JobWatch
Employment Rights Legal Centre

*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

This submission has been endorsed by the following organisations:

Basic Rights Queensland Inc

Community Legal Centres Australia

Circle Green Community Legal

eastern community legal centre

Inner City Legal Centre

Marrickville Legal Centre
From the inner west, serving NSW

SOUTH-EAST MONASH LEGAL SERVICE INC.

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Westjustice

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## A. About JobWatch

Job Watch Inc (JobWatch) is an employment rights, not-for-profit community legal centre. We are committed to improving the lives of workers, particularly the most vulnerable and disadvantaged.

JobWatch is funded by the Victorian State Government and the Victorian Legal Services Board Grants Program. We are a member of Community Legal Centres Australia and the Federation of Community Legal Centres (Victoria).

JobWatch provides the following services:

- Tailored information and referrals to workers from Victoria, Queensland and Tasmania, via a free and confidential telephone information service (TIS);
- Community legal education, through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;
- Legal advice and representation for vulnerable and disadvantaged workers across all employment law jurisdictions in Victoria; and
- Law reform work aimed at promoting workplace justice and equity for all workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our TIS. To date we have collected more than 272,000 caller records, with each record usually canvassing multiple workplace problems, including contract negotiation, recovery of wages, discrimination, harassment, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time across State and Federal laws.

Most of our callers and clients are not union members and cannot afford to get legal assistance from a private lawyer. To become clients of the legal practice, workers must have an employment law matter that has legal merit and their cases must satisfy the requirements of our funding agreements (which typically focus on client vulnerability and public interest issues).

All case studies have been de-identified to maintain confidentiality.

## B. Summary of recommendations

1. Based on JobWatch's expertise and the experiences of our callers and clients, we recommend the following changes to the National Employment Standards (NES):

    a. Section 15AA of the Fair Work Act 2009 (FW Act) should be amended to include a statutory definition of employment and a legislative presumption in favour of employment, in order to provide greater clarity in determining NES coverage.

    b. The Fair Work Commission (FWC) should be empowered to deal with disputes about any provision of the NES, including by arbitration.

    c. Where reasonableness is to be determined in relation to a provision of the NES, a list of relevant factors to be considered should be included in that provision.

    d. Section 62(3) of the FW Act should be amended to provide that in determining if additional hours are reasonable, workplace safety should be the paramount consideration.

    e. Dealing with extreme weather events and climate impacts should be an additional ground for requests for flexible working arrangements.

    f. For the purpose of the parental leave return-to-work guarantee, a position is to be regarded as the same as the pre-parental leave position, despite any changes made to the position under a flexible work arrangement or adjustments made under discrimination law.

    g. Consultation with an employee on parental leave should include giving the employee information about the specific operational justification for proposed changes that would significantly affect the status, pay or location of the employee's pre-parental leave position.

    h. Sections 113 and 133A should be replaced with a new s 113B, which should provide that an employee's entitlement to long service leave (LSL) derives from either the applicable state legislation or an applicable enterprise agreement, whichever is more favourable at the relevant time.

i. A contract of employment should never be able to require a longer notice period from an employee than is required from the employer.

j. Redundancy pay for eligible employees with continuous service of at least 10 years should be 18 weeks' pay.

k. For the purpose of redundancy pay, an employee's period of continuous service should not exclude a capped period of unpaid parental leave under the FW Act.

l. The provision for variation of redundancy pay based on employer incapacity to pay should be repealed.

m. The NES should expressly require employers, so far as is reasonably practicable, to provide retraining or upskilling opportunities to affected employees with a genuine view to avoiding redundancy.

n. The Fair Work Information Statement should include additional information outlining rights and obligations relevant to visa workers.

o. The entitlement to minimum wages should be part of the NES.

p. Employers should be required to provide employees with a written contract which sets out essential terms and conditions of employment. Where essential terms are not set out in writing, the onus should fall on the employer to disprove an employee's allegations in respect of those terms.

q. The obligations on employers regarding pay slips and employment records should be included in the NES.

r. The obligation to consult about major workplace changes should be extended to all employees covered by the NES, and should include providing specified information about operational justifications for the change.

s. The NES should provide for leave to deal with extreme weather events and climate impacts.

## C. Recommendations on existing standards in the NES

### C.1 Statutory definition of employee

2. JobWatch welcomed the introduction of s15AA in the FW Act on 26 August 2024, which shifted the focus back to the "real substance, practical reality and true nature of the relationship" when determining whether an employment relationship exists.

3. But we note that there is still no statutory definition of employee in Australia. The question of who is an employee in Australia is still decided according to common law principles. Section 15AA directs courts and the Fair Work Commission on how to apply the common-law concept of "employee" within the FW Act by requiring them to assess the real substance, practical reality, and true nature of the relationship. There still appears to be widespread uncertainty and disagreement about whether particular workers are employees or not and this leads, all too often in our experience, to misclassifications and underpayment claims.

4. So, JobWatch recommends the inclusion of a statutory definition of employee in s15AA of the FW Act, with a legislative presumption in favour of employment. This would provide greater clarity in determining NES coverage and entitlements.

**Case study:**

Eight international students, vulnerable to workplace exploitation, worked for the same individual without necessarily knowing each other. They performed cleaning, housekeeping and basic labouring work, both for him personally and also for a number of companies under his control.

They were promised a flat rate of pay, well below applicable minimums. They were instructed to obtain ABNs even though they had no business, equipment, or ability to subcontract or negotiate rates. They were told to submit invoices, but then they were paid little or nothing at all.

Although the workers were eventually found to be employees by the Federal Circuit and Family Court of Australia, when judged by the conventional indicia of

control, integration, provision of equipment and inability to delegate, they bore the burden of proving their own employee status. This is a complex legal task for most people, especially for migrant workers on temporary visas with limited English and limited access to legal advice.

A statutory presumption of employment would have shifted the burden from the workers to the putative employer to show that they were not employees and it would have ensured that minimum standards applied from day one unless rebutted.

The case of *Alvarez Nino v Kuksal (No 4)* [2023] FedCFamC2G 1051, in which JobWatch represented the Applicants, illustrates vividly that the current common-law characterization test, even with s 15AA's interpretive guidance, still places an unfair burden on vulnerable workers and allows unscrupulous operators to hide behind ABNs, sham arrangements and corporate structures.

### C.2 FWC arbitration on all NES disputes

5. JobWatch recommends that any dispute about a NES entitlement which cannot be resolved at the workplace level should be able to be dealt with by the FWC in any way it sees fit, including by arbitration.

6. Currently, the FWC does not have a blanket jurisdiction over all NES entitlements, and it may only deal with NES-related disputes where it is expressly authorised to do so under the FW Act, an enterprise agreement, a modern award, or another authorised dispute-resolution clause.

7. While it is true that many, if not most, employees can bring NES disputes to the FWC while still employed, award-free and agreement-free employees, and those whose contracts do not include an FWC dispute-resolution clause, cannot take an NES dispute to the FWC. Also, even where a modern award or enterprise agreement permits a dispute to be taken to the FWC, this does not automatically mean the FWC has the power to arbitrate the dispute. The FWC should have the power to arbitrate all NES-related disputes and for all employees covered by the NES, if it considers it appropriate.

8. We acknowledge that this would necessitate significantly increased resources for the FWC.

### C.3 Reasonableness tests

9. JobWatch believes that the factors to be considered in determining reasonableness listed in s 62(3) (additional hours) and s 114(4) (work on public holidays) of the FW Act are extremely useful and should serve as models for other provisions of the NES where a test of reasonableness is applicable.

10. JobWatch recommends that relevant factors to be considered in determining reasonableness be added to all such provisions, including but not limited to

    a. requests for flexible work arrangements,

    b. employee choice about casual employment,

    c. extensions of parental leave,

    d. safe job transfers and leave,

    e. agreement to take annual leave, and

    f. notice and evidence requirements.

### C.4 Maximum weekly hours (Division 3)

11. JobWatch recommends that in determining whether additional hours are reasonable, not all criteria in s 62(3) (a) should be treated as equal. An additional provision should be inserted into s 63(3) providing that in determining the reasonableness of additional hours, paramount consideration must be given to any foreseeable risk to employee health and safety, including psychosocial safety.

12. The FWC should be empowered to deal with disputes about additional hours arising under s 63, see recommendation C.2.

### C.5 Requests for flexible working arrangements (Division 4)

13. JobWatch acknowledges that climate change is increasingly impacting employment as extreme weather events become more common, affecting both safety at work and employees' daily lives.

14. So, JobWatch recommends that s 65(1A) of the FW Act be amended to add needing to deal with extreme weather events and other climate impacts as an additional ground to request flexible working arrangements.

## C.6 Parental leave and related entitlements (Division 5)

### *C.6.1 Transfer to a safe job (s 81); No safe job leave (ss 81A and 82A)*

15. The FWC should be empowered to deal with disputes about these sections; see recommendation C.2.

### *C.6.2 Consultation with employee on unpaid parental leave (s 83)*

16. Consultation must include information about the specific operational justification for proposed changes that would significantly affect the status, pay or location of the employee's pre-parental leave position; see recommendation D.4.

### *C.6.3 Return to work guarantee (s 84)*

17. JobWatch frequently encounters employees who cannot return to their pre - parental leave position, or the nearest suitable available position, because of their carer responsibilities or other issues arising from their pregnancy or parental status. In these circumstances, currently the employer has satisfied its obligations under s 84 by offering the unaltered position, even though the employee may have rights under the NES to request flexible work arrangements, or other rights under discrimination law relating to carer responsibilities.

18. To address this, JobWatch recommends that this section be amended to provide that for the purpose of s 84, a position is to be regarded as the same position (or the nearest in status and pay) as the pre – parental leave position, despite any changes made to the position under a flexible work arrangement, or required to be made under discrimination law, or reasonably necessary to accommodate the employee's carer responsibilities.

19. The FWC should be empowered to deal with disputes about this section, see recommendation C.2.

## C.7 Long service leave (Div 9)

20. Section 113 FW Act was intended as a transitional provision to preserve LSL entitlements under certain pre-FW Act industrial instruments, pending the development of a national LSL scheme which is yet to eventuate (FW Bill 2009 Explanatory Memorandum Item 7). See "Appendix: Section 113 FW Act" for a detailed analysis.

21. Section 113(1) has the effect of imposing LSL entitlements from pre-modern awards if the employee's current employment would have been covered by that pre-modern award had the employee been in that employment at the time of the commencement of the section in 2009. This provision is poorly understood, is often not applied, and in most cases is less favourable to employees who would otherwise be covered by State legislation, mainly because most pre-modern awards require 15 years of service before LSL entitlements arise.

22. Section 113(3) has the effect of preserving LSL entitlements in pre-modern agreements under very specific circumstances – so specific that to JobWatch's knowledge they have never arisen.

23. The remaining subsections of s 113 define the circumstances under which ss 113(1) and (3) apply.

24. Section 113A provided a one-off opportunity for enterprise agreements replacing certain pre-modern agreements to disregard periods of service that were also disregarded in the pre-modern agreement (*Fair Work Bill 2009 Explanatory Memorandum* Item 7). It is unlikely that any such pre-modern agreements remain in force.

25. JobWatch recommends that ss 113 and 113A be repealed altogether, and replaced with a new s 113B, which will clarify that an employee's entitlement to LSL at a particular time will be under applicable State legislation or under an applicable enterprise agreement, whichever is more favourable at that time.

26. Section 27(2)(g) FW Act will need to be amended to reflect this change.

27. A small number of employees may be disadvantaged by this change, so it is suggested that a transitional provision be inserted into Schedule 1 of the FW Act to empower the FWC to make an order on application that an employee or class of employee should be entitled to LSL as if s 113 in its current form applied.

**Case study:**

Audrey was employed as a senior technician at a car repair business. After 8 years of service, during which she was promoted several times, Audrey resigned. When she enquired about her entitlement to LSL under the *Long Service Leave Act 2018* (Vic) (LSL Act), the employer claimed that she was not entitled to LSL.

The employer relied on s 113 of the FW Act, arguing that because it was a member of an employer association that was a named respondent to a pre-modern award which contained LSL terms, Audrey's entitlement was under those terms, which required 10 years' service.

On Audrey's behalf, JobWatch argued that the highly-technical role Audrey performed at the time did not align with any job classification in the pre-modern award, which therefore would not have applied to her employment at the commencement of s 113. So, her entitlement was under the LSL Act.

## C.8 Notice of termination and redundancy pay (Division 11)

### *C.8.1 Requirement for notice of termination or payment in lieu (Subdivision A)*

28. JobWatch frequently encounters situations where employees have a contractual notice obligation that is longer than their employer's notice obligation. The risk here is that if the employee gives notice of resignation, the employer may then respond by terminating the employee's employment, leaving the employee with an unexpectedly short period of remaining employment.

29. Currently, the employee's only practical remedy in this situation is to make an unfair dismissal claim (if eligible) seeking compensation for the balance of the notice period. Given that a significant number of employees are not protected by the unfair dismissal laws, because they do not meet the minimum employment period, or fall within other exclusions, this position is unsatisfactory.

30. JobWatch recommends that an additional subsection be inserted into s 117 providing that where a term of an employment contract imposes a longer period of notice of resignation than the period of notice of termination required to be given by the employer (regardless of the source of that obligation), that term should have effect as if the employee's notice period were the same as the employer's.

**Case Study:**

Giovanna began working for a small online retailer while in Australia on a temporary visa. She soon found the employer's management style to be unpleasant, and after eight months she decided she would resign.

Giovanna found another job that satisfied the requirements of her visa, and arranged to start in two months. She then gave her employer the eight weeks' notice required by her employment contract.

The employer was angry that Giovanna had resigned and dismissed her effective immediately. As the employment contract did not specify how much notice the employer was required to give, under the NES the employer was only obliged to pay her in lieu of one weeks' notice. She was ineligible to make an unfair dismissal claim and was left facing seven weeks with no income.

## C.8.2 Redundancy pay (Subdivision B)

### *C.8.2.1 Redundancy amount after 10 years' service (s 118)*

31. Under s 118 of the FW Act, redundancy pay entitlements increase progressively from 4 weeks' pay after 1 year of service to 16 weeks' pay after 9 years' service, but then drop to 12 weeks' pay for 10 years' service or more.

32. This anomaly has historical roots in the 2004 "Redundancy Case" (PR032004 [2004] AIRC 287), which considered that LSL entitlements, which often arose at 10 years' service, resulted in "double counting" and should be taken into account when setting redundancy pay entitlements [154].

33. In JobWatch's view, this approach is no longer valid. Entitlements to LSL no longer uniformly arise at 10 years' service, and in any case, the two entitlements serve two different purposes. LSL is a reward for longevity of service. Redundancy pay is compensation for the hardship of termination of employment. The perception of "double counting" is unfounded, and it is unfair that a long serving employee's LSL should be partly absorbed into redundancy entitlement.

34. So, JobWatch recommends that s 118 should be amended to provide that redundancy pay for service in excess of 10 years is 18 weeks' pay.

*C.8.2.2 Meaning of continuous service*

35. Section 119(2) provides that redundancy entitlements are based on the employee's "period of continuous service". Under ss 22(1) and (2), although a period of unpaid parental leave does not break continuous service, it does not count towards the length of the employee's continuous service for redundancy pay.

36. JobWatch believes this unfairly disadvantages women who exercise their workplace right to take unpaid parental leave, , and gives rise to incoherent operation between the entitlements to redundancy pay and parental leave.

37. The experience of JobWatch callers indicates that women on parental leave are more vulnerable to redundancy and disproportionately bear its adverse impacts, both losing their job and having their redundancy pay reduced because of taking unpaid parental leave. Excluding unpaid parental leave from continuous service may perpetuate systemic sex discrimination, undermine the protective purpose of redundancy pay, is inconsistent with the principle of gender equity, and contrary to the purpose of discrimination law and the FW Act (s 3).

38. So, JobWatch recommends that for purpose of s119(2), an employee's period of continuous service on termination should not exclude a period of unpaid parental leave under the FW Act..

*C.8.2.3 Meaning of "ordinary hours"*

39. JobWatch frequently observes an injustice in the calculation of redundancy pay, where the employee's ordinary hours of work have been reduced shortly before the redundancy occurs, which then forms the basis for the entitlement.

40. JobWatch recommends that a subsection be inserted into s 118 defining "ordinary hours" for the purpose of the section, implementing the same or a similar hours-averaging method as that used in the *Long Service Leave Act 2009 2018* (Vic). That is, if the employee's ordinary hours have changed in the two years prior to the redundancy, then the ordinary hours are to be calculated as the average weekly hours over the past year, the past five years, or the entire period of employment, whichever is greater.

*C.8.2.4 Variation for inability to pay*

41. In JobWatch's view there is no justification for the variation of redundancy pay provided for in s 120(1)(b)(ii) based on employer incapacity to pay. No other

employment entitlement is subject to this caveat, nor should it be. The subparagraph should be repealed entirely.

*C.8.2.5 Obligation to provide reasonable training*

42. JobWatch recommends that the redundancy provisions of the NES should expressly require employers, so far as is reasonably practicable, to provide retraining or upskilling opportunities to affected employees with a genuine view to avoiding redundancy before termination occurs.

## C.9 FWO to prepare and publish statements (Division 12)

43. JobWatch observes considerable exploitation of employees who are present in Australia on visas. Many of these employees, and their employers, may be unaware of their employment rights and obligations, and the interaction between these and their rights and obligations under migration law.

44. JobWatch recommends that s 124 of the FW Act be amended to provide that the Fair Work Information Statement must contain information clarifying that visa workers have the same rights as all other workers in Australia.

## D. Proposed additional standards

45. JobWatch recommends that several employment rights that already exist elsewhere – under the FW Act and other legislation, or as common-law principles – be included in a suitable form in the NES. We believe this is beneficial because, among other things:

    a. it signals a clear guarantee of these rights as a universal safety-net for all national system employees,

    b. it provides access to low-cost, informal dispute-resolution and arbitration through the FWC,

    c. it makes civil remedies available for all contraventions, and

    d. it provides the FWC with further benchmarks when considering minimum standards orders for regulated worker (see e.g. 536JX(b)(ii) FW Act).

### D.1 Minimum wages

46. Minimum wages as determined from time to time by the FWC should be included in the NES.

### D.2 Written contract containing certain terms and conditions

47. The NES should require a written contract, however brief, to be exchanged between the employer and the employee prior to commencement or any agreed variation, setting out at least the following essential terms:

    a. Whether casual, permanent ongoing or fixed-term

    b. Start date (and end date if fixed term)

    c. Rate of pay and basis (i.e. hourly rate, salary, frequency, commission, allowances, any other identifiable agreed amounts)

    d. Hours and days of work and any conditions under which these can be varied

    e. Broad scope of duties.

48. The above requirements may be satisfied by reference to terms of an applicable modern award or enterprise agreement.

49. The employer must keep a record of the contract and provide a copy to the employee on request.

50. Where a written contract is not made in respect of any of the above terms, the onus will fall on the employer to disprove an employee's allegations in respect of the subject matter of those terms.

**Case study:**

Three of JobWatch's clients were young international students who were hired to work in a restaurant after being verbally engaged by the person who ran the business. They received no pay slips, were given no written terms of employment, and did not even know that the business was legally operated by a company rather than the individual who hired and supervised them.

Believing they had been underpaid, they brought small-claims proceedings, but in the absence of any written contract or employer records, the business disputed their start dates, their hours of work, and even whether the restaurant was open during the periods they claimed to have worked. This forced the Court to reconstruct events from text messages and fragmentary evidence because the employer had kept none of the legally required records.

Had these employees received even a simple written employment contract confirming their employment status, start date, pay rate, expected hours, and basic duties, they would have avoided uncertainty about who their employer was, prevented factual disputes about their hours, and significantly strengthened their ability to prove the underpayments that ultimately formed the basis of their claims.

### D.3 Pay slips and records

51. Employer's obligations regarding pay slips and employee records should be moved in their entirety from ss 535 and 536 to become part of the NES.

### D.4 Consultation in the event of major workplace change

52. JobWatch recommends that consultation obligations in the event of major workplace change currently provided for in MAs and EAs be extended to all employees covered by the NES.

53. JobWatch further recommends that consultation obligations require the provision of information about the specific operational justification for proposed changes that would significantly affect the existence, status, pay or location of the employee's position. This information is to be provided in advance of any changes made.

54. This is needed to enable employees to make useful alternative proposals to the employer, and to make informed decisions about their legal rights, for example, whether the employer will be able to raise a defence of genuine redundancy in the context of an unfair dismissal claim, and should be sufficient for this purpose, e.g. what positions are likely to be removed and why, what positions are likely to be available, if any external hires are proposed and why, etc.

### D.5 Climate leave

55. JobWatch observes that climate change is increasingly impacting employment as extreme weather events become more common, affecting both safety at work and employees' daily lives.

56. So, JobWatch recommends that a suitable standard providing for leave to deal the impact of extreme weather events and other climate-change-related impacts be added to the NES.

Yours sincerely

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JobWatch acknowledges the significant contributions of Julia Zhang to these submissions.

## E. Appendix: Section 113 FW Act

*“Applicable award-derived long service leave terms”*

57. Section 113(3)(a)(ii) defines “applicable award-derived long service leave terms” in relation to an employee as terms (including incidental terms) of a pre-modern award that would have entitled the employee to LSL, had that employee been working in their current circumstances of employment at the time of commencement of the section. Note that pre-modern awards are no longer operative in any sense, but s 113 is intended to preserve any LSL entitlements in them.

58. Section 113(1) provides that If applicable award derived long service leave terms exist, the employee is entitled to LSL under those terms, which then override any State or Territory LSL laws under s27(2)(g) of FW Act.

59. Due to the unclear meaning of these critical terms in section 113(3), interpretation issues have arisen leading to inconsistent outcomes and unintended consequences, demonstrated by the inconsistent interpretation in recent decisions concerning casual employees’ LSL entitlement under pre-modern awards.

60. In *Conroy's Smallgoods v Australasian Meat Industry Employees Union* [2023] FCAFC 59 (Conroy), the Full Court of the Federal Court considered whether Mr Finch, a casual employee, was entitled to LSL under the *Long Service Leave Act 1987* (SA) or under the Federal *Meat Industry (Smallgoods) Award 2000* (Meat Award) pursuant to s 113 FW Act.

61. The majority (O’Sullivan J and Raper JJ) concluded that “applicable award-derived long service leave terms” means terms in a pre-modern award which provides for LSL, ‘‘irrespective of whether the employee is included or excluded from those provisions”. This means, the Meat Award, which included a casual loading in lieu of LSL, was sufficient to enliven s 113.

62. The majority adopted a purposive interpretation approach, reasoning that a literal reading of the text of s113 would lead to absurdity, and would be contrary to the intent of the transitional provisions of preserving pre-modern award LSL entitlements. A literal reading would create improbable results such as subjecting employers to sudden liability under State or Territory laws for failure to provide LSL entitlements which did not exist until the enactment of the FW

Act. So, the majority concluded that Mr Finch's LSL entitlement must be determined according to the pre-modern award, which was nil.

63. Bromberg J argued in dissent for the ordinary meaning of the word 'entitled', meaning a right or benefit to LSL. The terms of the Meat Award did not confer an entitlement to be absent from work on leave, only a payment in substitution for the absence of leave. By examining the change of wording from predecessor provision (s527 of the *Workplace Relations Act 1996*), Bromberg J considered that Parliament intended a limited preservation of only those terms conferring an entitlement, not absolute preservation of the status quo.

64. In *Re Victorian Hospitals' Industry Association, Australian Nursing and Midwifery Federation and Health Services Union* [2023] VMC 12 (VHIA/ANMF), the Victorian Magistrates' Court distinguished *Conroy* based on different terms in the relevant pre-modern award (Nurses Award), which expressly stipulated that LSL provisions 'shall not apply in the case of a casual employee'. Unlike the Meat Award, it did not contain an express term providing that the casual loading included payment in lieu of LSL. The Court accepted that this difference meant the casual nurses were not subject to 'applicable award-derived long service leave terms' pursuant to s 113. This resulted in the nurses being entitled to LSL under the applicable State law, the *Long Service Leave Act 2018* (VIC).

65. The outcome is that some casual employees enjoy LSL entitlements under State legislation, while others do not, merely because of different wording in archaic pre-modern awards, despite both awards essentially denying LSL for casuals and providing casual loadings.

66. The inconsistency in the interpretation and application of s113 is unsatisfactory and inequitable.

67. Also, the legal certainty of LSL obligations is compromised, making it difficult for employers to determine whether certain LSL entitlements arise under State or Territory legislation or under a pre-modern award.

*"Applicable agreement-derived terms"*

68. Section 113(5) of the FW Act provides in essence that "applicable agreement-derived long service leave terms" exist in relation to an employee if there are no award-derived terms, and the FWC makes an order on application under s 113(6) to the effect that it is satisfied that there was an agreement pre-dating

the FWA, containing LSL terms operating as part of a LSL scheme covering more than one State or Territory, which would have entitled the employee to LSL had that employee been working in their current circumstances of employment at the time of commencement of the section, and that entitlement is on the whole no less beneficial than those that would otherwise apply.

69. Our research suggests that it is unlikely that the FWC has ever made an order under s113(6). This is not surprising, given the dizzyingly complex requirements involved.