Inquiry into the operation and adequacy of the National Employment Standards (NES) under the *Fair Work Act*

Submission of the United Workers Union

6 March 2026

UNITED WORKERS UNION

Contents

Acknowledgement to Country

The United Workers' Union is a national trade union. We acknowledge and respect the continuing spirit, culture and contribution of Traditional Custodians on the lands where we work, and pay respects to Elders – past, present and emerging. We extend our respects to Traditional Custodians of all the places that United Workers' Union members live and work around the country.

About the United Workers' Union

United Workers Union ('**UWU**') is a powerful new union with 150,000 workers across the country from more than 45 industries and all walks of life, standing together to make a difference. Our work reaches millions of people every single day of their lives. We feed you, educate you, provide care for you, keep your communities safe and get you the goods you need. Without us, everything stops. We are proud of the work we do– our early childhood educators are shaping the future of the nation one child at a time; supermarket logistics members pack food for your local supermarket and farms workers put food on Australian dinner tables; hospitality members serve you a drink on your night off; aged care members provide quality care for our elderly and cleaning and security members ensure the spaces you work, travel and educate yourself in are safe and clean.

Introduction

1. The UWU 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**').

2. The NES provisions contained in Part 2-2 of the *Fair Work Act 2009* (Cth) ('**the FW Act**') provide the foundation of Australia's safety net of minimum employment standards. The NES has not been subject to a dedicated review since its inception. Despite this, the scope of the NES has expanded, and provisions within the NES have been interpreted by the Fair Work Commission and the Courts, which has, in some instances lead to a lack of clarity about the entitlements.

3. The Terms of Reference 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.

4. 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):

- Division 4 − Request for Flexible Working Arrangements
- Division 4A − Casual Employment
- Division 5, Subdivision B − Parental Leave

Expanding the definition of immediate family

5. Aboriginal and Torres Strait Islander kinship relations are a complex and dynamic system of relationships that are not captured by existing non-Indigenous definitions of family[1], and as such are not recognised in the FW Act.

[1] Australian Institute of Family Studies (2014) Strengths of Australian Aboriginal cultural practices in family life and child rearing.

6. The UWU proposes that the definition of "immediate family" be amended to recognise these kinship relations for the purposes of paid and unpaid personal/carer's leave and compassionate leave under the NES (see ss. 97,102 and 104).

7. The UWU supports and adopts the submission of the ACTU in respect of kinship, which states:

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

8. Currently, the NES provides for paid and unpaid personal/carer's leave and compassionate leave related to certain circumstances involving an employee's "immediate family".

9. "Immediate family" is defined in section 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.

10. Notably, section 106B(3) defines a "close relative" of a person for the purposes of family and domestic violence leave as another person who is (a) a member of the person's immediate family (defined in section 12) or (b) related to someone according to Aboriginal or Torres Strait Islander kinship rules.

11. There is currently no other definition to assist with the interpretation of "kinship rules" in the FW Act.

12. The current legislative scheme creates an anomaly in that the NES partially recognises that kinship rules may render someone a close relative for the purposes of family and domestic violence, however it does not recognise kinship rules for other purposes such as caring responsibilities or attending funerals.

13. The difference between "close relative" and "immediate family" for these purposes also creates a situation where Aboriginal and Torres Strait Islander relationships are not as important or close as other definitions of "immediate family", when that is not an accurate reflection of these relationships for the purposes of social and cultural obligation.

14. Currently, Aboriginal and Torres Strait Islander workers have to take annual leave or leave without pay to attend to their kinship obligations, where other leave types could be used to more adequately address the purpose of their need to take leave.

Experiences of UWU Members

Barunah Alick, 48 years, Victor Harbour, SA - Security and Hospitality member:

"Throughout my employment history I have had extensive experience with not being able to take cultural leave and have had my relationships with family scrutinised and ignored.

Sorry business [a period of cultural practices that take place after someone's death] has always had to be taken as annual leave, or, at times leave without pay, but the thing about leave without pay is that it is frowned upon by the employer and work mates, so it's a last resort.

There have been funerals that I have needed to attend, First Nations relationships, it may be a brother where the employer would ask "how many brothers do you have?" Not understanding the complexity of relationships. There have been times where I would not even ask, knowing that with short notice, as is often the case with sorry business, I could not give enough notice and would not be approved to go.

My sister's son passed away suddenly at 22 years old. In white relationships he would have been my cousin, but for us, he is nephew. Because of short notice, I could not attend the funeral, it was up in Cairns and I am in Adelaide. It was devastating for me, my family and my community.

When I finally got to Cairns, months later, all we could do was cry. We had each held on to that grief for so long. There is such a deep sadness. I am Uncle to that young man who passed, and Uncle is a really important relationship in Aboriginal and Torres Strait culture. I still feel the impact of not being there for that sorry business now, I grew up with this family in Cairns, my parents passed, we depended on each other, I promised I would be there and I wasn't.

It is not right that the employer gets to say "yes" or "no" to such important things; it's not good enough.

I am an elder now, an uncle. There is more pressure to attend these things, to support family and community. In the old days Uncle's and Aunties would come down from Torres Strait, come in from Country and the kids would look up to them, they are an important presence, they teach and guide the kids, the family, look after each other and community. I am that elder now, being an Uncle, I have to go, I have to be there. I am a part of the old people now and the kids are looking to me. If I don't go, who is there for the young ones? If I don't go, that part of our way will be lost. We belong to each other, this is our way, it is very strong."

Leisha, Education WA – Aboriginal and Islander Education Officer:

"I am a Wagyl Kaip/Wilman woman, born near Narrogin and raised partly on Whadjuk Noongar land. I work as an AIEO in the Department of Education — a

role built on culture, connection, and supporting our kids and communities. The system benefits from the knowledge we bring every single day.

But when I needed cultural leave 3 years ago, that respect didn't go both ways.
I asked for time off to attend the funeral of my second cousin's baby. In Western terms that's "extended family", but in our kinship system she is my sister. We grew up together. We share our childhood, our families, and our culture. Her baby passing at one year old devastated all of us.

When I applied for leave, I was questioned and pushed back on. The admin staff wanted to know how we were "actually" related, why it mattered, whether she was my sister and whether it counted. It felt like being interrogated about my own family, at a time when I was grieving a child.

I had to fight for that leave. I had to push back, say I would go regardless, unpaid if needed. The questioning was culturally inappropriate, and many mob in my position would not have felt safe to argue the point. It shouldn't be this hard.

We AIEOs give so much, our cultural knowledge, our connections, and the trust we build with students and families. Yet when we need leave for cultural responsibilities or family, we face a system that doesn't understand - or recognise - our kinship.
This is exactly why the National Employment Standards must change to recognise First Nations definitions of immediate family, and why our awards need proper cultural safety and education for staff who approve or deny leave.

Our kinship is real. Our grief is real. Our obligations are real. And the system should reflect that."

Recommendation 1

15. The definition of "immediate family"[2] in the NES should be amended as follows:

[2] Noting that the same definition is also proposed by the ACTU in their submissions.

"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 and ceremonial leave

16. Aboriginal and Torres Strait Islander workers have unique obligations to their kinship relations, as well as to country. It is broader than attending to funerals, sorry business and other death-related cultural practices, and includes NAIDOC celebrations and other important cultural events and ceremonies.

17. There is no right to cultural and ceremonial leave under the NES for Aboriginal and Torres Strait Islander workers. These workers are often expected to participate in these kinds of celebrations at work during work time, and they may not be granted leave for other situations, such as conferences or cultural events.

18. Including a right to cultural and ceremonial leave is consistent with ensuring that the NES is relevant to the needs of Aboriginal and Torres Strait Islander workers.

Experiences of UWU Members

Rosemary, NSW, First Nations Round Table and Aged Care member:

"I was asked to provide proof to attend a NAIDOC event; it made me feel like my culture and identity were being questioned. It was as if my connection to my community, my obligations, and my heritage were being treated as less important than any other workplace requirement.

Then, when I couldn't get paid leave to attend a conference as a First Nations ambassador, it was even more painful—it made me feel like the work I do for my people isn't valued or respected.

Situations like this are not culturally safe. They single me out, make me feel vulnerable, and create opportunities for racial prejudices to emerge in the workplace. I shouldn't have to justify my culture or fight to be seen and supported. I want to work somewhere that truly respects who I am, my community, and my responsibilities as a First Nations person, and I am sure that all First Nations workers feel the same way.

Changing the NES to include paid cultural leave and that recognises my family removes opportunities for racial prejudice and sends a clear message that culture is respected and valued."

Recommendation 2

19. The UWU 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[3]:

> 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*

[3] The UWU notes that this provision and recommendation is identical to that proposed by the ACTU.

(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.

National long service leave standard

20. The UWU adopts and supports the ACTU's submission regarding the adoption of a nationally uniform minimum standard for long service leave. We repeat and emphasise their submission that in 2012, a post-implementation review of the FW Act

noted “broad support” for a uniform national standard for long service and recommended that it should have been introduced by 2015. No progress has been made in the decade since then.

21. A national long service leave standard would simplify and streamline the long service leave system, making it easier for workers and their employers to understand and implement their entitlements.

Section 113 Issues

22. Section 113 provides that if there are applicable award-derived or agreement-derived long service leave terms (outlined in subsections (3) and (5)) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.

23. Subsection 113(3) provides “award-derived” long service leave terms are terms of an award or State transitional award that would have applied to the employee immediately before commencement (1 January 2010) and would have entitled the employee to long service leave, even if they were not engaged before that date.

24. Subsection 113(5) provides “agreement-derived” long service leave terms are terms that would have applied to the employee immediately before commencement and there are no applicable award-derived long service leave terms in relation that the employee.

25. 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).

26. State or Territory industrial laws do not apply generally to the exclusion of the FW Act, however section 27(2)(g) outlines that State or Territory industrial laws apply regarding long service leave other than by reason of section 113.

27. The effect of this legislative scheme is that if there are no award or agreement-derived long service leave terms that apply to an employee, they are entitled to long service leave in accordance with the applicable State or Territory legislation.

28. However, if an employee is covered by an award or agreement meeting the requirements of section 113, usually awards or agreements with less beneficial

schemes of long service leave and other entitlements, the NES applies and deprives an employee of a more generous State or Territory entitlement.

Relevant case law

29. *Conroy's Smallgoods v AMIEU* (2023) 323 IR 419 ('***Conroy's'***) demonstrates the detriment to employees created by the operation of section 113. While it was "not in contest" that the relevant employee in that case, Mr Finch, was entitled to long service leave under the South Australian legislative scheme he would have been entitled to "*10.4 weeks of accrued long service leave equating to… $9,950.23*"[4], the Full Federal Court majority proceeded to find that Mr Finch's entitlement was "nil" because of the operation of section 113.

30. The Court in *Conroy's* found that the *Federal Meat Industry (Smallgoods) Award 2000* applied to Mr Finch's employment. That award excluded casual employees from being entitled to long service leave, meaning they had no entitlement to anything. The majority found that this was an "entitlement", and the provision was interpreted in accordance with its purposes which was to preserve long service leave arrangements in pre-modernised Awards, depriving Mr Finch of his long service leave in accordance with the SA legislative scheme.[5] Justice Bromberg's dissenting judgement interpreted the word "entitlement" as referring to "something", and in the context of section 113 "*those words are not capable of being grammatically construed as referring to award terms that would have entitled the employee to no long service leave at all*".[6]

Recommendation 3.1

31. Reform of section 113 is required to address its potential detrimental effects, depriving employees of entitlements they have worked many years to build up, and the ambiguity presented by the word "entitlement". The effect of the *Conroy's* decision is to deprive thousands of casual workers around Australia from accessing these entitlements in circumstances where they are unable to access alternative forms of leave such as annual leave. It leaves a loophole for employers to avoid liability for long service leave by keeping workers as casual employees.

[4] *Conroy's Smallgoods v AMIEU* (2023) 323 IR 419, [2].
[5] Ibid, [187].
[6] Ibid, [40].

32. The UWU recommends that section 113 is amended to make it clear that only award-derived or agreement-derived long service terms that are more beneficial than State or Territory entitlements are preserved.

Recommendation 3.2

33. The UWU proposes that there be a nationalised system of long service leave based on the most favourable conditions in the State or Territory systems, as submitted by the ACTU. Workers should not be entitled to less favourable conditions by reason of the state they live in.

Portable and private long service leave schemes

34. A number of the UWU's members, and other Australian workers, are part of various private and public portable long service leave schemes. There is a national portable long service leave scheme for workers in the coal mining industry, and various state schemes for building and construction, contract cleaning, community services and security.

35. These schemes allow a worker to retain their long service leave entitlement even if they work for one or more employers during their career.

36. These arrangements further complicate long service leave entitlements across Australia and create a situation where some workers can continue to accrue long service leave across multiple employers, while other workers cannot.

37. Arrangements such as the Long Service Corporation in NSW were created in recognition that some industries are arranged in such a way that employees often move between companies when doing effectively the same job.

38. Other industries have similar characteristics, such as hospitality, retail, agriculture, where employees move between companies and businesses for reasons outside of their control.

39. Portable long service leave is also sometimes implemented or bargained for as an employee benefit, where some types of service in a similar industry are recognised for the purposes of long service leave.

Recommendation 3.3

40. The UWU recommends that a form of portable long service leave based on existing state schemes be implemented as part of a national long service leave standard.

Accrual of personal leave and annual leave entitlements

41. The accrual of personal leave and annual leave entitlements should be straightforward and without complication. In reality, accrual of entitlements can be overly complicated and can vary between States and Territories.

42. Section 87(2) states that an employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

43. The meaning of "service" however prevents employees from accruing personal leave and annual leave entitlements during some periods of their employment.

44. Section 22 states that a period of service by a national system employee is a period during which the employee is employed by the employer, but does not include the following periods:

    (a) Any period of unauthorised absence;

    (b) Any period of unpaid leave or unpaid authorised absence, other than:

        (i) A period of absence under Division 8 of Part 2-2 (which deals with community service leave); or

        (ii) a period of stand down under Part 3-5, under an enterprise agreement that applies to the employee, or under the employee's contract of employment; or

        (iii) a period of leave or absence of a kind prescribed by the regulations;

    (c) any other period of a kind prescribed by the regulations.

45. The exclusions to what is considered a period of "service" means that employees are losing out on entitlements even when the period of absence is approved. It also means that employees may miss out on entitlements depending on what State or Territory they live in.

Accruing entitlements on long service leave

46. As discussed above, long service leave provisions vary significantly between State and Territory legislation, and now include multiple portable long service leave schemes. Each scheme provides for different accrual rates of personal/carers leave and/or annual leave entitlements.

47. The result is that entitlements to the accrual of annual leave and personal/carers leave varies significantly across Australia, depending on location or scheme.

48. Portable long service leave provisions were set up in some States and Territories to address inequitable situations where employees of certain industries did not accrue long service leave due to having to work for multiple employers. Instead of being paid by their employer, eligible employees are paid from the scheme. Currently, New South Wales, Victoria, South Australia, Queensland, and the Australian Capital Territory have portable long service schemes.

49. Portable long service leave schemes add a further complication, in that in the taking of long service leave an employee, that works multiple jobs, may be absent from multiple employers during the period of leave.

50. The main ambiguity arises in relation to these schemes as to whether portable long service leave constitutes “service” for the purposes of s 22.

51. Because employees are not being paid by their employer, employees taking long service leave through the portable long service leave scheme are considered to be on a period of unpaid leave or unpaid authorised absence under s 22(2)(b), and do not accrue entitlements to annual leave and personal leave.

52. Employees under a portable long service scheme are therefore often worse off than employees taking long service leave through their employer. These schemes were set up to address inequity, but the current restrictions in the NES undermine this intention.

53. The system is complicated for employees to navigate, results in employees of the same employer in different jurisdictions having different entitlements and can lead to significant legal uncertainty.

Recommendation 4.1

54. The UWU recommends that the NES be amended to ensure that annual leave entitlements and personal/carers leave entitlements continue to accrue whist a person is on long service leave in accordance with the relevant Act and/or scheme. Such amendment should be broad enough to ensure that entitlements accrue when an employee accesses portable long service leave.

55. That section 22 be amended to specify that long service leave is service, including public/private portable long service leave. This ensures that all employees taking long service leave are provided the same standard of entitlements.

56.

Accruing entitlements on workers' compensation

57. Accrual of entitlements for employees receiving a workers' compensation payment varies between each State and Territory. For setting a national standard, reforms to the NES must be made to ensure that each employee across the country receives the same entitlements.

58. Section 130 of the NES outlines that an employee is not entitled to take or accrue any leave (whether paid or unpaid) when the employee is receiving workers' compensation under a law of the Commonwealth, a State, or a Territory.

59. Because workers' compensation laws differ between each State and Territory, the application of this section differs depending on what jurisdiction an employee resides in y. For example, annual leave generally accrues for all employees except those in the Northern Territory and Norfolk Island, but some State schemes then modify that again. For example under the *Return to Work Act 2014* (SA), a worker is taken to have used their annual leave for a year period if they are in receipt of weekly payments for 52 weeks. Similarly, Commonwealth employees can only accumulate annual leave and personal leave for 45 weeks. Personal leave only accumulates for employees in Queensland, South Australia, and Western Australia.

60. The variation across Australia is needlessly confusing and should be reformed to ensure that there is continuity for all employees on workers compensation.

Recommendation 4.2

61. Amend s 130 to provide that employees of all jurisdictions accrue annual leave and personal leave while on workers' compensation.

Accruing entitlements during protected industrial action

62. Section 22 of the NES provides that employees taking protected industrial action are considered to be on periods of unpaid authorised absence.

63. Employees taking protected industrial action are therefore excluded from accruing entitlements because unpaid authorised absences are not considered to be a period of service under s 22(2)(b).

64. The issue also arises when employees are locked out of their worksites: in the decision of in *CFMEU and CEPU v Carter Holt Harvey Woodproducts Australia Pty Ltd T/A*

Carter Holt Harvey that a lockout was considered to be a period of unpaid authorised absence and therefore excluded from a period of service.

Recommendation 4.3

65. The definition of "service" under s 87(2) and s 22 should be amended to include that periods of protected industrial action are considered to be periods of service.

Compassionate Leave

66. For all Australian workers, including Aboriginal and Torres Strait Islander workers, grief is a complex and lengthy process. When a member of a worker's family becomes ill or dies, time-consuming and emotional tasks become a priority and require them to be away from work to be with family, make arrangements and take care of themselves.

67. Funerals and cultural practices relating to death can also require interstate or overseas travel, which adds to the amount of time required to be away from work.

Increasing the entitlement to compassionate leave

68. The NES currently provides for 2 days of paid compassionate leave as follows:

(1) An employee is entitled to 2 days of compassionate leave for each occasion (a permissible occasion) when:

(a) a member of the employee's immediate family or a member of the employee's household:

(i) contracts or develops a personal illness that poses a serious threat to his or her life; or

(ii) sustains a personal injury that poses a serious threat to his or her life; or

(iii) dies; or

(b) a child is stillborn, where the child would have been a member of the employee's immediate family, or a member of the employee's household, if the child had been born alive; or

(c) the employee, or the employee's spouse or de facto partner, has a miscarriage.

(2) Paragraph (1)(c) does not apply:

(a) if the miscarriage results in a stillborn child; or

(b) to a former spouse, or former de facto partner, of the employee.

69. 2 days is an extremely short period of time for a worker to be away from work for the purposes of grieving, preparing and attending a funeral, and possibly travelling to a different location.

70. For most Australians, organising and attending a funeral alone can take much longer than 2 days. It is an emotional process that can be extended for many reasons and may be a complicated and expensive endeavour.

71. For Aboriginal and Torres Strait Islander workers particularly, these processes can take weeks or even months.

72. Providing for such a short period of leave means that workers must resort to other forms of leave or unpaid leave, leaving them vulnerable to financial insecurity at a distressing time in their lives.

Experiences of UWU Members

Malcolm, SA – First Nations Round Table and Hospitality/Casinos member:

> *"I have lived away from my family in NSW for about 50 years, first in the NT on Groote Eylandt, and now for 34 years in SA. While growing up in NSW we had continuous contact with my mum's side of the family. She had 3 brothers and 7 sisters; I have 30 first cousins in NSW.*
>
> *So, the death of any aunts or uncles was always going to be bitter pill and while we weren't "traditional" with no language, land or ceremony, we considered ourselves to be one big family with many happy shared memories.*
>
> *Distance and time prevented me from attending many of their funerals which was due to employees only having limited time off to attend and being in central NSW, it would be a day and a half travel to attend and to return.*
>
> *It took this long to attend my father's funeral, and I was only able to remain longer because my place of work was closed on Monday / Tuesday. This was important as a lot of the organisation had been carried out by my sisters and as the oldest son, I needed to be on hand especially in regard to speeches and keeping the peace among my family.*

It was also important to reconnect with cousins on both sides, who I had not seen since my grandmother's funeral in the mid 1980's.

It would have been ideal and important for all of us to have been able to spend more time together.

My mum passed 6 months later (due to loneliness) and again it was with a heavy heart that we, my family and I travelled from SA for her funeral again for 4 days which was not enough time.

I had to return again 4 months later to clean out the house which was done in a hurry. So many memories and dividing up possessions was emotionally draining and exhausting.

Not sure if others go through such a difficult process dividing items and in some cases having family members feel hard done by when they didn't get a memory / item. It was very stressful - I had not lived at home for 40 plus years.

So many First Nations people now live far and wide from their home country and community. So, the tyranny of distance can be daunting and eats into the time you can spend with family and friends. It means you have less time to visit places that held good and important memories that you have with those who have passed or are ceremonially important.

For those with a strong connection to culture, land, law and duty time is important to assist with the grieving and the healing process and 3 /5 days leave is not enough, and if a person has to stay in the community then they should not be penalised by way of loss of job and or pay - allowances needed to be made.

Governments have policies in place that they say encourages employment for First Nations and the lack of consideration for this is a most important part of culture for First Nations people. This should be acknowledged and put in terms of employment for First Nations people. Giving greater empathy and equality."

Anonymous member, NSW – Hospitality:

"I work in hospitality in NSW and my father recently passed away due to a serious illness. We knew that his illness was terminal for about two years, but that didn't change how sad we were when he eventually passed away. None of my family had a lot of leave around the time of his death, so we all just made the best of it. I used my compassionate leave twice, one two-day period to spend time with my father before he passed away, one day to spend time with my family on the day that he passed, and one more day to attend the funeral. I went to work the day after the funeral, and I just didn't really talk much.

One of my siblings works casually, so they went to work on the day that my father passed away. My other sibling had a new job, so they worked from home on that day. Other siblings had travelled from Victoria the week before my father passed away and were using their personal/carer's leave to be with him. Another of my siblings didn't tell their workplace that their father had passed away so that they could continue to use their carer's leave, because they had an entitlement to use that leave if he were still alive.

My mum hasn't been back to work for a long time. I'm not sure how she's managing on her own. If we were able to take more leave, I think it would have been a much less stressful experience for us all to help mum, be with her, be together, and help her with the funeral. It's just lucky that some of us had some sick or annual leave to use, but that now means we can't use that leave for other reasons. It's a difficult decision that we wouldn't have to make if we'd had a few extra days of compassionate leave. Such a short period of time also put pressure on the feeling to try and get over it all rather than giving me the space I might have needed to process it in my own time."

Recommendation 5.1

73. The UWU proposes that the entitlement to compassionate leave in the NES is increased to 10 days.

74. Expanded entitlements to compassionate leave have been won by workers bargaining in the government, community, education and other sectors. These entitlements are usually 3, 4 or 5 days, which are still not adequate to address the needs of workers

experiencing grief. A national standard would ensure that all workers have access to adequate time to grieve and make arrangements in some of the most difficult circumstances they may experience in their lives.

Palliative care

75. Section 105 of the FW Act provides that an employee may take compassionate leave if it is taken:

    (a) To spend time with the member of the employee's immediate family or household who has contracted or developed the personal illness, or sustained the personal injury, referred to in section 104; or

    (b) After the death of the members of the employee's immediate family or household, or the stillbirth of the child, referred to in section 104; or

    (c) After the employee, or the employee's spouse or de facto partner, has the miscarriage referred to in section 104.

76. Section 104 of the FW Act provides the definition of a "permissible occasion" when compassionate leave may be taken. That currently includes when a relevant member of the family or household contracts or develops a personal illness or injury that poses a serious threat to their life, dies, or in cases of certain stillbirths and miscarriages.

77. Currently section 104 of the FW Act does not include the event that a relevant person enters palliative care as a "permissible occasion".

78. This is an issue because it can create a situation where a worker is entitled to compassionate leave in the event that the relevant person contracts a serious illness, but not where the relevant person enters palliative care after a prolonged period with that illness. A worker could have already used their two days of compassionate leave and would be unable to spend further time with the relevant person or take compassionate leave if they do not have access to any other types of leave.

Recommendation 5.2

79. The UWU recommends that a further category be added to subsection 104(1)(a), to outline that a worker is entitled to take compassionate leave when a relevant person enters palliative care.

Recommendation 5.3

80. The UWU adopts and supports the ACTU's submission more generally about improvements to personal/carer's leave, including the introduction of 10 days' paid carer's leave, and expanding who can access carer's leave and expanding carer's leave to include a broader range of circumstances and carer responsibilities.

Redundancy exemptions

Small Business Exception

81. Section 121(1)(b) states that small business employers are excluded from the obligation to pay redundancy pay. An employer is a small business employer if they employ fewer than 15 employees.

82. The NES exist to provide minimum entitlements to all employees. The small business exception, however, creates two classes of employees based on the size of the employer. Two employees doing the same job with the same amount of years of service may be denied redundancy pay based on the size of the employer.

83. The small business exception was originally created to protect the financial vulnerability of small businesses and was based on an assumption that small businesses would not be able to afford redundancy pay.

84. A decision of the previous Australian Industrial Relations Commission considered whether small businesses should pay redundancy pay. At the time, the previous Federal Government made submissions concerned about the cost impact on small businesses as redundancy payments represent a greater proportion of the overall labour costs to small businesses than it would for larger businesses.

85. The current exception is unfair to current small business employees. Small businesses are no less able than larger businesses to make redundancy payments and the exception is arbitrary. Small business employees should be entitled to the same entitlements as all other employees under the NES.

86. Amendments to the small business exception have already been made to the small business exception, demonstrating the need for further reform. In the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* included amendments that the exception did not apply when the employer was bankrupt or in liquidation, or if the employer is a small business employer due to the termination of one of more employees before the employer became bankrupt or went into liquidation. It is

appropriate to extend these amendments to remove the exception entirely to improve working conditions for small business employees.

Recommendation 6.1

87. The small business exception from s 119 should be removed to ensure that employees working for small businesses are afforded the same entitlements to redundancy under the NES as all other employees.

Ordinary and customary turnover of labour exception

88. The ordinary and customary turnover of labour exception has been frequently used by employers to avoid paying redundancy entitlements to employees.

89. Section 119(1)(a) outlines that an employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated 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.

90. The meaning of "ordinary and customary turnover of labour" has been disputed and interpreted differently.

91. The leading authority in *Berkeley Challenge Pty Ltd v United Voice* [2020] FCAFC 113 confirmed that for the exception to apply, the employment must be of such a nature that a reasonable person in the position of both those offering or seeking the particular job (or who were aware of all of the circumstances in which the employee had remained in the employer's workforce for sufficient length) would be aware and expect that it would come to an end in the ordinary course.

92. Similarly, in the case of *Fair Work Ombudsman v Spotless Services Australia Ltd* [2019] FCA 9, Spotless terminated the employment of three of its employees and did not pay any redundancy entitlements. All employees had worked for Spotless for several years, with one employee having 32 years of service. Spotless unsuccessfully argued that the ordinary and customary turnover of labour exception applied to its employees. In his reasons for decision, Colvin J found that the exception did not apply and the decision that Spotless made was plainly one that was in its own commercial interests.

93. But these Full Court decisions have not put this issue to rest. In the case of *United Workers Union v Compass Group Healthcare Hospitality Services Pty Ltd* [2023] FCAFC 92, Compass terminated the employment of 31 employees in and did not pay

any redundancy entitlements. At first instance, the South Australian Employment Tribunal (**SAET**) found the exception to pay redundancy due to the 'ordinary and customary turnover of labour' test applied to the 31 aged care workers. On appeal, the Full Court found that SAET failed to apply the test in *Berkeley Challenge Pty Ltd v United Voice* [2020] *FCAFC & Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Delta FM Australia Pty Ltd* (2021) 308 IR 94, and, amongst other things, concluded the relevant period for consideration related to contracts of employment from 2014, whereas the majority of the employees had been engaged under contract's prior. The Full Court confirmed that the test to be applied relates to what a reasonable person in the position of the parties to the employment contract would have understood from the inception, nature or as service grows about whether it was permanent or ongoing or whether they would be aware and expect it would come to an end in the ordinary course. The Full Court found that whether the exception applies requires consideration of the whole context of the relationship including the nature of the job and express contractual terms. Critically it was found that despite Compass Group's attempts to craft contractual terms to expressly avoid liability the workers, in circumstances where their employment continued for many years (ranging from 2 to 17), in an aged care facility where such work would be expected to continue and where they were unaware of the specifics of the commercial arrangement between their employer and the host they had a reasonable expectation of ongoing employment. It was only in 2023 that employees received the $180,000 in unpaid redundancy entitlements, from redundancy events that occurred in 2018.

94. Compass Group then unsuccessfully sought leave to appeal to the High Court of Australia, see *Compass Group Health Care Hospitality Services Pty Ltd & Anor v UWU* [2023] HCASL 178. Following this, the original proceedings for redundancy pay and penalties continued, and in June 2024, the South Australian Employment Tribunal determined that a pecuniary penalty should be paid by Compass, of $100,800 many years after employees were actually made redundant in June 2018, see *United Workers' Union v Compass Group* [2024] SAET 49.

95. There are limited circumstances in which an employment relationship is genuinely temporary, and employees expect it to end. Employers are currently using the exception to further their own business interests and to avoid paying redundancy pay.

96. The issues are only being resolved for employees by costly and time-intensive litigation and for every case that is prosecuted, there are no doubt employees who

have missed out due to the lack of means to challenge decisions of their employer. The exception should be removed.

Recommendation 6.2

97. Remove the ordinary and customary turnover of labour exception from s 119(1)(a).

Redundancy pay entitlement after at least 10 years of service

98. Under the current requirements to pay redundancy pay, employees with more than ten years' continuous service have a lesser entitlement to redundancy pay compared to employees with continuous service between 7 and 10 years.

99. While employees with 7 and 10 years of service receive between 13 and 16 weeks of redundancy, employees with more than 10 years of service are only entitled to 12 weeks of redundancy pay.

100. These provisions originate from a decision of the previous Australian Industrial Relations Commission where it was found that employees with more than 10 years' service must have their redundancy entitlements discounted, otherwise the entitlements would be double counted with long service leave entitlements.

101. This exemption has never been clear. Long service leave entitlements are derived from state and territory legislation and most employees are able to access long service leave after 7 years of continuous service. Indeed, many employees actually went backwards in redundancy entitlements when the award modernisation process occurred.[7]

102. These provisions are unfair and penalise employees for having longer periods of service with their employer. The discount of redundancy pay should be removed.

Recommendation 6.3

103. The UWU supports the ACTU position to remove the four-week discount for employees with ten years' service in s 119(2).

104. The UWU submits that the entitlement for redundancy pay for an employee with more than 10 years of service be amended to 20 weeks.

[7] See for example the transition from South Australian Awards to modern awards, where employees with more than 10 or more years service had their entitlements reduced.

Coverage of the NES

105. Workers in the gig economy lack the protections that are provided to most other employees under the NES. Many gig workers are paid below and are not entitled to minimum rates of pay, paid leave, maximum hours, superannuation, unfair dismissal protections, and workers' compensation.

106. The NES currently provides limited protections for workers in the gig economy. Some gig workers are classified as independent contractors, and some are considered to be employee-like workers. Some contractors do not meet the threshold required to be considered an employee-like worker.

107. The Fair Work Commission can set standards for employee-like workers about pay and conditions, but this only applies if a worker is covered by a minimum standard order or minimum standards guidelines.

108. Protections for employee-like workers do not go far enough. Workers in the gig economy are prone to exploitation and should be entitled to the same protections that employees are offered under the NES. The definition of "employee" should therefore be expanded to cover gig economy workers.

Relevant case law

109. The issue of whether workers in the gig economy are employees or independent contractors is a contested issue.

110. In the case of *Rajab Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807 it was found that drivers for the ride share company Uber are not employees, and are instead independent contractors. The Fair Work Commission considered that Uber did not exercise a high enough degree of control over their drivers for the relationship to be considered an employment relationship.

111. In the first instance decision of *Diego Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818, it was found that a driver for the meal delivery app Deliveroo was an employee because of the high degree of control that Deliveroo exercised. On appeal in *Deliveroo Australia Pty Ltd v Diego Franco* [2022] FWCFB 156, the Full Bench found that the driver was not an employee because of the terms in the written contract. The Full Bench found that considering the actual working relationship in practice did not matter, and the question of whether a worker is an employee or an independent contractor is focused solely on the written contract.

Recommendation 7

112. The relevant case law demonstrates that there is a lack of clarity around what criteria should be used when considering whether a worker is an employee or an independent contractor.

113. Expanding the current definition of "employee" to include workers in the gig economy will increase clarity on this issue and provide protections to workers in an insecure industry.

Definition of a day

114. Section 96(1) of the FW Act provides that an employee is entitled to "*10 days of paid personal/carer's leave*" for each year of service with their employer. This entitlement accrues progressively throughout the year based on employees' ordinary hours of work.

115. The meaning of 10 days was interpreted by the High Court of Australia in Mondelez[8] (***Mondelez***) 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*.[9]

116. The High Court also determined that the "day" in s96(1) means a 'notional day' which consists of one-tenth of the equivalent of an employee's ordinary hours of work in a two-week period.[10]

117. This interpretation unfairly prejudices workers in varied industries where their ordinary hours are structured in shift arrangements. For example, the ordinary hours of work for the two employees considered in *Mondelez* averaged three twelve-hour shifts per week, totalling 36 ordinary hours per week. The decision in *Mondelez* means that under the NES, those considered employees only were only entitled to accrue seventy-two hours of personal/carer's leave. Meaning they only had entitlement to six shifts/days of personal leave.

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[8] *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.
[9] Ibid [45]
[10] Ibid [45]

118. Comparatively, employees who do not work under shift arrangements and work standard working hours of 7.6 hours per day, five days a week, accrue and can access 10 days of personal leave. As a result of this disparity, employees engaged in shift work, which is already detrimental compared to a standard working arrangement of 7.6-hours a day, five days a week, are further disadvantaged. Disadvantages of shift work included hours of work inconsistent with general society, fatigue from extended work hours, and wide-ranging effects on health.

Experiences of UWU Members

Derek Dent, Victoria – Dairy Manufacturing Worker:

"I am a Union Delegate working in the Dairy Manufacturing industry.

As a shift worker I most commonly work rotating shifts on a four-on-four-off roster, meaning I work for 4 days and am off for 4 days. My 4 days of work consist of two 12-hour day shifts and two 12-hour night shifts. At various times in the year, I also work Monday to Friday, but my shift length is always 12 hours.

Under the NES, I am entitled to 76 hours of personal leave, which for me, is only 6.3 working days and not 10. This means I don't get the full value of my personal leave.

My employment is covered by an enterprise agreement. Under that enterprise agreement, we used to be entitled to 10 shifts of personal leave, but only at 7.6 hours' pay. This meant that we were financially disadvantaged by taking personal leave.

During negotiations for our last enterprise agreement, our employer agreed to our claim to access a limited number of personal leave days each year at the full 12 hours we would have been paid for if we had worked the shift. However, to achieve this claim, we had to trade away other claims and conditions. Shift work is hard work, and in an essential industry like Dairy Processing, we had to start our negotiations from a position where we were entitled to less than a regular Monday-to-Friday employee.

Being on personal leave should not add an extra stresser while I am trying to recover or support my family in their recovery.

Shift workers' ordinary hours need to be recognised and personal leave should reflect those hours under the NES."

Recommendation 8

119. The UWU supports and adopts the ACTU position to amend s 96(1) to define "day" as "the portion of a 24 hour period that would otherwise be allotted to work", and to amend s 97 to state that "day of paid personal/carer's leave" under s 96(1) is an authorised absence from work.

Annual leave entitlement

120. Section 87 of the FW Act provides that for each year of service with an employer (other than periods of employment as a casual employee of the employer), an employee is entitled to

(a) 4 weeks of paid annual; or

(b) 5 weeks of paid annual leave; if

(i) a modern award applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or

(ii) an enterprise agreement applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or

(iii) the employee qualifies for the shiftworker annual leave entitlement under subsection (3) (this relates to award/agreement free employees)

121. Annual leave is an important entitlement that allows workers to rest, recover, and rejuvenate. Annual leave allows workers to spend time with their families and live their lives outside of work.

Recommendation 9

122. The UWU supports the position to increase the annual leave entitlement by 1 week for both entitlements, so that standard employees are entitled to 5 weeks of paid annual leave and shift workers are entitled to 6 weeks of paid annual leave.

Definition of a shiftworker

123. The definition of shiftworker under the FW Act arises from s 87 of the FW Act which provides that a shiftworker is entitled to 5 weeks' paid annual leave if they meet the definition of shiftworkers under s 87(1)(b), being

> *(i) a modern award applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or*
>
> *(ii) an enterprise agreement applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or*
>
> *(iii) the employee qualifies for the shiftworker annual leave entitlement under subsection (3) (this relates to award/agreement free employees)*

124. Section 87(3) provides that an award/agreement free employees 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; or*
>
> *(b) the employee is in a class of employees prescribed by the regulations as shiftworkers for the purposes of the National Employment Standards.*

125. Section 196 of the Act provides that when approving an enterprise agreement, the Fair Work Commission must be satisfied that the agreement defines or describes the employee as a shiftworker for the purposes of the NES.

126. The Fair Work Commission has interpreted s 87(3)(a)(iii) to require that an agreement-free employee regularly works on Sunday, and public holidays, as requiring that an employee work at least 34 Sundays and 6 public holidays within a year.[11] Any

[11] *O'Neill v Roy Hill Holdings Pty Ltd* [2015] FWC 2461.

employee falling short of this standard, even by one Sunday, does not qualify as a shiftworker for purposes of annual leave entitlements.

127. The application of the 34 Sundays and 6 public holidays formula has resulted in many workers who undertake shift work missing out on the extra week of annual leave under the NES, as there are many varied ways employers can exploit this requirement.

128. For example, the UWU members who are engaged on shift rosters who would ordinarily meet the threshold can fall below the threshold if they take annual leave or long service leave and the number of Sundays or Public holidays they would have worked reduces. In effective, these workers who access their leave entitlements are penalised and lose out on the fifth week of annual leave accrual.

Recommendation 10

129. The UWU supports and adopts the ACTU position to establish a baseline within section 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, as follows:

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 (26 + 5); 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.

130. The UWU also supports and adopts the ACTU position that the baseline be applied to award/agreement free employees by amendment to section 87(3).

Disaster Leave

Disaster Leave Pay

131. Disaster leave is not provided within the NES. As climate change and extreme weather events become more frequent and intense, the need for inclusion of paid disaster

leave and emergency service/community service leave will become more common for workers across Australia.

132. Workers across Australia are already impacted by extreme weather events and climate disasters such as floods, fires, cyclones and droughts. These events now affect our members across Australia at work, home and in their communities, with successive extreme weather events being common in Australia. This has resulted in workers taking paid leave, if they have the entitlement, with casual workers receiving no paid leave entitlement, when they impacted by disasters.

133. The UWU members have reported losing income when their workplaces close or when they could not attend work during fires, floods, cyclones and extreme weather events. In addition, disasters cause disruptions and damage to infrastructure, including roads and schools which prevent workers from travelling to and from work.

134. Workers also have caring responsibilities which prevent them from attending work when climate disasters and extreme weather events occur. Women disproportionately shoulder caring and support responsibilities, which may further impact financial security and leave entitlements during disasters.

135. With the increasing threat of climate change, disasters and extreme weather events, access to disaster leave will assist workers to care for themselves and loved ones, protect their homes, evacuate and/or prepare, and deal with the aftermath of disasters without fear or losing their job or income.

Experiences of UWU Members

During the 2022 extreme flooding event in NSW and QLD, the UWU reached out to members check on their wellbeing, identify how they had been impacted, if they lost income and to alert them of our climate disaster relief fund. The UWU received many responses, including the following.

Casino Worker from Tallebudgera:

> *"I couldn't come to work yesterday because of flooding. Our house is ok. But the roads are closed. It was ok this morning. 1 road is still closed. 2 roads' access are open. This is the second time for me. I am a casual, 4am to 12pm shift. I called to let supervisor know that I couldn't come to work because of road closures. There were no other work issues. Thank you for your concerns*."

ECEC Worker from Bundamba:

> *"Fortunately my home was safe, but I lost all the food in my fridge and 2 freezers as the power was out for 36 hours due to flooding at the end of my street. My family and I were also stuck at home due to road closures, and school being closed for a week. Our union lady helped my boss and I to get paid disaster leave for the days we couldn't get to work. Goodstart was trying to make us use our own personal leave at the time. Thank you for checking in and I hope you were all safe and well!"*

Food Processing Worker from Goodna:

> *"I had 5 days off work as I live in Goodna and the highways were all under. I had already used all my annual leave, but I did qualify for the $1000 from Centerlink thank goodnesss…it came in handy. Damage to our house was paid for by the owners because I'm renting so my household was ok compared to many others."*

Hospitality Worker from Yeronga:

> *"I'm safe, and so is the business i'm working at currently. I was flooded in for about 3 days at the peak of it all and that did affect my pay, but I've been having a hard time accessing any flood support via centrelink. All the roads that led from my suburb into my workplace had flooded in, so while my house itself wasn't affected, I wasn't able to get into work for those days."*

Recommendation 11.1

136. The UWU recommends amending the NES to include disaster leave; employees should not have to risk their safety during disasters to go to work, or risk losing their income.

137. The UWU recommends that any amendment to the NES to include disaster leave should provide that:

    137.1. An Employee (including a casual Employee) may access Paid Disaster Leave under the following circumstances:

        (a) Where an employee is unable to travel to work due to the disaster and is unable to perform work remotely.

(b) Where an employee in unable to perform work due to the disaster.

(c) Where an employee experiences a delay in travel to work during rostered hours as a result of the disaster.

137.2. Leave entitlements: Leave may be claimed under multiple criteria in respect of the same disaster, subject to a total of 5 days paid leave per occasion (non accumulative). This paid leave can be taken as consecutive or single days, or as a fraction of a working day.

Disaster related unpaid community service leave

138. Under the NES, an employee can take unpaid leave for voluntary management activities within a recognised emergency management body.

139. Currently, workers are not entitled to paid community services leave under the NES. In addition, workers are not entitled to take unpaid community service leave unless they are engaged in voluntary emergency management activities that are recognised as an emergency management body. Workers should not be forced to risk their safety to go to work during a bushfire, flooding event, cyclone or other extreme weather event, nor to protect loved ones, neighbours or their community.

140. Under the current entitlement, workers cannot take unpaid community services leave unless they are a volunteer for emergency services such as the CFA, SES or RSPCA. However, during and after disasters and emergencies, workers often have to assist neighbours, communities, and loved ones but are not eligible to either paid or unpaid community services leave under the NES.

Recommendation 11.2

141. Community Services Leave should be amended to allow for payment to employees, including casuals, engaged in voluntary emergency management activities for recognised emergency services.

142. Employees, including casuals, should have the right to take unpaid community services leave when they need to care for family members, their community, and neighbours during disasters.

143. Section 22 should be amended to ensure that unpaid leave taken as part of community services leave (including disasters) is counted as service.

144. The UWU recommends amending Division 8 of the NES to provide that an employees, including casual employees, are able to access unpaid community services leave in lieu of disaster leave, and when paid leave entitlements are exhausted, when an employee is unable to: travel to work due to the disaster and is unable to perform work remotely, where an employee in unable to perform work due to the disaster, or where an employee experiences a delay in travel to work during rostered hours as a result of the disaster.

Other Issues

Annual leave and personal leave – deductions on public holidays

Recommendation 12.1

145. The UWU supports the ACTU recommendation to 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.

Personal/carer's leave – rate of pay

Recommendation 12.2

146. The UWU supports the ACTU recommendation to 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).

Personal/carer's leave – medical certificates

Recommendation 12.3

147. The UWU supports the ACTU recommendation to amend s107(3) 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.

Paid reproductive health leave

Recommendation 12.4

148. The UWU supports the recommendation of the ACTU for the introduction of ten days of paid reproductive leave to be included in the NES, enabling workers to take time off to manage reproductive health issues.

Roster Justice

Recommendation 12.5

149. The UWU supports the recommendation of the ACTU to require an employer to give at least 14 days' notice of a roster, and at least 7 days' notice of a change to a roster, unless otherwise agreed by the parties or in case of emergency, as a new minimum standard in the NES.

Giving workers back time

Recommendation 12.6

150. The UWU supports the recommendation of the ACTU for the Government to examine the option of reducing the maximum weekly hours from 38 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.

Employees cancelling leave

Recommendation 12.7

151. The UWU supports the recommendation of the ACTU to insert the wording that "(3) If an employer agrees to a request by an employee to take paid annual leave, that agreement cannot be revoked by the employer without the consent of the employee" into s88(3).

Enforcing NES entitlements in state/territory jurisdictions

Recommendation 12.8

152. The UWU supports the recommendation of the ACTU to the FW Act 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.

Exclusion of service as a casual from calculation of entitlements to notice of termination and redundancy pay

Recommendation 12.9

153. The UWU supports the recommendation of the ACTU to repeal ss 117(4) and 119(3) of the FW Act, removing the 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.

Conclusion

154. The NES provisions have, since their inception, provided the foundation of Australia's safety net of minimum employment standards.

155. Decisions interpreting the NES by the Fair Work Commission and the Courts over those 17 years have led to a lack of clarity and complexity regarding many NES entitlements.

156. The UWU welcomes this Inquiry and calls upon the Inquiry to consider amendments to the NES to resolve these issues, and to expand the NES to reflect the shifts that have occurred in our Industrial Relations system.

Yours sincerely

Larissa Harrison
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