudsman v Woolworths Group Ltd* (2025) 343 IR 340 at 434 where Perram J (although dealing with the different context of rostering arrangements for employees “regularly working Sundays” under the Retail Award) stated that: “Even a cursory examination of [cases including *O’Neill v Roy Hill*] show that they are not remotely authority for the proposition that as a matter of law the expression ‘regularly works Sundays’ means on average that an employee works 34 Sundays each year”. The Fair Work Ombudsman advises that: “In considering whether an employee regularly works Sundays and public holidays the threshold of 34 Sundays and 6 public holidays is not a universally applicable standard.” See: [Extra week of annual leave for shiftworkers \[K600359\] - Fair Work Ombudsman](#)

<sup>23</sup> [2023] FWCFB 81 at [21].

An alternative formulation - at least 35 shifts on Sundays and public holidays over the course of a year - was determined in *re Hospital Employees Conditions of Employment (State) Award (NSW)* “to make due allowance for vagaries in particular rosters and for unavoidable absence from duty.”<sup>24</sup>

The common application of the 34 Sundays and 6 public holidays formula has the effect that many workers who bear the burden of regular shift work miss out on the entitlement to the additional week of annual leave under the NES (and award/agreement provisions based on the NES). For example, AWU members working on offshore hydrocarbon and onshore mining and hydrocarbon sites have been denied the additional week on the basis of the 34 Sundays, 6 public holidays formula because they only work half of the year (or sometimes less) on a compressed roster. However, when they are on roster, they work every Sunday and every public holiday within that roster (these days are treated as any other day). It is physically impossible for these workers to work 34 Sundays because they work a 40% or 50% roster, but they still “regularly” work Sundays - every time they are on roster.

#### Additional requirements to meet the definition of shiftworker

It is possible that an employee meets the 34 Sundays and 6 public holidays formula, but is found to be disentitled to the extra week of annual leave on other grounds. This is illustrated by a case run by the United Workers Union (UWU), *Bega Dairy and Drinks Pty Ltd v UWU*,<sup>25</sup> where a shiftworker’s entitlement to the additional week of annual leave was disputed by the employer. The applicable enterprise agreement provided that for purposes of the entitlement to the additional week of annual leave under s.87(1)(b): “a shiftworker is a 7 day shiftworker who is regularly rostered to work on Sundays and public holidays”. The employee, Ory Wilson, worked on a 12:20 roster pattern (fixed 12 hour, 20 minute shifts on the same 3 days each week). Across the operation, employees were rostered to work every day of the week, although no work occurred between 6.20 pm Saturdays and 6.00 pm Sundays. Deputy President Boyce determined that to meet the definition of a 7 day shiftworker in the agreement, the employee needed to be rostered to work an equal number of shifts on each of the 7 days of the week across the relevant period (it was not enough that the employer ran a roster pattern covering every day of the week). Although the employee here worked every Sunday and (in the UWU’s submission) enough public holidays, he was found not to meet the definition of shiftworker to

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<sup>24</sup> 1976 AR 275.

<sup>25</sup> [2023] FWC 171.

qualify for the extra week's leave. The UWU observes that as a result of this decision: the employer has the benefit of a 7 day operation; its member bore the disutility of working every Sunday; but he did not get the benefit of the fifth week of annual leave (the historical basis of which is to compensate employees for the disutility of working on Sundays and public holidays).

We are also aware of employers determining arbitrary rules for application of the shiftworker entitlement to additional annual leave. The NSW Nurses and Midwives Association (**NSWNMA**) has provided an example where a hospital has determined that to qualify for 6 weeks' annual leave under the *Nurses' Award 2020* (which requires being regularly rostered over seven days of the week and regularly working on weekends), an employee must have worked at least 29 times on each day of the week (Monday-Sunday) over the year. This is said to represent 55% of the available opportunities to work on a given day across 52 weeks. These NSWNMA members can be rostered and generally do work across 7 days of the week, and usually work at least one Saturday or one Sunday each fortnight. In the union's view this establishes a regular pattern of work consistently across the entire week, which should satisfy their eligibility for the award entitlement to additional annual leave for shiftworkers.

#### Enterprise agreement definitions of shiftworker

In *United Voice v Serco Sodexo Defence Services Pty Ltd*,<sup>26</sup> the Federal Circuit Court upheld an agreement provision excluding "non-continuous shiftworkers" (i.e. those who did not continuously work shifts over 7 days a week, 24 hours per day including public holidays and weekends) from the entitlement to the additional week of leave, while continuous shiftworkers were eligible. Construing s.87(1)(b)(ii), under which an employee receives 5 weeks' annual leave if an agreement defines or describes the employee as a shiftworker for the purposes of the NES, the court found that: "the agreement does not, expressly or impliedly, exclude the NES. Further, the agreement does not reduce any entitlement of any worker employed under it."<sup>27</sup> This interpretation enables enterprise agreements to undermine the entitlement to 5 weeks' annual leave for certain shiftworkers.

#### **Recommendation 1**

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<sup>26</sup> (2014) 292 FLR 32.

<sup>27</sup> *Ibid* at [126]. Further at [129]: "The agreement simply recognises different categories of workers. Pursuant to the terms of the agreement, neither category of worker has any of their entitlements reduced. ... Rather, each category of shiftworker receives exactly what he or she is entitled to receive. Therefore, there cannot be any contravention of s 87(1)(b)(ii) by the terms or operation of the agreement."

The above discussion exposes that the NES does not actually bestow a clear entitlement to the additional week's annual leave for shiftworkers who are covered by awards or enterprise agreements (leaving the matter to be determined in those instruments); and that while the NES does provide some parameters for that entitlement for award/agreement free employees, court and tribunal decisions have undermined it (with some flow on to the approach taken towards award/agreement covered employees).

A baseline needs to be established in s.87(b)(i) for which shiftworkers are entitled to 5 weeks of annual leave under an award, which would also apply as the minimum for enterprise agreements by virtue of s.196.

This baseline could provide that an employee qualifies for the shiftworker annual leave entitlement if:

- (a) the employee works hours classified as shiftwork under the modern award they are covered by; and
- (b) the employee:
  - (i) regularly works on Sundays and public holidays - "regularly" means at least half of the Sundays and public holidays in the year (31, based 26 Sundays + 5 public holidays); or
  - (ii) is a permanent night shift employee; or
  - (iii) works a compressed roster for at least 40% of the year including working every Sunday and public holiday within that roster.

The same baseline could then be applied through amendments to s.87(3) for award/agreement free employees.

This recommendation is framed around the present entitlement to 5 weeks' annual leave for shiftworkers in s.87. This would increase to 6 weeks based on our proposal in Recommendation 13 below.

## **2. Annual leave and personal leave – deductions on public holidays**

### ***Issue/problem***

Sections 89(1) and 98(1) provide that if a period of paid annual leave or paid personal/carer's leave includes a public holiday, the employee is taken not to be on paid annual or personal/carer's leave on that public holiday.

However, in *CFMEU v Glendell Mining Pty Ltd*,<sup>28</sup> the Full Federal Court (by majority) allowed Glendell to deduct annual and personal leave from an employee's accruals where that leave fell on a public holiday. The employee was entitled to 6 weeks' annual leave and 3 weeks' personal/carer's leave. He was absent from work using both forms of leave during periods in which public holidays occurred. The employer treated him as having been on annual or personal/carer's leave on those public holidays.

The basis of the decision was that the leave entitlements provided for in an enterprise agreement were above the minimum leave entitlements prescribed by the NES, and that the protections in s.89 and s.98 do not purport to govern payments made above the minimum.

### **Recommendation 2**

Amend ss.89 and 98 to clarify that, where annual and/or personal leave entitlements in an enterprise agreement are above NES minima, the rule in those provisions that the employee is taken not to be on leave when it falls on a public holiday, also applies to the proportion of leave above the minima.

## **3. Annual leave and personal leave – accrual during period of workers' compensation**

### **Issue/problem**

Section 130 provides as follows (emphasis added):

(1) An employee is not entitled to take or accrue any leave or absence (whether paid or unpaid) under this Part during a period (a *compensation period*) when the employee is absent from work because of a personal illness, or a personal injury, for which the employee is receiving compensation payable under a law (a *compensation law*) of the Commonwealth, a State or a Territory that is about workers' compensation.

(2) Subsection (1) does not prevent an employee from taking or accruing leave during a compensation period if the taking or accruing of the leave is permitted by a compensation law.

Uncertainty has arisen in relation to when a State, Territory or Commonwealth compensation law "permits" (within the meaning of s.130(2)) an employee to take or accrue any leave or absence while on workers' compensation. Even aside from this uncertainty, the link in s.130(2) to the

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<sup>28</sup> [2017] FCAFC 35.

applicable State, Territory or Commonwealth compensation law leads to different results across the country.

Until the *Anglican Care* decision (see below), it was widely accepted that the effect of s.130 was to prevent an employee from accruing or taking annual leave while they are receiving workers' compensation payments unless this was expressly permitted by the relevant workers' compensation law.

In *Anglican Care v NSW Nurses and Midwives' Association*<sup>29</sup> the Full Court of the Federal Court interpreted s.130(2) to mean that employees are entitled to accrue leave under the NES (e.g. annual leave and personal/carer's leave) during periods of workers' compensation absences, if the relevant State, Territory or Commonwealth workers' compensation legislation countenances leave being accrued, or does not purport to prohibit it.<sup>30</sup> On this basis, the Full Court found that the NSW workers' compensation legislation permits the taking and accrual of annual leave while a worker is in receipt of compensation.

Applying this approach, the FWC in *UFUA v Telecommunications Authority t/as ESTA*<sup>31</sup> found that the Victorian workers' compensation legislation not only countenanced but made express reference to the accrual of annual leave (and long service leave), but not personal leave as it had been intentionally excluded by omission.<sup>32</sup>

As noted earlier, the accrual of leave for employees on workers' compensation differs between the jurisdictions.<sup>33</sup> Annual leave accrues for these workers in Queensland, NSW, Victoria, Tasmania, WA and (from 9 June 2023) in the ACT, but not in the NT and Norfolk Island. Annual leave usually accrues in SA, but different rules apply for workers who are totally incapacitated and on workers' compensation for 52 weeks or more. For Commonwealth employees annual leave can accumulate for 45 weeks only. Personal leave accumulates in Queensland, SA and (from 1 July 2024) WA; for Commonwealth employees, for 45 weeks only; but not elsewhere.

### **Recommendation 3**

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<sup>29</sup> [2015] FCAFC 81.

<sup>30</sup> *Ibid* at [16], [65].

<sup>31</sup> (2017) 272 IR 384.

<sup>32</sup> See also *ANMF v Alfred Health* (2017) 272 IR 366.

<sup>33</sup> See: [Annual leave and sick leave during workers compensation - Fair Work Ombudsman](#)

Provide a true national standard by amending s.130 to provide that employees accrue annual leave and personal leave while on workers' compensation in all states, territories and the Commonwealth.

#### 4. Annual Leave and personal leave – accrual during lockouts and other PIA

##### *Issue/problem*

Section 87(2) provides that employees accrue annual leave “progressively during a year of service”. Section 96(2) makes similar provision in relation to personal/carer’s leave.

According to s.22 (emphasis added):

- (1) A period of *service* by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include any period (an *excluded period*) that does not count as service because of subsection (2).
- (2) The following periods do not count as service:
  - (a) any period of unauthorised absence;
  - (b) any period of unpaid leave or unpaid authorised absence ...

However, protected industrial action (**PIA**) including periods when employees are subject to employer response action (lockouts), are considered to be periods of unpaid authorised absence that are excluded from a period of service for purposes of s.22(1)-(2)).

In relation to lockouts, this result arises from the decision in *CFMEU and CEPU v Carter Holt Harvey Woodproducts Australia Pty Ltd T/A Carter Holt Harvey*,<sup>34</sup> where the FWC found that workers who had been locked out for 74 days did not accrue any annual leave entitlements during that period. Deputy President Gostencnik concluded that: “on a proper construction of ... s 22(2) of the Act, the period during which the relevant employees did not attend for work by reason of CHH engaging in employer response action, was a period of unpaid authorised absence within the meaning of s 22(2)(b) of the Act with the consequence that the period is excluded from a period of service within the meaning of s 22(1) of the Act. Consequently, that period was not a “service” for the purposes of s 87 of the Act and so relevant employees did

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<sup>34</sup> [2018] FWC 6; upheld on appeal [2018] FWCFB 2731.

not, during the lockout period, accrue annual leave in accordance with the NES ... ”.<sup>35</sup>

When employees are taking PIA (e.g. employee claim action), this is also considered an authorised unpaid absence for purposes of s.22(1)-(2): the absence is “authorised” by virtue of Part 3-3, and must be “unpaid” under the rules precluding strike pay in Part 3-3, Division 9.

#### **Recommendation 4**

Amend s.87(2), s.96(2) and/or the s.22 definition of “service” to clarify that periods of protected industrial action including lockouts (employer response action) are considered periods of service, during which employees accrue annual leave and personal/carer’s leave.

### **5. Personal/carer’s leave – calculation of entitlements**

#### **Issue/problem**

Section 96(1) provides that employees are entitled to ‘10 days of paid personal/carer’s leave’ for each year of service. The reference to ‘10 days’ has been interpreted by a majority of the High Court of Australia in the *Mondelez Case (Mondelez)*<sup>36</sup> as meaning:

an amount of paid personal/carer’s leave accruing for every year of service equivalent to an employee’s ordinary hours of work in a week over a two week (fortnightly) period or 1/26 of the employee's ordinary hours of work in a year.<sup>37</sup>

The High Court also determined that the word “day” as it appears in s.96(1) means a ‘notional day’ consisting of one-tenth of the equivalent of an employee’s ordinary hours of work in a two-week (fortnightly) period.<sup>38</sup> This construction disadvantages workers whose ordinary of work are not arranged evenly across five days of the week (i.e. employees whose ordinary hours are compressed into longer shifts).

For example in *Mondelez*, the workers at the centre of the dispute, Natasha Triffit and Brendan

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<sup>35</sup> [2018] FWC 6 at [23].

<sup>36</sup> *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers’ Union (AMWU) and ors; Minister v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers’ Union (AMWU) and ors* (2020) 271 CLR 495.

<sup>37</sup> *Ibid* [45].

<sup>38</sup> *Ibid*.

McCormack, worked an average of 36 ordinary hours per week organised into 3 x 12 hour shifts per week on average. The decision of the High Court means that (at least under the NES) Natasha and Brendan only accrue 72 hours of personal/carer's leave and will exhaust their yearly entitlement after taking personal/carer's leave from just six 12 hour shifts.

In contrast, workers that perform the same number of ordinary hours over five days of the week (for example 7.6 hours on five days of the week) are able to take a full ten days' complement of paid personal/carer's leave per year.

This situation unjustly prejudices workers in critical industries such as manufacturing, transport, healthcare, etc where shift arrangements such as those in Mondelez are common.

Such workers should be able to take leave from work on 10 days/occasions per year if required because they are sick or injured, without loss of pay. Presently, they are not able to do so, and the FW Act ought to be amended to rectify this.

#### ***Recommendation 5***

Amend s. 96(1) to clarify that the word "day" is referring to "the portion of a 24 hour period that would otherwise be allotted to work"; and that a "day of paid personal/carer's leave" under s.96(1) is an authorised absence from work for a working day for a reason set out in s.97.

## **6. Personal/carer's leave – rate of pay**

### ***Issue/problem***

Under s.99, if: "an employee takes a period of paid personal/carer's leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period." This means that the employee misses out on overtime or penalty rates, loadings, incentive-based payments or bonuses, allowances and any other separately identifiable amounts (these are all the exclusions from the concept of "base rate of pay" in s.16(1)).

This interpretation was confirmed by the Federal Circuit Court of Australia in *Liistro v Cathay Pacific Airways Limited*,<sup>39</sup> where the employee's claim for payment of Excess Flying Pay and Hourly Duty Pay while on sick leave (under the instrument applicable to his employment) was rejected. The court determined that these payments: "depend[ed] on the applicant's roster which varies from month to month. The actual payments in each month is dependent on the nature of the duties performed by the applicant and the hours over which these duties are performed. These payments are identified separately in the applicant's payslips and vary considerably from month to month."<sup>40</sup> Therefore they were: "separately identifiable amounts within the meaning of section 16 of the Act. Consequently, they are not to be included for the purpose of calculating the applicant's entitlement to paid personal/carers leave pursuant to section 96 of the Act."<sup>41</sup>

### **Recommendation 6**

Amend s.99 to provide that an employee is entitled to be paid while on personal/carer's leave without any loss of ordinary pay they would have received if they had worked (i.e. payment should include penalty rates, bonuses, loadings, allowances and other separately identifiable amounts, rather than being at the base rate of pay for ordinary hours of work). This could be formulated as an entitlement of the employee to receive their "full rate of pay" as now applies for family and domestic violence leave under s.106BA(1) (see also s.18).

## **7. Personal/carer's leave – medical certificates**

### **Issue/problem**

Subsection 107(3) provides that employees seeking to take paid personal/carer's leave must, if required by the employer, produce "evidence that would satisfy a reasonable person" that the leave the employee is seeking to take is for a reason specified in s.97.

In relation to this issue, the *Explanatory Memorandum to the Fair Work Bill 2008* states that:

*Subclause 107(3) enables an employer to require an employee who has given notice to provide evidence that would satisfy a reasonable person that the employee is entitled to the leave. The types of evidence commonly requested include a medical certificate or statutory declaration. It may not be reasonable on every occasion of personal illness for an employer to require an employee to provide a medical certificate. However, in cases*

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<sup>39</sup> [2014] FCCA 1848.

<sup>40</sup> Ibid at [39].

<sup>41</sup> Ibid at [40].

*of an absence extending beyond a short period or repeated absences on particular days (e.g., before or after a weekend or public holiday), it may be reasonable for an employer to request a medical certificate in support of the employee's request for leave.<sup>42</sup>*

It is neither practical nor fair for employees to be required to obtain a medical certificate or other reasonable evidence on every occasion they seek to take paid personal/carer's leave, particularly for short absences.

Evidence requirements are commonly interpreted by employers as requiring workers to produce evidence on each occasion if required by the employer, even where illness, injury or caring responsibilities may be ongoing over a long period of time. These evidence requirements are costly, time consuming, and can be a significant disincentive to workers taking the leave they need. Workers should also have the ability to use enduring forms of evidence for enduring illness, injury or caring responsibilities to demonstrate their need to take personal or carer's leave, rather than being required to produce evidence on each occasion such leave is requested.

#### **Recommendation 7**

Section 107(3) should be amended such that "evidence that would satisfy a reasonable person" is only required after an absence from work on paid personal/carer's leave on more than two consecutive days. Further, the section should be amended to provide that workers have the ability to use enduring forms of evidence for enduring illness, injury or caring responsibilities, rather than being required to produce evidence on each separate occasion such leave is requested.

The ANMF proposes that s.107(5) could also be tightened. This provision allows for an award or enterprise agreement to include terms relating to the kind of evidence that an employee must provide. In the union's experience, this has been used in bargaining to place more onerous requirements on workers, such as only accepting medical certificates from doctors to the exclusion of other suitable professionals e.g. a pharmacist. Because it is permitted by the NES, such a term is unlikely to be considered a reduction in entitlements in the context of a BOOT assessment, and would be difficult to quantify in any case. To address this:

- s.107(5) could be amended to provide that any enterprise agreement term must not increase the burden on employees seeking to verify their absence; or

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<sup>42</sup> Explanatory Memorandum to the Fair Work Bill 2008 at [415].

- repeal s.107(5).

## 8. Redundancy pay - “ordinary and customary turnover of labour” exception

### *Issue/problem*

Section 119(1) provides that (emphasis added):

An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:

(a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; ...

This exception to the obligation to make redundancy payments to employees is frequently asserted (and arguably, abused) by employers, with differing interpretations of the exception creating significant confusion for employees and unions. The application of the exception has also drifted from its original purpose focused on general turnover of labour in industry, and sectors where intermittency in employment was a feature, with the goal of not unduly imposing additional obligations on employers in the context of the difficult circumstances of the early 1980s recession.<sup>43</sup>

The cases illustrate the complexity and range of arguments employers can run to avoid making redundancy payments, with substantial evidence required to demonstrate to a court's satisfaction the various factors relevant to establishing that the exception should not apply. *Berkeley Challenge Pty Ltd v United Voice*<sup>44</sup> provides a typical example: two employers (members of the same corporate group) sought to rely on the exception when terminating employees with considerable periods of service, after losing contracts to supply cleaning services. In rejecting the application of the exception and finding the employers liable to make redundancy payments to the dismissed employees, the Full Federal Court:

... held that ‘ordinary and customary turnover’ refers to terminations that are common or usual, both in the sense that it is commonly observed and in the sense that it is habitual or of longstanding practice. Various factors are considered, including the objective expectations of the employees that the work is (or is not) ongoing; whether the turnover

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<sup>43</sup> *SDA v Countdown Stores* (1983) 7 IR 273 at 277–8. See also *Termination Change and Redundancy Case (Supplementary Decision)* (1984) 9 IR 115 at 128.

<sup>44</sup> (2020) 279 FCR 249.

of labour is a normal feature of the particular kind of business (but not a feature made normal for the specific employer by its own practices in terminating employees); whether the nature of the work being undertaken is such that it is evident the job will come to an end even though the business will be ongoing; whether practices of termination are longstanding for that particular type of employment; and whether the event of termination is unusual.<sup>45</sup>

In reaching its decision, the Full Court considered that:

... the employment contracts of the affected employees provided for permanent employment. There was no term specifying that their continued employment was dependent upon the continued provision of the Contract Services by Berkeley or that their employment would be terminated without redundancy pay should the contract with Lend Lease be lost.

In comparison, most other employees within the Spotless Group were employed for specific contracts, and their employment was terminated when the specific contracts came to an end if redeployment within the Spotless Group or employment with the incoming contractor was not possible.<sup>46</sup>

In *CEPU v Delta FM Australia Pty Ltd*,<sup>47</sup> the employer succeeded in establishing that the ordinary and customary turnover of labour exception applied, in part because it had written terms into the employment contracts about the possibility that operational changes could mean positions may not continue; and that termination due to the company's change or loss of a contract is part of the ordinary and customary turnover of labour within the company. This suggests that employers can avail themselves of the exception and avoid having to make redundancy payments, through careful drafting of contractual clauses.

Another redundancy pay exception may be available to employers to deal with a situation where the work is contract to contract and there is no further work for employees when a contract ends. The employer may be able to negotiate positions for employees with the new contract provider, so the employer falls within s.120(1)(b)(i) ("employer obtains other acceptable employment for the employee") on application to the FWC to reduce the amount of redundancy pay required. The availability of this alternative avenue tends to negate the need for the very broad ordinary and customary turnover of labour exception.

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<sup>45</sup> A Stewart et al, *Creighton and Stewart's Labour Law*, 7<sup>th</sup> edition, Federation Press, 2025, [22.70].

<sup>46</sup> (2020) 279 FCR 249 at [50]-[51].

<sup>47</sup> (2021) 308 IR 94.

There is strong support across a wide range of unions for removing this archaic and confusing exception.

### **Recommendation 8**

Remove the words “except where this is due to the ordinary and customary turnover of labour” from s.119(1)(a).

## **9. Redundancy pay entitlement after at least 10 years of service**

### **Issue/problem**

National system employees terminated on account of their job no longer being required or because of the insolvency/bankruptcy of their employer are entitled to redundancy pay based on their period of continuous service under the NES.

The quantum of redundancy entitlements is expressed as a number of weeks’ pay, with the entitlement increasing according to years of continuous service as set out in the following table (extracted from s119(2)):

<b>Redundancy pay period</b>		
	<b>Employee’s period of continuous service with the employer on termination</b>	<b>Redundancy pay period</b>
1	At least 1 year but less than 2 years	4 weeks
2	At least 2 years but less than 3 years	6 weeks
3	At least 3 years but less than 4 years	7 weeks
4	At least 4 years but less than 5 years	8 weeks
5	At least 5 years but less than 6 years	10 weeks
6	At least 6 years but less than 7 years	11 weeks
7	At least 7 years but less than 8 years	13 weeks
8	At least 8 years but less than 9 years	14 weeks
9	At least 9 years but less than 10 years	16 weeks
10	At least 10 years	12 weeks

Employees made redundant with ten or more years' continuous service have a lesser redundancy entitlement (12 weeks) compared with employees with continuous service between 7 and 9 years (who receive between 13 and 16 weeks).

The basis for this apparent anomaly is not directly addressed in the *Explanatory Memorandum to the Fair Work Bill 2008*, and prior to the commencement of the FW Act there was no federal legislated redundancy entitlement at all, with such entitlements instead being provided for in federal awards.<sup>48</sup>

In 1984, standard award terms dealing with redundancy were established by the Australian Industrial Relations Commission (AIRC) for reasons including to compensate employees for the loss of “non-transferable credits” (e.g. personal leave and long service leave) that occurs in redundancy situations.<sup>49</sup>

Redundancy entitlements in federal awards were reconsidered by the AIRC in the 2004 *Redundancy Test Case*.<sup>50</sup> In that case the AIRC determined to extend redundancy entitlements such that these entitlements in awards would continue to increase progressively beyond five years' service and up to ten years' service<sup>51</sup> as compensation for, among other things, the loss of non-transferable assets, particularly long service leave.<sup>52</sup>

The AIRC also determined to discount redundancy entitlements for employees with at least ten years' continuous service on the grounds that to not do so would be double-counting, where the increase in the redundancy pay scale from 5 to 10 years was being granted in large part as compensation for the loss of non-transferable assets, particularly long service leave.

The above reasoning is no longer applicable in the context of the contemporary industrial relations landscape. For many national system employees, long service leave entitlements are derived from state/territory legislation,<sup>53</sup> with all state/territory jurisdictions allowing for access

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<sup>48</sup> *Explanatory Memorandum to the Fair Work Bill 2008*, [r.82].

<sup>49</sup> *Re Termination, Change and Redundancy Case* [1984] AIRC 34, [73].

<sup>50</sup> *Re Redundancy* [2004] AIRC 287.

<sup>51</sup> *Ibid* [153].

<sup>52</sup> *Ibid* [154].

<sup>53</sup> Section 27(2)(g) FW Act confirms that long service leave under state/territory legislation is not excluded by the operation of the FW Act, other than in respect of employees that are entitled to long service leave under Division 9 of Part 2-2. Relevantly, Division 9 Part 2-2 entitles employees to long service leave in accordance with the terms of an award or agreement providing for long service leave if such an award/agreement applied would have applied to the employment at the test time (1 January 2010).

to pro rata (or full) long service leave from at least seven years of continuous service<sup>54</sup> and as early as from 5 years in the cases of NSW and ACT.<sup>55</sup>

For those employees, there is an entitlement to receive both pro rata long service leave and a non-discounted redundancy payment from either 5 or 7 years up until 9 years' continuous service. In this context, there is no basis to apply a discount after ten or more years' service.

This unfairness is brought into particular focus when observing that the discount for employees with ten years' service can mean they receive **less in total compensation (combining long service and redundancy pay) than employees in the same circumstance but with fewer years' service.**

This situation arises in the case of employees with 8 or 9 years' service who are entitled to long service leave under state legislation in any of NSW, ACT, QLD, WA and TAS. Such employees receive approximately 20.94 weeks combined redundancy and long service leave pay after 8 years' continuous service<sup>56</sup> and 23.5 weeks after nine years.<sup>57</sup> By contrast, the combined amount in these jurisdictions drops down to 20.67 weeks after ten years.<sup>58</sup>

The situation is substantially the same in VIC, and the anomaly also applies in SA and NT, but only in respect of 9 years' continuous service where a combined 27.7 weeks' pay would apply compared with 25 weeks cumulative for 10 years' continuous service.<sup>59</sup>

It is appropriate to acknowledge that in the *Redundancy Test Case*, the AIRC did contemplate that long service leave entitlements under state legislation may provide for different entitlements compared with the standard under federal awards. The AIRC decided to deal with this by including a provision in the standard award term that allowed for parties to make applications to

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<sup>54</sup> In respect of Victoria, see ss. 6 and 9 *Long Service Leave Act 2018* (VIC); in respect of QLD, see s.95(3) and (4) *Industrial Relations Act 2016* (QLD); in respect of SA, see s.5(3) and (4) *Long Service Leave Act 1987* (SA); in respect of WA see s.8(3) *Long Service Leave Act 1958* (WA); in respect of TAS, see *Long Service Leave Act* ss.8(2) and (3) and ss.(8A)(2) and (3); in respect of NT, see s.10(2) *Long Service Leave Act 1981* (NT).

<sup>55</sup> See s.4(2)(iii) *Long Service Leave 1955* (NSW), and s.11(c) *Long Service leave 1976* (ACT).

<sup>56</sup> These jurisdictions provide for long service leave on the basis of 2 months leave for 10 years' service with a 'month' defined as 4 and 1/3 weeks (or in the case of ACT, a calendar month). In determining a pro rata entitlement amount after eight years, 2 months' leave after 10 years = 8.67 weeks. Multiplied by 0.8 = 6.67 weeks long service leave, available pro rata after 8 years of service. Added to a redundancy entitlement of 14 weeks under s.119(2), total = 20.94 weeks total combined long service and redundancy pay.

<sup>57</sup> 8.67 weeks x 0.9 = 7.8 weeks pro rata long service leave, plus 16 weeks redundancy pay pursuant to s.119(2) = 23.8 weeks total combined long service and redundancy pay.

<sup>58</sup> 8.67 weeks' long service leave plus 12 weeks redundancy pay pursuant to s.119(2) = 20.67 weeks total combined long service and redundancy pay.

<sup>59</sup> In these jurisdictions, pro rata long service leave accrues on the basis of 1.3 weeks per year of service. 1.3 x 9 weeks = 11.7 weeks, plus 16 weeks redundancy pay pursuant to s.119(2) = 27.7 weeks.

reduce redundancy entitlements on account of long service entitlements being paid out under state legislation.<sup>60</sup>

It is instructive that no equivalent provision was included as part of the establishment of a legislated right to redundancy pay. This means the entitlement (or otherwise) of a redundant employee to access long service leave under state laws is no longer relevant to, and has no bearing on, the appropriate quantum of redundancy pay.

In this context, the four-week discount for employees with ten years' service in s.119(2) is no longer relevant (if it ever was) and should be removed.

The ACTU proposes that employees with at least 10 years of service should be entitled to 20 weeks of redundancy pay. This proposal is broadly consistent with the formula in s.119(2) and recognises that that many employees at this level will have worked well beyond at least 10 years of service, which should be fairly reflected in the entitlement.

### ***Recommendation 9***

Row 10 in the table at s.119(2) should be amended as follows:

10	At least 10 years	<u>20 weeks</u>
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## **10. Long Service Leave**

### **National long service leave standard**

#### ***Issue/problem***

The ACTU has long argued for the adoption of a nationally uniform minimum standard for long service leave, based on the common denominator most favourable to workers; and ending any “zombie” awards that have the effect of providing long service leave conditions which are less beneficial than relevant state legislation<sup>61</sup> (on this aspect see further below).

The 2012 Post-implementation Review of the FW Act noted the “broad support” for a uniform national standard in discussions and submissions to the review, and recommended that:

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<sup>60</sup> *Re Redundancy* [2004] AIRC 287, [155]; see also *Re Redundancy, Subsequent Decision* [2004] AIRC 564 [15], Appendix A at R.3.5.

<sup>61</sup> ACTU, 2024 Congress Policy, Industrial Relations, page 6.

“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.”<sup>62</sup> The ACTU and a number of employer organisations supported the principle of a national approach to long service leave in their submissions to the Productivity Commission’s 2015 review.<sup>63</sup> However no progress has been made in the decade since then towards the implementation of a national long service leave standard.

### **Recommendation 10.1**

The ACTU believes there is merit in exploring the development of a national standard for long service leave but recognises the challenges in building the intergovernmental consensus required to make this happen. As a next step, Commonwealth and State Governments could develop an options paper for reform to help with building such consensus. This could include an audit of current entitlements – including award-derived and agreement-derived long service leave terms (see below) – to better understand their application, different options for the national standard and recommendations on next steps. The paper should also recognise and protect the portable long service leave schemes operating in many jurisdictions.

### **Award-derived and agreement-derived long service leave terms**

#### **Issue/problem**

Section 113(1) provides that:

If there are applicable award-derived long service leave terms (see subsection (3)) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.

Under s.113(3)-(3A), “award-derived long service leave terms” are terms of an award (or State reference transitional award) that would have applied to the employee immediately before the commencement of Part 2-2 (1 January 2010); and that would have entitled the employee to long service leave (regardless of whether they were actually engaged before that date).

Section 113(2) provides that the rule in s.113(1) does not apply if certain types of instruments that came into operation before 1 January 2010 still apply to the employee (e.g. a pre-reform workplace agreement or Australian Workplace Agreement, or an enterprise agreement, workplace determination, etc that expressly deals with long service leave).

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<sup>62</sup> R McCallum, M Moore and J Edwards, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, Department of Education, Employment and Workplace Relations, Canberra, 2012, pages 101-102.

<sup>63</sup> Productivity Commission, *Workplace Relations Framework: Report No. 76*, Volume 1, 30 November 2015, page 522.

The effect of s.113, combined with s.27(1)(g), is that:

- where there are no award-derived long service leave terms applicable to an employee, that employee is entitled to leave in accordance with the applicable state/territory legislation;
- but if an employee is covered by an award that meets the requirements of s.113, it does not matter that an employee has not accrued enough service to qualify for long service leave under that instrument – the NES applies, precluding any claim under a more generous state/territory statute.

A similar set of provisions apply to preserve in operation applicable “agreement-derived long service leave terms” (s.113(4)-(6)).

In *Maugham Thiem Auto Sales Pty Ltd v Cooper*,<sup>64</sup> an employee made redundant after almost nine years’ service was denied entitlements to pro-rata long service leave under SA legislation because the Full Federal Court found the *Vehicle Industry – Repair, Services and Retail – (Long Service Leave) Award 1977* applied to his employment (meeting the requirements in FW Act s.113(3)(a)). The court considered that the requirement of s.113(3)(a)(ii), that the terms of the award “would have entitled” the employee to long service leave: “is satisfied if, at the test time, the employee would have had a right to long service leave under a relevant award (that is, an award satisfying the first condition in s 113(3)(a)), irrespective of whether at that time the employee would have accrued long service leave”.<sup>65</sup>

The detriments to employees arising from s.113 are further illustrated by the decision in *Conroy’s Smallgoods v AMIEU*.<sup>66</sup> A Full Federal Court majority held that if the relevant award-derived terms expressly exempt casuals from long service leave, this is still an “entitlement” (within s.113(3)(a)(ii)) that precludes a claim by employees under SA long service leave legislation that would otherwise apply. The *Federal Meat Industry (Smallgoods) Award 2000* applied and did not entitle casuals to long service leave. According to Justice Raper: “the phrase “would have entitled” in s 113(3)(a)(ii) should not be read literally so as to confine the operation of s 113(1) to only those award terms for which employees were eligible to accrue and receive long service leave under those provisions. ... The provision is to be interpreted according to its purpose, which

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<sup>64</sup> (2014) 222 FCR 1.

<sup>65</sup> Ibid at [43].

<sup>66</sup> (2023) 323 IR 419. NAB, Wage Inspectorate Victoria and State of NSW were granted intervention rights in this case as it raised issues also being dealt with in separate prosecutions for breaches of state long service leave laws.

in this case was to preserve the long service leave arrangements in pre-modernised awards.”<sup>67</sup> As a result, an employee with more than eight years’ service was denied an entitlement to long service leave for which he would have qualified under SA legislation.

According to the AMIEU, which ran the *Conroy’s Smallgoods* case, the effect of this decision has been to hive out thousands of casual workers across Australia from accessing long service leave, including (recently) a member who had 17 years of service (13 as a casual, four as a permanent employee). Other affiliates including SA Unions strongly support reform in this area.

### **Recommendation 10.2**

Amend FW Act s.113, which was intended only as a transitional provision for the shift to the Fair Work system, with the objective of ensuring that outdated inferior award and agreement provisions no longer play a role in setting long service leave standards for employees. The amendment would preclude the operation of award-derived or agreement-derived long service leave terms that provide for lesser entitlements than the applicable state or territory legislation.

In situations where employees are currently better off under award-derived or agreement-derived long service leave terms than under state or territory legislation, that award or agreement provision should continue to apply, for example:

- ANMF members in Victoria enjoy a more beneficial entitlement of 6 months’ long service leave at the completion of 15 years’ service under clause 20 of the *Nurses (Victorian Health Services Award) 2000*, which is roughly double that of the *Long Service Leave Act 2018 (Vic)*, albeit accessible at a later date (cf. entitlement available after 7 years in Victoria).
- Similarly, the HSU has members who have award-derived and agreement-derived long service leave terms providing 6 months’ long service leave after 15 years of service, for example under clause 36 of the *Health Professional Services - Public Sector - Victoria Award 2003*; and clause 32.1 of the *Health Services Union of Australia (Victoria – Private Sector – Medical Scientists, Psychologists and Pharmacists) Award 2004*. The HSU proposes that each element of the applicable award/agreement-derived term and the relevant state/territory long service leave legislation should be compared for purposes of whether employees are “better off” (with each more favourable element of the two applying). For example, the award-derived entitlements described above provide for a

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<sup>67</sup> Ibid at [187]; compare Bromberg J (dissenting) at [40].

greater quantum of long service leave but fall below the Victorian legislation in terms of access to the entitlement, flexible use, non-absorption of public holidays during leave, etc.

## 11. Paid Reproductive Health Leave

### *Issue/problem*

Reproductive health can impact all workers and will affect most workers, regardless of age, sex or gender, at some stage in their working lives. Examples of reproductive health issues that can impact on work include:

- Menstruation. An Australian study of more than 20,000 people found that 90% of working women experience debilitating pain from their periods, and 40% were forced to take days off or hide symptoms, compounding and exacerbating the impact.<sup>68</sup> Severe menstrual pain alone costs women nearly nine productive days per year.<sup>69</sup>
- Pregnancy.
- Breastfeeding and lactation.
- Contraception.
- Miscarriage and pregnancy loss. It is estimated that 15-20% of pregnancies end in miscarriage and affect one third of all women,<sup>70</sup> and between 100,000 and 150,000 couples per year experience pregnancy loss.<sup>71</sup>
- Perimenopause. Around 40% of perimenopausal women present to their primary healthcare physician (GP) with depressive symptoms.
- Menopause. The Australian Federal Government has estimated that 28% of menopausal women will have symptoms severe enough to impact their participation in the workforce.<sup>72</sup> Other research found that menopause symptoms affect 74% of women aged 45 to 55, with 17% forced to take extended leave due to the severity of their condition.<sup>73</sup>

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<sup>68</sup> Beale & Mahwhinney, McKell Institute, *Suffering in Silence: Making the Case for Reproductive Leave in Australia*, June 2024.

<sup>69</sup> Bankwest Curtin Economics Centre (2025) *The Costs and Benefits of Implementing a Universal Reproductive Health Leave Entitlement in Australia*.

<sup>70</sup> Bankwest Curtin Economics Centre (2025) *The Costs and Benefits of Implementing a Universal Reproductive Health Leave Entitlement in Australia*, page 9.

<sup>71</sup> Oderberg, *Hard To Bear: Inviesting the Science and Silence of Miscarriage*, Ultimo Press.

<sup>72</sup> Federal Budget Women's Budget Statement, October 2022.

<sup>73</sup> Bankwest Curtin Economics Centre (2025) *The Costs and Benefits of Implementing a Universal Reproductive Health Leave Entitlement in Australia*, page 9.

- Chronic conditions such as poly-cystic ovarian syndrome and endometriosis. 1 in 7 Australian women are estimated to have endometriosis.<sup>74</sup>
- Hormone therapy.
- Fertility treatments, IVF and assisted reproductive health services. 1 in 9 Australian couples experience fertility issues<sup>75</sup> and 1 in 18 babies born in Australia are conceived through assisted reproductive technologies.<sup>76</sup>
- Hysterectomy and vasectomy. One in four men over the age of forty have a vasectomy. Vasectomies and hysterectomies for people aged 35-44 have prevalence rates of 1,200 and 220 for 100,000 people, respectively.<sup>77</sup>
- Termination. According to Medicare data, terminations have a prevalence rate of 1,800 for 100,000 women of reproductive age.<sup>78</sup>
- Preventative health care such as screenings for breast, cervical and prostate cancer. 1 in 6 men are affected by prostate cancer. Breast cancer is the most common form of cancer diagnosed for Australian women, and around 8 deaths are prevented for every 1,000 women screened every two years.

The impact on workers of menopause, perimenopause, and reproductive health is significant, yet still poorly understood and largely taboo in the workplace. Those impacts include reduced wellbeing and economic participation, discrimination, and withdrawal from the labour market, with significant implications for gender equality and women's economic security. As men have traditionally been considered the default worker, the reproductive body and the physiological transitions women go through, including menstruation and menopause, have not been taken into account.<sup>79</sup> There is growing evidence that this failure to recognise the reproductive bodies of workers over the life course (from childbearing and caring years through to menopause) can have

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<sup>74</sup> Bankwest Curtin Economics Centre (2025) The Costs and Benefits of Implementing a Universal Reproductive Health Leave Entitlement in Australia, page 9.

<sup>75</sup> [About reproductive health | Australian Government Department of Health, Disability and Ageing](#)

<sup>76</sup> Bankwest Curtin Economics Centre (2025) The Costs and Benefits of Implementing a Universal Reproductive Health Leave Entitlement in Australia, page 9.

<sup>77</sup> Bankwest Curtin Economics Centre (2025) The Costs and Benefits of Implementing a Universal Reproductive Health Leave Entitlement in Australia, page 9.

<sup>78</sup> Bankwest Curtin Economics Centre (2025) The Costs and Benefits of Implementing a Universal Reproductive Health Leave Entitlement in Australia, page 9.

<sup>79</sup> Colussi, S., Hill, E., & Baird, M. (2023). Engendering the right to work in international law: Recognising menstruation and menopause in paid work. University of Oxford Human Rights Hub Journal, 5, 1-40. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4613359](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4613359).

significant negative consequences for workers, employers, business, the economy, and gender equality.<sup>80</sup>

There is a growing body of research evidence on poor workplace supports for reproductive health (including menstruation, fertility treatment, pregnancy loss and menopause), which shows that inadequate support for these reproductive concerns contributes to inequality and gendered disadvantage at work, with some women reporting reduced wellbeing and economic participation, discrimination and withdrawal from the labour market, with significant impacts for gender equality and women's economic security.<sup>81</sup> For example, a failure by employers to recognise and accommodate menopause in the workplace can result in:

- Reduced job satisfaction, productivity and retention which can contribute to feelings of disengagement with work;<sup>82</sup>
- Increasing the likelihood of women reducing their hours of work, leaving management roles, or retiring early at a time when they are at the peak of their experience and earning potential;<sup>83</sup>
- Poor workplace conditions (such as poor ventilation, temperature control and lack of managerial support) which may impact the wellbeing and labour force participation of menopausal workers;<sup>84</sup>
- Workers experiencing stigma, negative gender stereotypes and ageism related to menopause, with research showing women are often hesitant to disclose their menopausal status and request workplace support due to feelings of embarrassment and fear of discrimination.<sup>85</sup> For example, a 2021 study found that although 83% of

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<sup>80</sup> Submission of Professor Elizabeth Hill (University of Sydney) and Ms. Sydney Colussi (PhD Candidate, University of Sydney) – Co-convenors of The Body@Work Project to the Senate Community Affairs References Committee on issues related to menopause and perimenopause, p 1.

<sup>81</sup> Colussi, S., Hill, E. and Baird, M. (2024) 'Reproductive policies: An expanding approach to work and care' in M. Baird, E. Hill, and S. Colussi (eds) *At a Turning Point: Work, Care and Family Policies in Australia* (Sydney University Press, 2024) p 20.

<sup>82</sup> Colussi, S., Hill, E. and Baird, M. (2023) "Engendering the right to work in international law" p. 18.

<sup>83</sup> British Medical Association, *Challenging the Culture on Menopause for Working Doctors* (2020); Gavin Jack et al, *Women, Work and the Menopause: Releasing the Potential of Older Professional Women* (La Trobe University, September 2014) 1, 3–4.

<sup>84</sup> Emily Bariola et al, 'Employment Conditions and Work-Related Stressors are Associated with Menopausal Symptom Reporting among Perimenopausal and Postmenopausal Women' (2017) 24(3) *Menopause* 247.

<sup>85</sup> Vanessa Beck, Jo Brewis and Andrea Davies, 'The Post-Re/Productive: Researching the Menopause' (2018) 7(3) *Journal of Organizational Ethnography* 247, 252; Kathleen Riach and Gavin Jack, 'Women's Health in/and Work: Menopause as an Intersectional Experience' (2021) 18 *International Journal of Environmental Research and Public Health* 1.

women experiencing menopause were affected at work, 70% felt uncomfortable speaking with their manager about it.<sup>86</sup>

There is also a growing body of research that demonstrates the economic costs of reproductive health issues, with the impacts being particularly pronounced for women. For example:

- ABS data shows that 26.8% of working women retire under the age of 55, and on average, women are retiring seven years before men, and 12 years before their desired age of retirement due to menopause symptoms.<sup>87</sup>
- The Australian Institute of Superannuation Trustees estimated in 2023 that menopause may cost women in the 50-54 age group more than \$15 billion per year in lost earnings and superannuation for every year of early retirement.<sup>88</sup> This amounts to a combined shortfall of over \$112.2 billion in foregone earnings due to early retirement (7.4 years).<sup>89</sup>
- Millions of Australian women are impacted by chronic conditions such as endometriosis and polycystic ovary syndrome. One 2019 study estimates the total economic cost of endometriosis and chronic pelvic pain in the reproductive aged population averages \$6.5 billion each year in Australia. The majority of costs (75–84%) were due to productivity loss (absenteeism, presenteeism and reduced workforce participation).<sup>90</sup>
- Research reports that women with endometriosis have greater productivity loss as pain increases, with chronic pain one of the most significant contributors to absenteeism or presenteeism in the workplace.<sup>91</sup> 70% of women with endometriosis take unpaid time off work to manage their symptoms, one in three had been passed over for a promotion, and one in six had lost their job because of endometriosis.

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<sup>86</sup> Circle In. (2021). Driving the change: Menopause and the workplace. <https://circlein.com/research-and-guides/menopause-at-work/>

<sup>87</sup> Australian Institute of Superannuation Trustees. (2023). 2023-24 Pre-budget Submission to the Assistant Treasurer and Minister for Financial Services. <https://consult.treasury.gov.au/pre-budget-submissions/2023-24/view/689>; ABS Retirement and Retirement Intentions, Australia <https://tinyurl.com/24enn27k>.

<sup>88</sup> Australian Institute of Superannuation Trustees. (2023). 2023-24 Pre-budget Submission to the Assistant Treasurer and Minister for Financial Services. <https://consult.treasury.gov.au/pre-budget-submissions/2023-24/view/689>, page 25.

<sup>89</sup> Ibid.

<sup>90</sup> [The cost of illness and economic burden of endometriosis and chronic pelvic pain in Australia: A national online survey \(plos.org\)](https://doi.org/10.1371/journal.pone.0218881) Mike Armour, Kenny Lawson, Aidan Wood, Caroline Smith, Jason Abbott and Praveen Thumbikat, 'The Cost of Illness and Economic Burden of Endometriosis and Chronic Pelvic Pain in Australia: A National Online Survey' (2019) 14(10) *PLoS One* 1.

<sup>91</sup> Soliman AM, Coyne KS, Gries KS, Castelli-Haley J, Snabes MC, Surrey ES. The Effect of Endometriosis Symptoms on Absenteeism and Presenteeism in the Workplace and at Home. *J Manag Care Spec Pharm*. 2017; 23(7):745–54. Epub 2017/06/27. [The Effect of Endometriosis Symptoms on Absenteeism and Presenteeism in the Workplace and at Home | Journal of Managed Care & Specialty Pharmacy \(jmcp.org\)](https://doi.org/10.1177/107774801770627).

- The impacts of regular absenteeism or perceived low productivity can be wide ranging, with women reporting that these impacts ranged from losing a chance for promotion, to having employment terminated or resignation due to stress.
- A BankWest Curtin Economics Centre report estimated in 2025 that the value of lost productivity cost from reproductive health conditions is around \$21.3 billion per year. Menopause, menstrual pain, endometriosis and miscarriage are the main contributors to the value of lost productivity from reproductive health conditions.<sup>92</sup>
- \$60k (approx.) is the average amount of super that women miss out on due to early retirement because of menopause.
- A 2021 survey of over 700 Australian women found that 83% of respondents said their work was negatively affected by menopause. Almost half of participants considered retiring or taking a break from work when their menopausal symptoms were severe, with 28% taking leave.<sup>93</sup> 42% of women who considered this option and didn't take leave cited financial reasons as a major barrier.<sup>94</sup> Only 3% felt they had received 'excellent' support from their workplace during menopause, with 60% saying the support was 'poor' or 'below average.' 70% said they did not feel comfortable talking to their manager about their needs, with 53% saying their manager's awareness would have been a great support to them during this time.

Reproductive health issues clearly have the potential to have significant impacts for the gender pay gap and the retirement income gap. Menopause often affects workers when they are at the peak of their careers, when they are in senior roles or about to progress into those roles. However their experience of menopause may cause them to leave senior roles, reduce their hours, not progress further in their careers, be overlooked for promotions or projects, or retire early. It also often affects workers after they have used up most of their personal leave entitlements to take care of children or ageing parents, and may not have much left to take care of their own health.

It also impacts workers in casual and insecure work, those in low paid jobs, those who may be working across several employers to make ends meet, and those who work in industries with physically demanding or unsafe working conditions, or which have not had historically had

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<sup>92</sup> Bankwest Curtin Economics Centre (2025) The Costs and Benefits of Implementing a Universal Reproductive Health Leave Entitlement in Australia, page 8.

<sup>93</sup> Circle In. (2021). Driving the change: Menopause and the workplace. <https://circlein.com/research-and-guides/menopause-at-work/>.

<sup>94</sup> Ibid.

effective access to bargaining to win better working conditions. The addition of dealing with challenging menopausal symptoms in jobs and industries where there are already multiple challenges for older women workers forces women to reduce work or leave entirely. A UK survey found that a significant number of healthcare workers had reduced their hours, left management roles, or considered early retirement due to menopause,<sup>95</sup> and the HSU reports a similar phenomenon in Australia.<sup>96</sup> Another study observed that menopausal women in casual work appeared to be more frequently and more severely affected by musculoskeletal symptoms than those in comparable secure work.<sup>97</sup>

A number of the ACTU's affiliates have done significant work on issues relating to reproductive health by engaging with their members and with employers, bargaining for reproductive leave and workplace adjustments, developing materials and resources, and undertaking or commissioning research. For example:

- Numerous affiliates have included a claim for menstrual/menopause/reproductive leave and/or entitlements in collective bargaining. About half of affiliates who have included a claim have been successful in winning clauses in agreements.
- The quantum of the leave bargained for varied, with the most common claim being put forward being 5 days, 10 days and 12 days. We note that some unions, such as the HSU, are campaigning and bargaining for 12 days paid leave.
- Many affiliates also advanced claims for flexible work arrangements or other workplace accommodations, such as the right to work from home, flexible working hours, changes to the work environment and access to unpaid leave.

The surveys that multiple affiliates have done of their members highlight common themes:

- The importance of increasing education and awareness of the impact reproductive health has on workers, both for workers and for employers.
- For many workers, reproductive health issues and menopausal symptoms negatively impact on their ability to work, which has many implications such as disengagement, reduction of hours, leaving or not pursuing senior roles, and early retirement. This is despite the fact that menopausal workers are generally highly skilled and experienced,

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<sup>95</sup> British Medical Association (2022), Challenging the culture on menopause for working doctors report, <https://www.bma.org.uk/advice-and-support/equality-and-diversity-guidance/gender-equality-in-medicine/challenging-the-culture-on-menopause-for-working-doctors-report>.

<sup>96</sup> Submission of the Health Services Union to the Senate Community Affairs References Committee on issues related to menopause and perimenopause, p 6.

<sup>97</sup> Yoeli H, Macnaughton J, McLusky S, 'Menopausal symptoms and work: a narrative review of women's experiences in casual, informal, or precarious jobs', *Maturita*, vol. 150 2021, <https://pubmed.ncbi.nlm.nih.gov/34219903/>.

and that many symptoms can be managed effectively through the making of reasonable adjustments and access to flexible working arrangements.

- There are a range of workplace supports that are helpful to workers experiencing reproductive health issues that impact their work, including symptoms of menstruation, perimenopause and menopause. One of the most common supports identified was access to flexible work and working from home arrangement, as well as leave.
- Many workers are reluctant to speak about their experience of reproductive health issues in the workplace, due to stigma, embarrassment, the taboo nature of these issues, the lack of support, understanding and respect from employers, and fear of the consequences of doing so (for example being perceived negatively, having their abilities or commitment to work questioned, fear of encouraging further sexism or ageism in the workplace, or being otherwise discriminated against).
- Workers face difficulties in accessing reasonable adjustments at work.

### **Case Studies**

#### *EI (HSU member)*

*I have stage IV Endometriosis with a nodule on my bowel. I've had 3 surgeries and countless other appointments related to my condition in the past 8 years, and I do not currently have reproductive leave in my workplace agreement. The way I've been able to manage and cope with my Endometriosis and other reproductive health experiences has been different between employers.*

*My current employer is very understanding and supportive of my needs due to my Endo. In the first 6 months of working there, I needed a third major surgery for a hysterectomy. It was a crazy scramble because I was only given a week's notice before the surgery. Thankfully, my employer was extremely supportive and mostly they were happy that my surgery had finally been arranged! There were no issues with having to take the leave, and I was reassured I wouldn't be financially disadvantaged – this was an enormous relief.*

*My previous employer was less understanding. I remember having a big surgery scheduled for excision of endometriosis and a bowel shave to try and remove the nodule there. My doctors advised me that I would need to take three weeks off, but I didn't have enough paid leave accrued. My employer was okay with me taking the time off, but I had to do a lot of back and forth with payroll and use all my remaining personal and annual leave for that year.*

*Having reproductive health leave is important because it removes the burden of having to explain why you are taking the leave if you don't want to or aren't comfortable doing so. At my*

current workplace, my boss and colleagues are understanding, supportive, and I have the flexibility I need to manage my health and my work. This empowers me to take the time I need to recover properly, rest when I need to, and in turn allows me to show up at work as my best self for them, and our members.

Rachel (HSU member)

Before my current workplace, I had not heard of reproductive leave.

In my previous workplace, I had to have a LLETZ procedure to remove pre-cancerous cells developing into cervical cancer, which required a checkup every 6 months. Unfortunately, it was necessary for me to have the procedure again after a year, and I needed to take a week off work to manage the recovery.

I had to use a combination of personal and annual leave. While I had accrued good leave balances, I was unable to use personal leave that year to spend time with my son.

Having reproductive health leave would mean that I would not have to dip into personal and sick leave when managing my reproductive health. It would act as a safety net and would remove a large amount of stress.

Caroline (FSU member)

Caroline was working in a call centre and was experiencing severe menstrual symptoms which meant that she needed to use the bathroom hourly. She did not believe she was “sick” and had not used her sick leave to see a doctor about the issue. Call centre workers’ time away from the phone is closely monitored and she was told she may be put on a performance improvement plan (PIP) due to the amount of time she was spending in the bathroom. The PIP may have led to dismissal if her performance did not improve. The member disclosed to her employer that the reason for her absences was due to severe menstrual bleeding. Her employer worked with her to allow her to access her sick leave so she could go to the doctor to investigate the cause of her severe bleeding. During enterprise bargaining this FSU member shared the experiences she had at work and the difference it would have made if she had been able to access additional flexibility, support, and paid leave. Her employer agreed during bargaining to introduce paid menstrual/menopause leave as well as the right to request flexibility when suffering severe symptoms. This was the first time an employer in the finance industry had introduced paid menstrual/menopause leave into an enterprise agreement.

Sarah (FSU member)

Sarah experienced some serious pain at a work office party in 2019. She didn’t know the cause and spent 11 weeks in and out of 3 different hospitals being told by gynaecologists that her pain wasn’t that bad and that it didn’t cause terrible pain. She couldn’t eat for 11 weeks and lost

*44kg during that time. She hasn't taken a holiday in 11 years. She does not currently have access to paid reproductive health leave.*

### **Proposed solution**

Australian unions are campaigning for ten days of paid reproductive leave to be included in the NES, enabling workers to take time off to manage reproductive health issues. Entitlements to paid reproductive leave have already been won by workers through their unions bargaining in the healthcare, finance, education, and the community sector. The Queensland Council of Unions led efforts to win the entitlement for 265,000 public sector workers in that state in 2024.

These entitlements are allowing women in different life stages to access the leave in a way that works for them. This may include access to leave to address reproductive health issues, such as endometriosis, to deal with painful or debilitating symptoms during menstruation or menopause, to attend appointments during pregnancy and for fertility treatments, where they experience pregnancy loss, or for preventative health screening such as breast and cervical cancer. Men can access reproductive leave for things like fertility treatment, attending appointments with their partner, prostate screening, undergoing and recovering from vasectomy, or dealing with grief related to pregnancy loss.

It is important that paid reproductive leave is available as a universal entitlement that all workers can access, regardless of their state or industry, and the only way to do this is to enshrine it as a right in the NES. This will help to address the gender pay gap, reduce reproductive health stigma, increase women's workforce participation, support workers' health and wellbeing, and create more inclusive workplaces across the country. It also allows workers to rest, heal and treat reproductive health conditions without worrying about the financial and workplace consequences of absence from work.<sup>98</sup>

There is a cost to not doing this – a report by the Bankwest Curtin Economics Centre estimated that **not** providing this entitlement costs the economy up to \$21.3 billion annually in lost time, presenteeism, absenteeism and reduced workforce participation. By contrast, the costs to businesses of implementing the entitlement are a fraction of these lost productivity costs - the

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<sup>98</sup> Bankwest Curtin Economics Centre (2025) The Costs and Benefits of Implementing a Universal Reproductive Health Leave Entitlement in Australia, page 9.

annual net cost of a universal entitlement is estimated to be \$1.7 billion under mid-range assumptions, the equivalent of only \$140 per year per employed worker.<sup>99</sup>

The benefits to employees from access to paid reproductive leave are wide-ranging. Allocated time and flexible work options to manage issues arising from reproductive health and access to preventative health screening mean increased wellbeing, workforce participation and economic security, a better quality of life and increased early detection of health issues for workers and their families.

Benefits for employers include increased productivity, with employees empowered with transparency to plan and manage reproductive health issues and appointments, as well as employee engagement, wellbeing and retention. Employers can also manage and meet their duty of care to eliminate sex discrimination and to ensure workers' health and safety while at work.

The aggregate gross cost of 12 days of paid reproductive health leave is estimated at somewhere between \$2.3 billion and \$5.9 billion, with a central estimate of \$3.6 billion.<sup>100</sup> This does not include the offsetting financial benefits that will accrue to businesses from the implementation of the entitlement, which derive from the improved productivity, improved retention and lower retirement rates among workers. The aggregate financial benefits to businesses from implementing up to 12 days of paid reproductive health leave are estimated to be between \$1.13 billion and \$3 billion per year, with a central estimate of \$1.88 billion per year. This represents a cost offset of 53% on the up-front costs of implementing 12 days of paid reproductive health leave, and a net cost of \$1.7 billion (equating to \$140 per year per person employed).<sup>101</sup>

Benefits to the broader community include breaking down stigma related to reproductive health, increased gender equality, closing the gender pay gap between men and women workers and increased participation of women in the workforce.

***Recommendation 11.1:***

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<sup>99</sup> Bankwest Curtin Economics Centre (2025) The Costs and Benefits of Implementing a Universal Reproductive Health Leave Entitlement in Australia, pages 7-8.

<sup>100</sup> Bankwest Curtin Economics Centre (2025) The Costs and Benefits of Implementing a Universal Reproductive Health Leave Entitlement in Australia, page 7.

<sup>101</sup> Ibid.

The NES should be expanded to provide universal access to 10 days' paid reproductive health leave, an entitlement that provides leave and flexibility for workers to address reproductive health issues that impact on their capacity to work or take preventative measures like health screening.

#### Including reproductive health as a protected attribute in FW Act

Many workers are discriminated against in the course of their employment for reasons related to their reproductive health – for example menstruation, perimenopause, menopause and IVF. This contributes to inequality and gendered disadvantage at work, reduced wellbeing and economic participation, and withdrawal from the labour market, with significant impacts for gender equality and women's economic security.<sup>102</sup>

Multiple affiliates of the ACTU have conducted surveys of their members in relation to reproductive health in the workplace.<sup>103</sup> A common theme arising from the survey results is that many workers are reluctant to speak about their experience of menstruation, menopause and perimenopause in the workplace, due to stigma, embarrassment, the taboo nature of these issues, the lack of support, understanding and respect from employers, and fear of the consequences of doing so (for example being perceived negatively, having their abilities or commitment to work questioned, fear of encouraging further sexism or ageism in the workplace, or being otherwise discriminated against). Another common theme from the survey results is the difficulties workers face in accessing reasonable adjustments at work. Some workers described workplace practices which could constitute indirect discrimination against menopausal workers, such as unsuitable uniforms which do not provide thermal comfort, and strict rostering that does not allow for toilet breaks to manage heavy bleeding or hot flushes.

Given how these issues disproportionately affect women and their participation in work, and the ongoing stigma and lack of understanding associated with them, inclusion of reproductive health as a standalone protected attribute in the FW Act is justified and has the potential to significantly improve women's workforce participation. The addition of reproductive health as a standalone protected attribute would also assist in bringing about the cultural shift required in many

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<sup>102</sup> Colussi, S., Hill, E. and Baird, M. (2024) 'Reproductive policies: An expanding approach to work and care' in M. Baird, E. Hill, and S. Colussi (eds) *At a Turning Point: Work, Care and Family Policies in Australia* (Sydney University Press, 2024) page 20.

<sup>103</sup> For more information about these surveys, see the [ACTU submission to the Senate Community Affairs References Committee on issues related to menopause and perimenopause](#) (10 May 2024).

workplaces to ensure workers receive the support and workplace accommodations that they require.

**Recommendation 11.2:**

Include reproductive health as a protected attribute in the FW Act in all relevant sections.

## 12. Cultural and Kinship Leave

Aboriginal and Torres Strait Islander peoples have extended family and kinship bonds, obligations and relationships that nonindigenous Australians do not have, but which are not currently recognised in the FW Act.

In this submission the ACTU is proposing an amendment to the definition of “immediate family” to recognise kinship, and to allow leave for Aboriginal and Torres Strait Islander employees to attend cultural and ceremonial events.

### **Kinship Leave – Background**

Aboriginal and Torres Strait Islander peoples have bonds and relationships that extend beyond traditional concepts of family.

For Aboriginal and Torres Strait Islander peoples ‘Kinship’ sets out societal structures and relations. It is a system that determines how people relate to one another.

Kinship relationships can be complex and can vary from community to community or amongst clan groups. The kinship system is a central feature of Aboriginal and Torres Strait Islander socialisation and family relationships.

Kinship includes family and extended family including spouses, parents, parents of a spouse, grandparents, siblings, aunts, uncles, cousins, guardians, foster parents, stepparents and step siblings, half-brothers and half-sisters, children, foster children, adopted children and stepchildren.

Aboriginal and Torres Strait Islander peoples also do not distinguish between the closeness of relationships within families. For example, one wouldn’t describe an aunt as a “Great Aunt” or “Great Uncle”, it would just be “Aunt” or “Uncle”. Additionally, in some communities an aunt would be considered as a mother, likewise for fathers/uncles. Children of brothers and sisters may be considered as one’s own children, rather than as nieces/nephews. With cousins there is no such thing as a second or third cousin, only ‘cousins’. Cousins may also be considered as brothers and sisters.

Further, some Aboriginal and Torres Strait Islander people live in a collective environment where community is seen as family.

### ***Issue/problem***

Presently, access to some leave entitlements (paid personal/carer's leave, unpaid carer's leave and compassionate leave) under the NES is predicated on a need arising related to the employee's "immediate family"(see FW Act ss.97, 102 and 104). The term "immediate family" is defined in s.12 as:

*(a) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the person; or*

*(b) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the person.*

This definition does not account for the complexity and depth of kinship and family relationships amongst Aboriginal and Torres Strait Islander peoples as set out above.

In Aboriginal and Torres Strait Islander communities, caring can and does occur outside the current definition of immediate family, but this is not recognised by the current definition.

### ***Recommendation 12.1***

The unique caring responsibilities that Aboriginal and Torres Strait Islander workers hold under kinship should be recognised within the NES. This is most appropriately achieved by updating the definition of "immediate family" in the NES to the following:

*"immediate family" of a person means:*

*(a) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the person; or*

*(b) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the person; or*

*(c) a person with whom there is a connection, relationship or obligation arising under Aboriginal or Torres Strait Islander kinship customs, traditions or cultures of communities, groups, or families to which the first person belongs.*

### **Cultural leave – Background**

Aboriginal and Torres Strait Islander workers have unique obligations to kin and country. This can include (but is not limited to) obligations to participate in cultural events and ceremonies such as funerals, reburials, smoking ceremonies, sorry business and NAIDOC celebrations among other important cultural events and ceremonies.

Cultural obligations are of deep significance to Aboriginal and Torres Strait Islander peoples who are bound by strict lores in community. Absence from cultural responsibilities may deeply impact

on a person's status, position and how they are respected by their kinship, people and community.

***Issue/problem***

Aboriginal and Torres Strait Islander workers, as custodians of the world's oldest continuing culture, should have a legislated and enforceable right to participate in, and celebrate, culture.

Currently, no such right exists. To include such a right is consistent with ensuring the NES are fair and relevant to Aboriginal and Torres Strait Islander workers.

***Recommendation 12.2***

The ACTU proposes the NES be amended to introduce a new form of leave, "Aboriginal and Torres Strait Islander Cultural Leave", available to Aboriginal and Torres Strait Islander employees as follows:

After section 113A

Insert:

*Division 9A—Aboriginal and Torres Strait Islander cultural leave*

*113B Division applies to Aboriginal and Torres Strait Islander employees*

*This Division applies to employees who identify as Aboriginal and/or Torres Strait Islander and who are accepted by their community as such.*

*113C Entitlement to Aboriginal and Torres Strait Islander cultural leave*

*(1) An employee is entitled to 10 days of paid Aboriginal and Torres Strait Islander cultural leave in a 12 month period.*

*(2) Paid Aboriginal and Torres Strait Islander cultural leave:*

*(a) is available at the start of each 12 month period of the employee's employment; and*

*(b) does not accumulate from year to year; and*

*(c) is available in full to part-time and casual employees.*

*(3) The employee may take Aboriginal and Torres Strait Islander cultural leave as:*

*(a) a single continuous 10 day period; or*

*(b) separate periods of one or more days each; or*

*(c) any separate periods to which the employee and the employer agree, including periods of less than one day*

*113D Taking Aboriginal and Torres Strait Islander cultural leave*

(1) The employee may take Aboriginal and Torres Strait Islander cultural leave for the purpose of attending ceremonial or cultural matters.

Note 1: Examples of ceremonial or cultural matters that could be covered by subsection (1) include, but are not limited to, Reconciliation Week, Sorry Day, NAIDOC, Survival Day, Coming of the Light, Children's day, men's business, women's business, sorry business, cleansing ceremony and tombstone unveiling.

(2) The employer must not unreasonably refuse to agree to a request by the employee to take paid Aboriginal and Torres Strait Islander cultural leave.

#### 113E Payment for Aboriginal and Torres Strait Islander cultural leave

(1) If, in accordance with this Division, an employee takes a period of paid Aboriginal and Torres Strait Islander cultural leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

#### 113F Notice and evidence requirements

##### Notice

(1) An employee must give their employer notice of the taking of leave under this Division by the employee.

(2) The notice:

- (a) must be given to the employer as soon as practicable; and
- (b) must advise the employer of the period, or expected period, of the leave.

##### Evidence

(3) An employee who has given their employer notice of the taking of leave under this Division must, if required by the employer, give the employer evidence that would satisfy a reasonable person that that leave was taken for a reason specified in section 113D(1).

##### Compliance

(4) An employee is not entitled to take leave under this Division unless the employee complies with this section.

#### 113G Extending period of Aboriginal and Torres Strait Islander cultural leave

(1) An employee may agree with their employer to take twice as much leave at half the rate of pay required by section 113E.

## 13. Increasing annual leave entitlements

### Issue/problem

Annual leave has essentially been frozen at 4 weeks since the 1970s – half a century ago. The ACTU proposes increasing paid annual leave entitlements for employees covered by the NES from 4 to 5 weeks per year (and from 5 to 6 weeks for shiftworkers). The FWC should also review modern awards with a view to lifting the casual loading from 25% to 27.5% to compensate

casual employees for not being entitled to this additional week of leave. The reasons justifying this increase in the annual leave and loading entitlements of Australian workers are as follows.

#### Unpaid overtime

According to the 2025 Go Home on Time Day survey conducted by the Centre for Future Work, the average Australian employee is already working 3.6 hours a week, or 4.5 weeks per year, for their employer for free as unpaid overtime. On average, younger workers aged 18 to 24 perform the most unpaid overtime: 4.7 hours per week, 6.4 weeks per year. Part-time and full-time employees are, on average, working one free hour for their employer for every 7 paid hours they work.<sup>104</sup> In terms of annual leave, each 7 paid hours earns a full-time worker only 32.2 minutes of paid annual leave – about half as many minutes as they will work for free. Raising the basic annual leave entitlement to 5 weeks would only raise this figure to 40 minutes – still leaving the time worked for free well ahead.<sup>105</sup>

#### Stress and Overwork

Countless surveys and studies have shown that Australian workers are suffering from a significant burden of stress, overwork and burnout. The 2023 ACTU “Work Shouldn’t Hurt” survey found that 37% of workers are ‘regularly and always’ exposed to stress at work. A Gallup study, *State of the Global Workforce 2023*, found that Australian workers had the second highest level of work stress at 47%.<sup>106</sup> OECD analysis has also shown that 10.2% of Australian workers work long hours (50+ hours per week) – above the OECD average.<sup>107</sup> Globally, 80% of workers report feeling ‘time poor’ – not having enough time in the day to do everything they need to do. Time poverty is often cited as the main reason why workers are unable to exercise sufficiently or eat healthily. Providing an additional week of annual leave for workers would offset all of these factors – reducing workplace stress, psychological injury and shifting the balance of work and leisure time for time-poor workers.<sup>108</sup>

#### Length of time since increase last granted

As noted above, annual leave entitlements have not moved since the 1970s. With the age of the average full-time worker sitting at about 40 years, this means that the average worker was not alive when the amount of annual leave granted was last increased in Australia. The Productivity Commission, in 2015, recommended that “Australian governments should periodically assess

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<sup>104</sup> See Centre for Future Work, [Go Home on Time Day 2025](#)

<sup>105</sup> ACTU calculations.

<sup>106</sup> See L Sander, [Stress levels in Australian workplaces among the highest as we battle constant interruptions and irritating colleagues](#), *The Conversation*, 19 October 2023.

<sup>107</sup> See OECD, [Current well-being](#)

<sup>108</sup> See: [Australia has a worse work-life balance than the US. What are we doing wrong? - ABC News](#)

whether there are grounds for increasing current annual leave entitlements in the NES". More than a decade later, the time for such a reassessment has come.<sup>109</sup>

### Comparator nations

Roughly a quarter of OECD nations now provide a larger amount of annual leave for their citizens than does Australia (see list below) – and this is not even considering their generally higher number of public holidays. While some of these countries are small, rich tax havens (Luxembourg, Malta), others are some of the most productive and competitive economies in the OECD (Austria, Germany, France, Spain) along with several dynamic and advanced economies (Denmark, Iceland, Portugal, Norway, Sweden).

OECD countries with a greater entitlement to annual leave than Australia are:<sup>110</sup>

- Austria (25 days statutory minimum)
- Czech Republic (20 days minimum, 25 days collectively agreed)
- Denmark (25 days minimum, 30 days collectively agreed)
- Finland (25 days minimum, 25 days collectively agreed)
- France (25 day minimum)
- Germany (20 days minimum, 30 days collectively agreed)
- Iceland (24 days minimum)
- Luxembourg (26 days minimum)
- Malta (24 days minimum)
- Netherlands (20 days minimum, 25 days collectively agreed)
- Norway (21 days minimum, 25 days collectively agreed)
- Portugal (22 days minimum)
- Slovak Republic (20 days minimum, 25 days collectively agreed)
- Spain (22 days minimum)
- Sweden (25 days minimum).

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<sup>109</sup> Productivity Commission, *Workplace Relations Framework: Report No. 76*, Volume 1, 30 November 2015, page 540-541.

<sup>110</sup> See OECD, [Additional leave entitlements for working parents](#), 2020.

### **Recommendation 13**

Amend s.87(1) to increase the quantum of paid annual leave for employees covered by the NES from 4 to 5 weeks; and from 5 to 6 weeks for shiftworkers who qualify for an additional week of annual leave.

Require the FWC to vary modern awards to lift the casual loading from 25% to 27.5% to compensate casual employees for not being entitled to this additional week of annual leave.

## **14. Improvements to personal/carer's leave**

### ***Issue/problem and proposed solutions***

Access to personal and carer's leave provides important relief and support for employees balancing work and care, and was designed to assist workers in reconciling their employment and family responsibilities.<sup>111</sup>

However, personal/carer's leave is no longer adequate in several key ways and has not kept up with the nature of the modern worker, and the diversity of families and caring responsibilities. There are a number of limitations with the leave that mean it is no longer fit for purpose, including that is of insufficient quantum, not all workers who need it can access it, and workers cannot take leave in all of the situations they need it.

The entitlement to personal/carer's leave needs to be updated so that it is sufficient in quantum, and can be taken by everyone who needs it, in the circumstances they need it in. This would recognise the fact that most workers will have caring responsibilities at some stage in their working lives, and would reflect the diversity of their families and circumstances.

### **Quantum of the leave**

The combined nature of the entitlement to carer's leave and personal leave can mean that carers have insufficient leave balances to access time off when they are unwell, which makes it more difficult for carers to manage their own health and wellbeing. However, the entitlements should not be separated without an increase in the quantum, as this would raise complex issues of how much leave an employee could take for each purpose, and result in unfairness to employees who would have less dedicated leave entitlements for each purpose than they do

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<sup>111</sup> Fair Work Commission (January 2024) *Discussion paper, Work and Care, Modern Awards Review 2023-24* at [224], [230].

currently. The combined nature of the entitlement also gives workers flexibility in how they use the entitlement if they have significant health issues or significant caring responsibilities.

The quantum of personal/carer's leave needs to be increased, to ensure that workers have a sufficient amount for both purposes contemplated by the entitlement. There should be an additional and standalone amount of paid carer's leave available, which can only be taken for caring purposes. The Government should further investigate the case for this new entitlement, and the quantum of additional paid carer's leave that should be provided.

#### Accessibility – who can take the leave

The narrow scope of personal/carer's leave means that it does not reflect the diverse nature of families and caring arrangements, and excludes many workers with caring responsibilities. The particular caring and cultural obligations of First Nations workers are also poorly recognised. There is a need to ensure that the full range of caring relationships is recognised, including for foster children and kinship care. Casual workers are also not entitled to paid personal/carer's leave.

Section 97 of the FW Act provides that personal/carer's leave is available for two purposes, one of which is to provide care or support to a member of the employee's immediate family, or a member of the employee's household. The definition of immediate family in s.12 of the FW Act is confined to specific relationships.

Recommendation 17 of the Final Report of the Senate Select Committee on Work and Care<sup>112</sup> proposed that the definition of 'immediate family' be amended and broadened for the purposes of an employee accessing carer's leave. It proposed that in addition to the current definition, the following people should be classified as 'immediate family':

- Any person who is a member of an employee's household, and has been for a continuous period of over 18 months;
  - Any of the employee's children (including adopted, step and ex-nuptial children);
  - Any of the employee's siblings (including a sibling of their spouse or de facto partner);
- and

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<sup>112</sup> Senate Select Committee on Work and Care, Final Report (March 2023), Recommendation 17.

- Any other person significant to the employee to whom the employee provides regular care.

We concur with this recommendation, with the addition of kinship care and foster children. Casual employees should also have access to paid personal/carer's leave.

Paid personal and carer's leave should be made available to:

- employees who care or expect to care for a dependent or any other person significant to the employee to whom the employee provides regular care or is in palliative care (in line with Recommendation 17 of the Work and Care Final Report);
- employees who have kinship relationships and kinship care obligations;
- foster parents to ensure they have access to entitlements to provide the necessary care and support to foster children in their care; and
- casual employees.

#### Accessibility – what the leave can be taken for

The entitlement is currently limited to use in specific situations. Section 97 provides that an employee may take personal/carer's leave in two situations:

- because they are not fit for work because of a personal illness or personal injury; or
- to provide care or support to an immediate family member or a member of their household who requires care or support because of a personal illness or personal injury, or an unexpected emergency.

These situations are unnecessarily confined and do not cover common situations which require workers to take personal/carer's leave. For example:

- Employees frequently encounter situations where they need to attend a medical appointment during working hours, but do not at that point in time meet the requirement of being unfit for work. This includes medical appointments that are necessary for the maintenance of health or are preventative health measures.
- Our affiliates report that employers some times refuse personal leave in situations where an employee has a condition that renders them unfit for work, but is not strictly an 'illness' or 'injury'.
- There are several common caring activities for workers not currently covered such as organising formal care arrangements, attending medical and other appointments, and palliative care.

Paid personal and carer's leave should be extended to include a broader range of circumstances and carer responsibilities that are not limited to illness, injury or emergencies, and include attending medical appointments, medical conditions that render the employee unfit for work, and attending to other caring activities (such as organising formal care arrangements, attending medical and other appointments with the person being cared for, and palliative care).

#### **Recommendation 14**

- There should be an additional and standalone amount of paid carer's leave available, which can only be taken for caring purposes. The Government should further investigate the case for this new entitlement, and the quantum of additional paid carer's leave that should be provided.
- Make paid personal/carer's leave available to all workers who need it, including:
  - a. employees who care or expect to care for a dependent or any other person significant to the employee to whom the employee provides regular care or is in palliative care (in line with Recommendation 17 of the Work and Care Final Report);
  - b. employees who have kinship relationships and kinship care obligations;
  - c. foster parents to ensure they have access to entitlements to provide the necessary care and support to foster children in their care; and
  - d. casual employees.
- Extend the entitlement to include a broader range of circumstances and carer responsibilities including attending medical appointments, medical conditions that render the employee unfit for work, and attending to other caring activities (such as organising formal care arrangements, attending medical and other appointments with the person being cared for, and palliative care).

## **15. Roster justice**

### ***Issue/problem***

For millions of workers, rosters are unpredictable, one-sided and insecure. This can play havoc with their financial security, well-being and ability to meet caring and family responsibilities.

As the 2023-24 review of Modern Awards by the FWC found [at 89]:

“Material before the Commission suggests that roster instability and unpredictable hours adversely affects worker-carers, who require predictable schedules to manager caregiving responsibilities. On-demand flexibility, where employees are expected to be

available to short notice, was noted to exacerbate job insecurity. For part-time employees, particularly those with caregiving responsibilities, this can lead to income insecurity and increased work family conflict.”<sup>113</sup>

The length of notice that employers must provide for a roster varies widely across modern awards, from 14 days down to nothing at all on the 25 awards examined by the FWC for the review.<sup>114</sup>

While rostering and notice periods are matters usually dealt with in modern awards, it would be possible to include a minimum standard for predictable hours of work in the NES which all modern awards would adhere to as a minimum, with industry and award specific variations that build upon this standard also possible.

The ACTU acknowledges that the FWC has commenced on its own initiative a review of Part time award terms that may address some of the issues identified here. However, whether or not it does remains to be seen, especially as the need for predictable hours of work for full time employees may be beyond its scope.

### ***Recommendation 15***

Amend s.62 (dealing with maximum weekly hours) by adding the following sub-sections:

#### **Arrangements for working hours**

(5) An employer must provide an employee (other than a casual employee) predictable hours of work.

(6) In determining whether hours of work are predictable for the purpose of sub-section (5), the following must be taken into account:

(a) whether the employer has provided a regular pattern of work in writing, including the days of work and start and finish times;

(b) changes to the regular pattern of work are made on at least two weeks’ notice and following genuine consultation of at least two weeks, including taking into account the employee’s personal circumstances (including family responsibilities and caring arrangements);

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<sup>113</sup> Fair Work Commission [Modern Awards Review 2023-2024](#) (AM2023/21).

<sup>114</sup> Ibid, para [90].

(c) overtime payments are payable for all work performed outside the regular pattern of work; and

(d) an employee may refuse a roster change if it is unreasonable regarding their personal circumstances.

(7) In the case of a dispute about sub-section (5), the status quo remains until the dispute is determined.

## 16. Giving workers back time

### *Issue/problem*

The case for a four-day working week in Australia continues to grow, with recent trials achieving positive results for worker well-being, productivity and improved staff retention.

Pilots of the “100:80:100” model (100% pay, 80% time, 100% output) have found that productivity is maintained or improved when work is redesigned around outcomes rather than hours. A Swinburne University study of Australian firms trialling a four-day week found that none reported a drop in productivity, while most saw improvements alongside lower sick leave and higher staff retention.<sup>115</sup> Large employers such as Medibank have also reported stable performance, stronger engagement and reduced absenteeism following four-day- week trials.<sup>116</sup>

Wellbeing outcomes are just as compelling. A large peer reviewed study covering Australian workplaces found that a four-day- week significantly reduced burnout and improved mental and physical health, without negative impacts on output. This was leading to better retention, lower recruitment costs and a more sustainable workforce.<sup>117</sup>

Economically, the evidence is that introduction of the four-day week is leading firms to improve inefficient work design – one of Australia’s key productivity hurdles. Trials show that when hours are reduced, organisations cut low value-meetings, streamline processes and adopt smarter technology—changes that lift productivity per hour worked.<sup>118</sup>

A four-day week would also assist with closing Australia’s large “productivity gap” with real wages. Since the turn of the century, productivity has grown about ten percent faster than wages,

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<sup>115</sup> ABC, [Australian companies that trialled four-day work week haven't look back](#), 16 June 2023.

<sup>116</sup> Future 4 Days, [Reimagining the Work Week: Momentum Builds for Four Days in Australia](#), 30 August 2025

<sup>117</sup> ABC, [Working a four-day week without taking a pay cut reduces burnout](#), 22 July 2025

<sup>118</sup> University of Melbourne, [A four-day week could help Australia's economy](#), 22 July 2025

meaning that workers are not receiving their fair share of Australia's economic pie. If they did, they would be at least \$180,000 better off today.

Importantly, a four-day week is just one way that workers can take back more of their time, given the diverse work patterns and arrangements across industries and occupations. It may be more appropriate in some cases for workers to secure additional rostered days off or, as this submission also calls for, extra annual leave. In other cases, the main challenge confronting workers – especially those on casual or part time arrangements – might be hours that are unpredictable and insufficient.

To make progress, we encourage the Australian Government to actively support and promote efforts by employers, employees and their unions to trial and adopt a four-day working week, and other models that give workers back their time. That could include supporting trials, providing guidance on their roll-out and assisting with promoting the results.

The ACTU also encourages the Government to investigate reducing maximum weekly hours in the NES from 38 down to 35 hours a week as the first step. This would also include a requirement on the FWC to vary modern awards accordingly, including by ensuring no loss of pay, by lifting hourly pay rates by 8.5 per cent or 38/35ths, and introducing a right for employees to request to work a four day week where reasonable.

### ***Recommendation 16***

As the next step towards a 4-day week, the Australia Government should examine the option of:

- reducing maximum weekly hours in the NES from 38 down to 35; and
- flowing that through to the modern awards, with no loss of pay and a clear right to request to work reduced days, tailored to industry or occupational circumstances.

The Australian Government should also actively support and promote those employers and unions that have moved to, or are considering moving to, a 4-day week, and other approaches to give workers back their time.

### **17. Taking paid annual leave**

The ANMF has raised two issues with the operation of s.88 relating to the taking of annual leave under the NES. Section 88(1) allows an employer and employee to mutually agree on a period when annual leave may be taken. Under s.88(2) an employer must not unreasonably refuse to agree to an employee's request to take annual leave. In practice, most workplaces have a system that allows employees to submit their leave requests to their employer.

The first issue is that the NES could be more prescriptive about the manner in which planned annual leave is treated, once there is agreement on the timing of leave. The legislation should be amended to allow an employee to request that an already approved period of leave be varied or cancelled. Such a request should be treated in the same manner as the initial leave application, namely that the request for variation or cancellation of leave must not be unreasonably refused by the employer.

Secondly, the annual leave provisions should clarify that an annual leave request, once approved by the employer, cannot be cancelled unilaterally by the employer. The ANMF has been approached on a number of occasions by members whose employers have sought to revoke an approved period of leave under the misapprehension that they have the ability to do so, whereas the legislation is silent on this issue.

### **Recommendation 17**

The ACTU supports amending s.88 to:

- allow an employee to request that an already approved period of leave be varied or cancelled, with such a request not to be unreasonably refused by the employer;
- clarify that an annual leave request, once approved by the employer, cannot be cancelled unilaterally by the employer.

## **18. Enforcing NES entitlements in state/territory jurisdictions**

SA Unions has highlighted a limitation on the ability of the South Australian Employment Tribunal (**SAET**), incorporating the South Australian Employment Court, to enforce NES entitlements through the range of orders that a federal court may make under s.545(1): “any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision”. The High Court has observed that the power of federal courts under s.545(1) is to make orders of a preventative, remedial or compensatory nature.<sup>119</sup> Section 545(1) also allows federal courts to make orders against the individuals who have been accessories (within the meaning of s.550) to the contraventions, such as directors and HR personnel.

In contrast, SAET and other eligible state or territory courts are limited by s.545(3) to making orders that an employer “pay an amount to, or on behalf of, an employee of the employer if the

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<sup>119</sup> *Australian Building and Construction Commission v CFMEU* (2018) 262 CLR 157 at [107].

court is satisfied that” the employer was required to pay the amount under the FW Act (or under an instrument) and the employer has contravened a civil remedy provision by failing to pay the amount. Therefore these state and territory courts cannot make orders addressing underpayments (including those arising from NES breaches) more broadly, for example by requiring employers to take preventative actions such as regular payroll audits, training for company officers, etc. In addition, the limitation in s.545(3) that an order can be made against an *employer* only, can mean that in the event of phoenixing or insolvency, the SAET is prohibited from making orders against a natural person who was responsible for and/or involved in the contraventions that created the sums being due. This obstacle to pursuing the underpayment against the individuals knowingly concerned in the contravention<sup>120</sup> can have meaningful consequences for the recovery of monies within the SAET.

### **Recommendation 18**

An amendment is sought to enable eligible state and territory courts to have the same powers as federal courts under s.545(1) to “make any order the court considers appropriate”, once satisfied that a person has contravened or proposes to contravene the NES.

### **19. Exclusion of service as a casual from calculation of entitlements to notice of termination and redundancy pay**

SA Unions seeks repeal of two provisions which preclude consideration of an employee’s service as a casual when calculating “continuous service” for purposes of the s.117 entitlement to notice of termination or payment in lieu and the s.119 entitlement to redundancy pay.

Section 22 provides that an employee’s period of service with an employer (for purposes of calculating NES and other entitlements under the FW Act) “is a period during which the employee is employed by the employer”. In *AMWU v Donau Pty Ltd*,<sup>121</sup> the FWC held that this includes a period of regular and systematic casual employment contiguous with the commencement of permanent employment.

However, ss.117(4) and 119(3) (introduced by the Coalition Government through the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth)) both state as follows:

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<sup>120</sup> See *Fair Work Ombudsman v Step Ahead Security Services Pty Ltd & Anor* [2016] FCCA 1482, [65]-[66].

<sup>121</sup> (2016) 262 IR 18.

A reference in this section to continuous service with the employer does not include periods of employment as a casual employee of the employer.

This has the effect that if an employee begins as a casual but is later converted to permanent, the period of service as a casual will not count towards the period of continuous service that forms the basis for calculating their entitlements under ss.117 and 119.

While casual employees are excluded from access to these entitlements by s.123(1)(c), service as a casual prior to becoming a permanent employee should count towards the assessment of that employee's continuous service under ss.117 and 119 – resulting in a higher level of notice of termination and redundancy pay.

The current provisions have adverse implications for workers who have shown long-term commitment to an employer, including through periods of casual employment, and sit uneasily with the broader objectives of the new provisions regulating casual work introduced by the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth).

#### **Recommendation 19**

The ACTU supports the repeal of ss.117(4) and 119(3).

#### **20. Definition of “service” for accrual of annual leave and personal/carer’s leave under portable long service leave schemes**

The ACTU supports the submission of SA Unions in relation to an ambiguity about the definition of “service” in s.22 of the FW Act, as it interacts with the leave entitlements of employees working under portable long service leave schemes.

Portable long service leave schemes are now in place in Victoria, the ACT, New South Wales, Queensland and South Australia. In SA the scheme has been expanded to include community services workers, in addition to workers in the construction industry.

As noted earlier in this submission, under ss.87(2) and 96(2) paid annual leave and personal/carer’s leave accrue progressively during a year of service according to an employee’s ordinary hours of work. Section 22 defines “service” as a period during which an employee is employed by an employer, excluding certain periods (for example, unpaid leave, authorised unpaid absence).

Where an employee takes long service leave under the *Long Service Leave Act 1987* (SA), the employee remains on paid leave from their employment and is paid directly by the employer. However under a portable long service leave scheme, the employee is paid by the scheme rather than the employer. SA Unions has found that some employers view an absence from work to take long service leave under a portable scheme as an “unpaid” or otherwise excluded period for purposes of s.22. On that basis, the period of the employee’s absence would not count as “service”, so that annual leave and personal/carer’s leave entitlements under the NES would not accrue.

Allowing ambiguity in the definition of “service” to erode leave entitlements undermines the very purpose of portable long service leave schemes and disproportionately affects workers in industries such as community services and construction. The NES should be amended to provide certainty and prevent workers from being disadvantaged for exercising a lawful entitlement.

***Recommendation 20***

Amend s.22 to include periods of unpaid authorised absence, where a worker is taking long service leave under a portable scheme, as periods of service. This would ensure that periods of absence under such a scheme are counted towards annual leave and personal leave entitlement calculations.

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