4 March 2026

House of Representatives Standing Committee on Employment, Workplace Relations, Skills and Training
PO Box 6021
Parliament House
Canberra ACT 2600

By email only: employment.reps@aph.gov.au

Dear Standing Committee on Employment, Workplace Relations, Skills and Training,

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

The Employment Rights Legal Service (**ERLS**) welcomes the opportunity to make this submission on the operation and adequacy of the National Employment Standards (**NES**) under the *Fair Work Act 2009* (Cth) (**Act**). We consent to this submission being published. All case studies in this submission, names and identifying information have been changed to protect client confidentiality.

About the Employment Rights Legal Service

ERLS is a joint initiative of Redfern Legal Centre, Inner City Legal Centre and Kingsford Legal Centre to provide workers across New South Wales (**NSW**) with free employment law advice and representation. ERLS aims to both address and remove the systemic barriers that prevent access to justice and allow for the exploitation of workers across NSW. Since its inception in July 2021, ERLS has assisted almost 3,000 people across NSW who have experienced workplace issues.

This submission draws on our collective experience as legal practitioners representing marginalised and low-income workers in NSW. We have focused our submission on the parts of the NES that are most relevant to our clients' experiences and the ERLS areas of practice. The submission was prepared using contributions and case studies from all ERLS partners.

Division 3 – Maximum weekly hours

Guidance on meaning of "reasonable additional hours"

ERLS often advises employees who are asked to work additional hours about their rights. This is a particularly relevant issue in the hospitality, meat, manufacturing and service industries, where it is common for employees to be required to work substantial overtime hours, posing a real and significant risk to their workers' health and wellbeing.[1] ERLS supports reform to

[1] See for example in relation to the hospitality industry: Nejad, L.M & Thomson, K. (2022). Mental Health in Hospitality: The need for industry-specific solutions (White Paper), Clipboard Hospitality and Skills for Life.

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section 62 of the Act to provide more guidance for employees and employers when determining whether additional hours are '*reasonable*' for the purposes of this section.

The current framework set out in section 62(3) requires consideration of ten different criteria to determine this, including '*any other relevant matter'.* Generally, ERLS recognises the drafting in section 62(3) is flexible and has positive aspects as it allows courts to consider each employment relationship on its individual facts.

Although there are pecuniary penalties attached to any contravention of section 62, it does not in itself give rise to any underpayment of an employee's wages or entitlements (assuming that they are properly compensated for any overtime worked). Because of this, employees are unlikely to make a standalone court claim for the breach of section 62 unless they are pursuing a broader underpayment claim. However, the provision is vital as it sets out expectations of standard weekly working hours and can act as a framework for real-time conversations between employees and employers.

ERLS frequently advises employees who are unsure as to whether they can refuse a request to work additional hours. Unfortunately, the breadth of section 62 means that even if employees are requested to work significant extra hours, it is difficult to give any firm indication about whether such requests are '*reasonable'* because of the uncertainty involved in applying the multi-factorial test. Anecdotally, we have also observed that there is a stigma in many workplaces that makes many employees feel unable to decline extra hours.

Without proposing any change that would limit the Court's discretion, ERLS believes that there are certain situations which should be deemed '*unreasonable*' under section 62. These include:

- circumstances where employees are asked to work overtime as part of their 'ordinary hours' i.e. where there is a contractual agreement for employees to work extra hours every week. These arrangements are unreasonable and undermine the right of an employee to refuse to work additional hours;

- circumstances where employees are asked to work over a certain number of hours in a given week or month.

To be clear, the above examples are not intended to be a 'ceiling' or a limitation of the scenarios that could be considered unreasonable under section 62.

The above guidance could be provided by adding a notation to the end of the section, similar to the notation included in section 596 of the Act (representation by lawyers and paid agents) about non-English speakers.

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Recommendation 1*: *The Government should amend the Fair Work Act 2009 to provide greater clarity on the meaning of "reasonable additional hours" in section 62.

Enforcement

ERLS supports the introduction of a more accessible enforcement avenue for alleged contraventions of section 62 of the Act. As outlined above, a breach of section 62 can only be enforced by an employee through a Court claim, with a filing fee attached. This is an impractical and lengthy process for most employees, particularly if they are not intending to pursue an underpayment claim or any other alleged contravention of the Act.

ERLS considers that the availability of a Fair Work Commission **(FWC)** dispute resolution process, similar to the process available with respect to flexible working arrangements under section 65B, would provide a more effective alternative for employees who are managing requests to work additional hours. In many cases, disputes regarding additional hours could be resolved through the FWC conciliation process, and in cases where this is not possible, by the FWC making an order about whether certain requests are unlawful under section 62.

Case study – Manu

Manu came to us for advice after being dismissed from his role at a factory. In his employment contract, Manu's employer had included an "individual flexibility agreement" which said that he had agreed to work regular additional hours in exchange for a salary that was above the Award rate. Manu worked over 45 hours every week, even when he had considerable caring responsibilities for family, until he was injured at work.

Recommendation 2*: *The Government should amend the Fair Work Act 2009 to provide a Fair Work Commission dispute resolution process for alleged contraventions of section 62 of the Act.

Division 6 – Annual leave

Annual leave

Annual leave is an essential entitlement that is critical for the health and wellbeing of workers. It is the only type of leave that is not required to be used for a certain purpose. The benefits of paid time off work are significant for both employers and employees and offer positive effects towards worker productivity, morale, job satisfaction and reduced job turnover.[2]

ERLS supports increasing the annual leave entitlement for full-time employees by one week, meaning non-shiftworkers will be entitled to five weeks' annual leave and shiftworkers will be entitled to six weeks' annual leave. Such an increase would align Australia with other common law jurisdictions such as the UK, and European nations such as Austria, Sweden, Denmark,

[2] See, for example, Davis and Blackburn (2023).

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and France, all of which have a statutory minimum of 25 – 30 days. To encourage employees to take regular annual leave, ERLS recommends that the extra week of annual leave must be used within 12 months of it accruing.

Unpaid leave

There is no general entitlement to unpaid leave in the NES. We have advised many employees who have needed to take time off work for a variety of compelling personal reasons that do not satisfy the requirements for personal/carer's leave, for example, to attend a funeral or move house. This may occur at a time when the employee has not accrued sufficient annual leave (such as shortly after commencing their employment), to take paid leave. In these circumstances, employees are reliant on the discretion of the employer to grant additional unpaid leave or flexible working arrangements. In some cases, employees face pressure to resign if their requests cannot be accommodated.

ERLS supports the introduction of a separate unpaid leave entitlement of up to 2 weeks per year which could be requested by employees and granted subject to business needs.

Recommendation 3*: *The Government should amend the Fair Work Act 2009 to increase the annual leave entitlement for permanent employees, and also introduce an unpaid leave entitlement which can be refused on reasonable business grounds.

Division 7 – Personal/carer's leave, compassionate leave and paid family and domestic violence leave

The NES should better protect casual workers. Regular and systematic casual employees should have access to compassionate and personal/carer's leave in proportion to their service.

Recommendation 4: The Government should allow regular and systematic casual employees to access compassionate and personal/carer's leave in proportion to their service.

Personal leave

Personal leave should be available for medical appointments in situations where an employee is not necessarily unfit for work on the day.[3] This should include the management of chronic medical conditions, psychology appointments, non-cosmetic dental appointments and physiotherapy appointments. We have called for a separate allowance for reproductive leave (below). However, appointments to manage fertility (like IVF appointments) should also be able to be covered by personal leave.

Anecdotally, many employers already allow employees to use personal leave for medical appointments that do not meet NES criteria. However, some employers strictly apply the NES criteria. This is particularly burdensome for workers who need to manage chronic health

[3] *Fair Work Act 2009* (Cth) s 97 (a).

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conditions and who are more vulnerable to discrimination without clear workplace rights to manage their conditions.

Workers need broader access to personal leave to manage their medical conditions. This should include non-cosmetic dental care, which can significantly impact a person's quality of life, as well as their overall health.[4] Easier access to other healthcare services like physiotherapy might also prevent the deterioration of minor health conditions, leading to a healthier workforce.[5]

Employers might be concerned that expanding the availability of personal leave might increase absenteeism. However, the combined pool of carer's / personal leave would still be capped at 10 days per year.

Case study- Pam

Pam came to us for advice after she was dismissed from her job. She is a single parent of two children. During our advice sessions, Pam told us that during her employment she had asked for time off to take her daughter to see a specialist and to attend her own medical appointment. Pam's employer told her that she could not use her accrued leave to cover the absences. Pam was in significant financial hardship and had to choose between getting paid for those hours of work or keeping the medical appointments.

The current NES definition also has broader implications. For example, any adverse action taken against employees because they need to attend medical appointments during work hours will not be covered by the general protections as it is not a 'workplace right' within the meaning of section 341 of the Act.

Recommendation 5: The Government should amend the Fair Work Act 2009 to allow employees to use personal leave to attend medical appointments, including for management of chronic medical conditions, allied health services, psychological treatment and dentistry.

Carer's leave

The scope of 'family' for carer's leave should be expanded to be include a wider range of family relationships. Currently, employees are only able to take leave to care for "immediate family" members or members of their household.[6] Immediate family is narrowly defined and does not include, for example, aunties or uncles, nieces or nephews, or kinship relationships in Aboriginal and Torres Strait Islander communities. For many ERLS clients, this narrow

[4] J.C Spanemberg et al, "Quality of life related to oral health and its impact in adults", *Journal of Stomatology, Oral and Maxillofacial Surgery, 2019;* 5.
[5] Srikanta Padhan, Avilash Mohapatra, "Empowering Wellness" Unveiling the Key Role of Physiotherapy in Preventive and Promotive Health", *Indian J Prev Med, 2023; 11(2) 71-77.*
[6] *Fair Work Act 2009* (Cth) s 97 (b).

definition does not reflect their social and cultural obligations to provide care to extended family members.

Carer's/personal leave would still be limited to 10 days, which limits the potential downside for employers, whilst providing much-needed flexibility for employees. The NES has already recognised the expanded family relationships in the context of family and domestic violence leave, where 'close relative' is defined to include a person who is "related to the first person according to Aboriginal or Torres Strait Islander".[7]

Some employers have also moved to expand the scope of 'family' for the purposes of carer's leave. Monash University, for example, defines 'family member' to include "a person with whom the staff member shares an Aboriginal or Torres Strait Islander kinship relationship or any other person with whom the University is satisfied that the staff member has a genuine family relationship".[8]

Recommendation 6: The Government should amend the Fair Work Act 2009 to allow employees to take carer's leave to care for a wider range of family members, including aunts, uncles, nieces, nephews, cousins and kinship relationships in Aboriginal and Torres Strait Islander communities

Compassionate leave

The current entitlement of two days compassionate leave is not enough. Workers need more time to be with their loved ones in times of crisis and to grieve.

Workers' compassionate leave entitlements should be increased to five days on each eligible occasion. Additionally, employees should have access to an additional five days of unpaid compassionate leave per year, which would not accrue each year. This would better reflect the time that workers need when supporting family members experiencing a life-threatening illness, dealing with a miscarriage, or mourning a death. For some workers, organising and participating in funeral rites also requires more time than two days. An increased entitlement to compassionate leave would better allow workers to fulfil their obligations.

As discussed above in relation to carer's leave, the scope of 'family' for compassionate leave should be expanded to include a wider range of family relationships, including uncles, aunties, cousins, foster parents or children (in cases where they are no longer part of the same household), and Aboriginal and Torres Strait Islander kinship relationships.

Some employers have already increased the availability of compassionate leave to a wider range of family relationships. The University of New South Wales' Professional Staff Enterprise Agreement allows compassionate leave to be taken for a staff member's immediate

[7] *Fair Work Act 2009* (Cth) s 106B.

[8] *Monash University Enterprise Agreement (Academic Professional Staff) 2024* [2024] FWCA 2976 (13 August 2024) cl 40.1(e).

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family or household, or a person who is related by blood or marriage or who has a strong affinity with an employee by way of traditional or ceremonial affiliation.[1]

Case study – Elijah*

Elijah came to us for advice after having issues with his job at a restaurant. As a migrant worker with a young family, Elijah found it particularly difficult to balance his caring responsibilities with working and providing financial support to his family overseas. Shortly after Elijah started his role, his father became very ill and passed away. Elijah was able to take about five weeks of leave to travel overseas and attend his father's funeral but had to ask for this to be unpaid leave as he did not have enough annual leave to cover his absence.

Recommendation 7: The Government should increase employees' entitlement to paid compassionate leave to five days on each eligible occasion.

Recommendation 8: The Government should amend the Fair Work Act 2009 to create an additional entitlement to five days' unpaid compassionate leave per year, which does not accrue.

Recommendation 9: The Government should amend the Fair Work Act 2009 to allow employees to take compassionate leave in relation to a wider range of family members, including aunties, uncles, nieces, nephews, cousins, foster parents, foster children, foster siblings, and kinship relationships in Aboriginal and Torres Strait Islander communities

Reproductive leave

ERLS supports calls for 10 days' reproductive leave each year.[9] This should include leave for pregnancy, menstrual health, for the management of hormonal conditions (like menopause), for fertility treatments and for preventative care. This leave should be capped at 10 days per year and should not accrue each year.

[9] E.g. Unions NSW, *Reproductive Leave – It's for Every Body!* (February 2025).

Case study- Jade

Jade was six months into her job as an accountant in a medium-sized company. There were no concerns with her performance. Jade commenced IVF treatment and needed to take some partial days of leave to attend IVF appointments. When she disclosed this to her employer, she was told she could not use her sick leave as she wasn't sick. Jade did not have any accrued annual leave. Jade was left with the choice of either discontinuing her expensive IVF treatment or losing her job. Jade ended up resigning from her job and making a lengthy sex discrimination complaint against her ex-employer. While she was able to get a good settlement in her complaint, she should not have been put in this position in the first place.

As shown by Jade's case, the current personal leave entitlements are not sufficient. Many types of appointments, like IVF treatments or other preventative checks, are not clearly covered by personal leave as an employee might still be technically 'fit to work'. Management of other chronic reproductive conditions, like endometriosis, might use up the entirety of a worker's personal / carer's leave entitlements.

Major employers like the Queensland Public Service have already implemented 10 days' reproductive leave.[10] These agreements could be models for changes to the NES.

Recommendation 10: The Government should amend the Fair Work Act 2009 to create an additional entitlement to ten days paid reproductive leave per year, which does not accrue.

Gender affirmation leave

ERLS supports the introduction into the NES of a separate leave entitlement for workers for the purposes of accessing gender affirmation treatment or services. Some employers are already offering employees gender affirmation leave, with policies and provisions in enterprise agreements allowing 20 days,[11] 30 days,[12] or up to 8 weeks' leave.[13] Gender affirmation leave should not accrue.

Recommendation 11: The Government should amend the Fair Work Act 2009 to create an additional entitlement to gender affirmation leave, which does not accrue.

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[10] Minister for Industrial Relations and Public Sector Commission, *Directive: Reproductive Health Leave* Directive 7/24 (Effective 30 September 2024).

[11] Meaghan Bare, Lindy Richardson, Kirsten Sullivan and Brayden Moulday, *Gender Affirmation Policies and leave: best practice considerations for employers* (21 November 2022) <https://www.maddocks.com.au/insights/gender-affirmation-policies-and-leave-best-practice-considerations-for-employers>.

[12] *The University of New South Wales (Professional Staff) Enterprise Agreement 2023* [2023] FWCA 3660 (3 November 2023) cl 49.0.

[13] Minter Ellison, *Diversity and Inclusion*, <https://www.minterellison.com/responsible-business/diversity-and-inclusion (accessed 26 February 2026).

Division 11 – Notice of termination and redundancy pay

Redundancy pay and small business exemption

Small business employers are exempt from the obligation to pay redundancy under section 121 of the Act. ERLS supports reform to require small businesses to pay redundancy if they are in a financial position to do so. Currently, all small businesses are exempt from paying redundancy and there is no requirement for them to apply to the FWC to rely on this provision.

The current blanket exemption puts many employees at a disadvantage simply because they have chosen to work at a small business. These workers are usually paid less than employees of larger businesses and already experience greater financial hardship if they are made redundant.

Case Study – Sally

Sally had worked for her employer in regional New South Wales for around four years when she was abruptly told that her position was being made redundant. She was paid out her final entitlements, which included a seven-week payment of redundancy. Almost two months after her employment had ended, her employer contacted her to ask her to pay back the seven weeks' redundancy pay, as they were a small business employer and exempted from paying redundancy. Sally tried to explain to her employer that she had already used the money to make her rent payments, but her employer continued to insist that she pay the money back. This caused Sally considerable distress, and she felt compelled by the persisted contact to pay the money back for a mistake that was no fault of her own.

ERLS acknowledges that many small businesses are in a position where they do not have sufficient cash flow to support redundancy payouts, particularly if there are multiple redundancies. However, this is not always the case. In circumstances where the failure to pay redundancy can have a significant impact on individuals, ERLS considers that the onus should be on a small business to establish that they cannot afford redundancy pay. This could be done through an application under section 120(b)(ii) of the Act on the grounds that the employer '*cannot pay the amount*.'

Relatedly, there is no ability for employees to dispute the validity of any reliance on section 121(1)(b) by an employer unless they make an underpayment claim in Court. In many cases, ERLS has observed the small business exemption being used inappropriately by mid-size businesses to avoid paying redundancy, either by design or because of a misunderstanding of whether the exemption applies to them.

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The definition of 'small business' under the Act is complex and often requires assessment of whether a company is a 'related entity' of another company under the Corporations Act, and/or whether casual employees are 'regular and systematic' casuals. Importantly, employees cannot make this assessment themselves, or receive legal advice on the prospects of their claim for redundancy, without accessing internal records showing the company's employee count and/or relationship with external entities. This effectively requires an employee to commence court proceedings and seek discovery of these records to confirm whether the employee can rely on section 121(1)(b). Putting the onus on the employers to establish that they cannot pay redundancy would resolve this issue.

Enforcement

ERLS also notes that it is common for larger employers to purport to rely on the exemptions in section 120(1) without applying to the FWC to determine whether they are required to pay redundancy. While unlawful, the only avenue available to employees to seek payment of this amount is a court claim. To address these situations, ERLS considers that employees should have standing to make an application to the FWC for an order to pay redundancy if the employer does not comply with the requirements of section 120(1).

Case study – Ahmed

Ahmed worked as a restaurant cook for four years when he was told his job was being made redundant. His employer offered to keep him on if he reduced his hours and performed waitstaff duties as well, which Ahmed felt was a demotion given his qualifications and experience. His employer told him that unless he accepted the change in role, he would need to resign, and his employer wouldn't be paying redundancy pay as they had offered him acceptable alternative employment. Given his employer's refusal to pay, Ahmed had no other option but to pursue a court claim to recover the redundancy pay, which caused him considerable energy and stress in doing.*

Reduction of redundancy pay

Section 119(2) of the Act sets out the amount of redundancy pay which is payable to an employee, subject to other eligibility requirements in the Act. The amount of redundancy pay is linked to years of 'continuous service'. However, once an employee reaches 10 years of service, their entitlement to redundancy reduces significantly from 16 weeks to 12 weeks. This change is consistent with the 2004 Redundancy Case decision which determined that this reduction should occur to avoid 'double counting', as employees with 10 years of service would be entitled to be paid out their long service leave in many cases.

With respect, we do not agree that redundancy pay should be reduced for workers in this category. Firstly, many workers who accrue long service leave may choose to take this leave

during their employment and would not receive this entitlement as a cash benefit on termination. It is also more likely that workers with more than ten years of service will have greater seniority, and / or be at an age where finding alternative employment is more difficult. As stated at paragraphs [137] and [141] of the decision:

> *'There is a real likelihood that, for some, employment post-redundancy will be of a lesser quality, that the remuneration will be lower and that job satisfaction and social status will be reduced... Loss of seniority is more significant for longer serving employees*.'

ERLS also considers that the purpose of long service leave is fundamentally different to statutory redundancy pay, and accordingly, receiving both entitlements should not be considered 'double-counting'. As outlined in Parliament's report:

> *'LSL has long been considered a reward to people who demonstrated loyalty by remaining with their employer for considerable periods of time. It also served the practical purpose of refreshing the workforce as well as retaining skills and expertise with a particular employer.'*

It is not consistent with the nature and purpose of long service leave to treat this entitlement as effectively supplementing the shortfall in any redundancy payment.

ERLS would support reform to section 119(2) that would entitle workers with 10 years of service to at least 16 weeks' redundancy pay.

Please let us know if you have any questions about this submission. You can reach us at legal@unsw.edu.au.

Yours faithfully,

KINGSFORD LEGAL CENTRE on behalf of the Employment Rights Legal Service (**ERLS**)



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