

STRONGER TOGETHER

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Fair Work Commission
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Re: 4 Yearly Review of Modern Awards – NES issues

AWU submissions

1. The Australian Workers' Union (AWU) submits the following regarding the awards identified below.

Alpine Resorts Award 2010 – clause 11.5

2. We agree the current provision conflicts with the minimum annual leave entitlements contained in the NES.
3. We propose the following wording for clause 11.5:

Seasonal employees are entitled to annual leave in accordance with the NES and payment of a loading of 8.33% for all annual leave taken or paid upon termination of employment.

4. We submit this variation is cost neutral for an employer based on the following calculation:

Current situation

Example weekly rate = \$700
Current additional loading payment for 26 weeks = $\$700 \times 8.33\% = \58.31
per week x 26 weeks = **\$1,516.06**

Amended situation if leave paid upon termination

Example weekly rate = \$700
2 weeks of annual leave would accrue in 26 weeks of employment
Payment on termination would be 2 weeks x \$700 = $\$1,400 \times 8.33\% \text{ loading} = \$1,516.62$

Fire Fighting Industry Award 2010

5. We agree this provision is inconsistent with how leave accrues under the NES.
6. An option to resolve the issue may simply be deleting the following words: "before the completion of the full 12 month qualifying period for annual leave in any year of service".
7. However, other parties who are more familiar with this award may be better placed to determine whether this change would lead to further unintended consequences.

27 awards regarding accrual only after 12 months of continuous service

8. We agree this provision is inconsistent with the NES.

Horticulture, Pastoral, Wine and other awards – provision regarding annual leave on transfer of employment

9. We do not accept this provision must be removed because it is inconsistent with the NES.
10. We reject on a conceptual level the argument that provisions in the NES are intended to reduce existing superior entitlements for employees under an award or an enterprise agreement.
11. The relevant clauses provide an additional entitlement for employees in relevant transfer of employment situations. Hence the provisions are ancillary and/or supplementary to the NES and are permitted to be included in an award under s 55 (4) of the *Fair Work Act 2009* (the Act).
12. Paragraph [214] of the Explanatory Memorandum to the Act states the following in relation to s 55 (4) of the Act:

This provision allows modern awards and enterprise agreements to deal with machinery issues (such as when payment for leave must be made). It also allows awards to provide more beneficial entitlements than the minimum standards provided by the NES. For example, an award or agreement could provide for more beneficial payment arrangements for periods of leave, or provide redundancy entitlements to employees of small business employers. Similarly, an agreement

could provide a right to flexible working arrangements. The term about a dispute settlement procedure would also apply to that right.

13. The submission from the National Farmers' Federation (NFF) and other employer groups that a modern award cannot provide a more beneficial entitlement in terms of a transfer of business situation than what is specified in s 91 of the Act is analogous to an argument that a modern award cannot include redundancy entitlements for small business employers because of s 121 of the Act.
14. The NES contains minimum conditions of employment for employees, not for employers.
15. This is confirmed in paragraph [208] of the Explanatory Memorandum which states:

The intent of the NES is that it provides enforceable minimum entitlements for all eligible employees.
16. Further, the Act is beneficial legislation and the rule of construction that beneficial and remedial legislation is to be given a liberal construction rather than one that is literal or technical should be applied.¹

Racing Industry Ground Maintenance and Silviculture Award – reference to casual loading compensating for long service leave

17. We submit the words "long service leave" should be deleted because the current provision is incorrect and inconsistent with the NES.

Waste Management Award 2010

18. Clause 32.2 of the award should be deleted because it is inconsistent with minimum entitlements under the NES.

Horse and Greyhound Training Award 2010

19. We agree this provision is inconsistent with the minimum notice required to be given to an employee under the NES.

¹ See *Brennan CJ and McHugh J in IW v City of Perth* [1997] HCA 30; 191 CLR 1

20. We submit the words "or be given" should be deleted in clause 10.2 (d) and the following words inserted underneath the existing table in clause 10.2 (d): "Probationary employees must be given one week of notice of termination of their employment".



Stephen Crawford
SENIOR NATIONAL LEGAL OFFICER