MASTER BUILDERS
AUSTRALIA

Submission to Standing Committee on Employment, Workplace Relations, Skills and Training

6 March 2026

Introduction

Following a referral from the Minister for Employment and Workplace Relations, Hon Amanda Rishworth MP on 27 November 2025, the House of Representatives Standing Committee on Employment, Workplace Relations, Skills and Training adopted an inquiry into the operation and adequacy of the National Employment Standards (NES) under the *Fair Work Act 2009* (FW Act) (Inquiry).

Master Builders Australia (Master Builders) takes this opportunity respond to the Inquiry.

This Inquiry – a commitment arising from the 2022 Jobs and Skills Summit – looks to consider whether the NES continue to meet the needs of workers, employers, and the broader economy including considering the effectiveness and application of the NES, including any opportunities for technical improvements.

Master Builders is the nation's peak building and construction industry association, which was federated on a national basis in 1890. Master Builders' Members are the Master Builder State and Territory Associations. Over 130 years, the Master Builders network has grown to more than 32,000 businesses nationwide, including the top 100 construction companies.

Master Builders is the only industry association representing all three sectors: residential, commercial, and civil construction. For noting, the membership contingent is made up predominantly of small and medium-sized enterprises.

Master Builders' vision is for a profitable and sustainable building and construction industry. Master Builders appreciates the opportunity to provide feedback on matters that are relevant to our industry for the purposes of ensuring suitability and sustainability of practices but to also hold fast to our vision for the industry.

A strong and flexible industrial relations system underpins a competitive, modern and productive economy. A safe and productive workplace relations environment is fundamental to the growth of the building and construction industry, a thriving economy, and increased job opportunities.

Master Builders supports policies that promote safer and more productive workplaces but also encourages governments to consider the broader consequences of legislative and regulatory changes.

The current industrial relations framework raises concerns about the benefits for workplaces, a common-sense, practical approach is needed with a focus on quality over quantity of legislation and regulation; the regulatory burden of the FW Act, in addition to industry specific modern awards is drowning our industry, particularly small businesses.

Over the past decade, no industry has performed worse than construction when it comes to productivity. The effects of this have been grim: ever deteriorating housing affordability, insufficient volumes of new home building and delays in the delivery of new homes. The poor performance of construction productivity means that it costs more to create the vital infrastructure that we need. As a result, government capital and infrastructure budgets don't stretch as far. One of the most problematic aspects of weak construction productivity is the way it infects other parts of the economy and erodes the buying power of families' pay packets.

Regulations also act as one of the biggest drains on productivity in the construction industry.

Australia's poor productivity performance is the main reason why stronger demand results in worse inflation – rather than growth in economic activity. Few industries are as exposed to the productivity crisis as construction. New figures show that construction productivity dropped by 2.8 per cent during 2024-25, its seventh consecutive year of decline. Productivity in our industry is now 21.5 per cent lower than it was in 2013-14, a bigger reduction than every other industry.

Commentators and observers often draw a line between the industrial relations environment and productivity, and it is generally acknowledged that industrial relations can play an important role in contributing to the strength of the Australian economy. This is why getting these settings *right* is so important and ensuring any further regulation does not work at odds with the Federal Government's housing and infrastructure goals.

It is Master Builders' view that there is a clear link between the two; workplace relations arrangements that set appropriate minimum terms and conditions of employment while minimising administrative burden and allowing businesses the certainty to grow and prosper must logically have a positive impact on productivity.

Balancing minimum conditions for workers with equal rights for employers while promoting job creation is crucial, and any legislation and regulation should be clear and simple to understand, reducing confusion and complexity for businesses.

It is crucial to the building and construction industry that minimum conditions of employment should be fair, easy to understand, economically sustainable and represent a genuine safety net. Overlapping minimum conditions across industrial instruments should be avoided to reduce complexities and acknowledgement of industry-specific instruments and any overlap should also be considered as part of this process.

Over time, we have seen the NES expand from the original 10 standard conditions to now 12. It is also clear that the NES now extends into areas that have not traditionally been seen as minimum employment conditions. This includes, for example, the addition of superannuation to the NES and the growing tendency to provide a level of specificity that is not generally associated with the traditional minimum standards.

While Master Builders does not proffer a specific view on the current matters included in the NES, any further expansion should be approached with caution. Any amendments to the existing NES must be carefully considered and based on evidence of the need for regulatory change. This would also include consultation with relevant industry participants and representative bodies.

It is the Master Builders overall position that there should not be any substantive changes to the NES framework, nor should there be changes made to the individual NES entitlements without appropriate consultation being undertaken.

Summary of recommendations

- Master Builders strongly encourages the Committee to recommends that there is no further expansion to the NES.
- There are some specific technical amendments that would assist including:
  - Amending section 64 of the FW Act to allow for averaging over 52 weeks.
  - Repealing section 130(2) of the FW Act
  - That payment for public holidays only be available where an employee is providing service as defined under s22 FW Act.
  - Repealing sections 66 and 112 of the FW Act.

Response to Inquiry

General comments

The NES was established to provide a safety net of minimum entitlements and conditions for workers – regardless of industry, role, or contractual arrangements.

Since its inception, the NES remained largely unchanged until significant amendments to the FW Act commenced from 2023 which have expanded its practical operation and enforcement. For example, the NES now includes minimum superannuation entitlements and paid leave for workers experiencing family and domestic violence.

It is Master Builders' view that the NES remains fit for purpose. As a minimum set of employment conditions, the NES remain appropriate and responsive.

In addition to the obligations under the NES, wages and conditions for workers in the building and construction industry are regulated by the Building and Construction General On-Site Award 2020 [MA000020] ('the Award') which provides industry-specific employment conditions and entitlements to respond to the nature of this sector or workplace-specific Enterprise Agreements, with minimal conditions and entitlements based on those provided in the NES.

This allows the consideration of industry specific matters, for example the project-based nature of the work through to the workplace specific hours of work and conditions, in addition the highly regulated and safety-critical nature of the industry means there must be flexibility in respect of employment terms and conditions for example the Award continues to provide for daily hire working, arrangements. This aids in financial viability in the engagement of labour to meet project requirements and deadlines and to be able to access skilled labour, where available, at short notice.

The NES establishes the minimum conditions of employment and whilst its intention is for it to be relatively simple, the building and construction industry's reliance on the modern award and enterprise agreements to ensure appropriate minimum entitlements and conditions, ultimately results in a departure from the minimum conditions and entitlements. Master Builders is concerned this now defeats the intention of the modern award system and fails the test of simplicity and accessibility.

This means that the overall effectiveness and application of the NES for the building and construction industry whilst applicable, is somewhat limited.

The effectiveness and application of the NES, including opportunities for technical improvements.

For some time, Master Builders has called for a range of technical amendments to the NES that would improve their operation.

Averaging of hours

Section 64 of the FW Act permits the averaging of hours over 26 weeks for award/agreement-free employees. Master Builders proposes averaging over 52 weeks to better facilitate the engagement of professionals, such as project managers, whose hours are often averaged due to the intensity of some of their work during peak periods.

Averaging of hours provides freedom to employers and employees to achieve work outcomes more productively. This change would facilitate a work practice that engendered efficiency, especially

amongst those businesses which regularly experience peak periods of activity as well as periods between projects where little activity occurs.

The change would not adversely affect those who are low paid or vulnerable in the event that the current 26 week period was changed to 52 weeks.

- Recommendation: To amend section 64 of the FW Act to allow for averaging over 52 weeks.

Leave while on workers compensation

Master Builders also suggests that Section 130(2) of the FW Act be repealed.

This would assist in resolving an inconsistency between the NES and state and territory legislation in relation to whether employees are entitled to accrue annual leave while receiving workers compensation payments.

Section 130 FW Act indicates that leave will not accrue and cannot be taken where an employee is absent from work but receiving workers' compensation. Because this exclusion is itself subject to State and Territory law,[1] which will apply where it provides accrual to employees on compensated absences, employers must have regard to confusing and often uncertain State and Territory workers' compensation laws.

Case law has interpreted section 130 of the FW Act narrowly to mean that an employee is entitled to accrue annual leave or personal/careers leave under the NES unless the particular state, territory or Commonwealth workers compensation law expressly states that such leave does not accrue[2]. While some argue further case law on the topic has made this 'clear' the approach remains different across the country. This simply causes confusion which could quite simply be remedied.

- Recommendation: Section 130(2) of the FW Act be repealed.

Unpaid leave and public holiday payments

Master Builders also considers there to be uncertainty regarding the operation of s116 FW Act, which indicates when an employee is to receive payment for absence on a public holiday.

Under s114 of the FW Act, an employee has a right to be absent from work on a public holiday. While an employer may request an employee to work, where that request is reasonable (having regard to the factors in s114(4)) an employee may also refuse such a request, if their refusal is reasonable (again having reference to the considerations in s114(4)). Accordingly, an employee is always entitled to be absent on a public holiday if they have good reasons to refuse to work.

Section 116 provides that an employee who is 'absent from his or her employment on a… public holiday' must be paid at the employee's base rate of pay. Several restrictions arise on the payment for employees who are absent from work on a public holiday, which are not immediately apparent from the terms of s116.

The first restriction arises from the fact that under s116, an employee absent on a public holiday only needs to be paid for their 'ordinary hours of work.' Some of the implications of this are set out in a legislative note to s116 which indicates that: If the employee does not have ordinary hours of work on the public holiday, the employee is not entitled to payment under this section. For example, the

[1] Fair Work Act, s130(2)
[2] *Anglian Care v NSW Nurses' and Midwives Association* [2015] FCAFC 81

employee is not entitled to payment if the employee is a casual employee who is not rostered on for the public holiday, or is a part-time employee whose part-time hours do not include the day of the week on which the public holiday occurs.

This note resolves any ambiguity about the meaning of 'ordinary hours' for part-time or casual employees, which are often ambiguously defined under modern awards or agreements, which might only define ordinary hours for full-time employees. What the legislative note at s116 indicates is that it is an employee's actual usual hours which determine their ordinary hours, such that parttime or casual employees who are absent from work on a public holiday are only entitled to payment where they would have ordinarily worked (or were rostered to work) on the day on which the public holiday falls.

However, a further ambiguity arises in relation to employees (whether full-time or otherwise) who are absent from work on unauthorised or extended unpaid leave. It should be noted that where workers are on unauthorised or unpaid leave (except in relation to community service leave) they will not be providing 'service'[3] and so will not accrue paid annual or paid personal/carer's leave. Oddly, payment for absences on public holidays is not tied to whether or not an employee is relevantly providing service, which means that it is less certain whether employees on unpaid or unauthorised leave need to be paid for public holidays.

There is some support for the restriction of payment for public holidays to such employees within the terms of s116. Considering first those employees on extended unpaid leave, Master Builders submits that such workers will not be entitled to payment for public holidays due to the fact that their ordinary hours can no longer be said to include the public holiday. This interpretation reflects an example given in the Explanatory Memorandum to the *Fair Work Bil 2008*, which indicates that an employee who is 'on unpaid parental leave for the first half of 2010… would not be entitled to payment for the public holiday on 26 January 2010,'presumably on the basis that they would 'not ordinarily have worked on that day.'.[4]

With respect to employees on unauthorised leave, Master Builders submits that such workers might also be considered to have altered their ordinary hours such that they could not be said to fall on a public holiday. A further argument arises from the fact that s116 only requires payment where an employee is absent from work 'in accordance with this Division', i.e. Division 10 of the NES, comprising s114-116.

Accordingly, where an employee is on unauthorised leave because they have unreasonably refused a reasonable request to work on a public holiday, they will be absent from work contrary to Division 10, meaning that payment does not have to be made. Less certain is whether an employee on an extended unauthorised absence, such that they cannot be contacted, would also be absent contrary to s114. While it is clear that an employee must actually provide reasons for not working[5] (where reasonably requested to do so) it is uncertain whether an employee who cannot be contacted to make such a request would be absent contrary to s114.

Master Builders submits that s116 should be amended to make it clear that payment does not have to be made to those employees who are on extended authorised unpaid leave, or to those on unauthorised leave.

One suggestion to achieve this might be by adding to the legislative note at s116.

[3] Fair Work Act, s22(2)(a), 87(2), 96(2)
[4] Explanatory Memorandum to the Fair Work Bill, item 461
[5] Pietraszek v Transpacific Industries Pty Ltd t/as Transpacific Cleanaway [2011] FWA 3698, (2011) 63 AILR 101-373, at para 85

However, there are problems with such an approach. Legislative notes do not form part of an Act[6] and have traditionally been rejected by courts as interpretive aids due to the fact that they cannot be amended in Parliament (but can be altered by the drafter consolidating the Act).

Nevertheless, it is possible to have recourse to legislative notes where the meaning of a legislative provision is unclear.[7]

While Master Builders considers that s116 does support the exclusion of public holiday pay to those employees who are either on extended authorised unpaid leave or unauthorised leave, it would be preferable for a subsection to be added to s116 to put this matter beyond doubt. As a matter of policy, Master Builders submits that such employees should not be entitled to payment for public holidays, as this is an entitlement which is supposed to accrue only to those employees who would have otherwise worked on that day. As noted, employees who are on unauthorised or unpaid leave (apart from community service leave) do not accrue paid annual or paid personal carer's leave, due to the fact that they are not providing 'service' as defined under s22 of the FW Act. Master Builders submits that 'service' could be similarly used in s116 regarding public holiday payments, to resolve the ambiguities that we have raised.

- Recommendation: That payment for public holidays only be available where an employee is providing service as defined under s22 FW Act.

Unnecessary provision

Sections 66 and 112 of the FW Act "carve out" State and Territory provisions in each particular subject area where the State and Territory laws are more beneficial to an employee. State or Territory legislation relating to the subject matter of these sections override the NES where the State and Territory legislation is more beneficial.

Master Builders is not opposed to the underlining purpose of this provision. However, Master Builders is concerned that the NES is, in large part, otherwise self-contained and does not need an employer to make reference to other documents in order to readily understand the safety net to be applied. Accordingly, we recommend their deletion in order to better effect a simple, comprehensive safety net as the desired outcome.

- Recommendation: That sections 66 and 112 of the FW Act be repealed

The interaction between the NES and other workplace instruments, including modern awards, enterprise agreements, and individual flexibility arrangements.

Master Builders' primary position in relation to modern awards is that to the extent that they have continuing relevance, modern awards should reflect their safety net characteristics and be simply worded and accessible to the layperson; they should only reflect necessary departures from the NES that are required because of specific industry conditions.

Despite the "modernisation" process of awards and numerous subsequent reviews, the Award remains lengthy and cumbersome, notwithstanding some positive changes arising out of the 4-yearly review of modern awards.

In its 2018 decision, the Full Bench of the Fair Work Commission did determine that a number of provisions were not meeting the modern awards objectives and made a range of changes to some

[6] (Acts Interpretation Act 1901 (Cth), s13.)
[7] Acts Interpretation Act 1901 (Cth), s5AB. See also The Ombudsman v Moroney [1983] 1 NSWLR 317

key provisions including the fares and travel allowances, the ordinary hour of work provisions, and the operation and application of some allowances.[8]

Certainly, the introduction of greater options in relation to the arrangement of Rostered Days Off, the ability to adopt time off in lieu of overtime (TOIL) and mechanisms to deal with annual leave accruals by agreement has progressed aspects of the Award, but by and large complex and productivity sapping clauses remain.

For example, the Award continues to mandate weekly payments by the Thursday of each week[9], dictates when a lunch break must be taken[10], sets overly prescriptive minimum hours for weekends and public holidays[11] and allows limited flexibility with respect to working outside ordinary hours[12].

As noted by the Cole Royal Commission[13]:

> *The principal award of the Australian Industrial Relations Commission (AIRC) which bears upon the building and construction industry in Australia is the National Building and Construction Industry Award 2000 (NBCIA). Despite attempts to simplify the NBCIA and circumscribe the number of allowable award matters the NBCIA is highly prescriptive. Among other matters, it prescribes a wide range of allowances and special rates, and complicated provisions in relation to rostered days off (RDOs), crib time, overtime, special time, shift work and weekend work.*

Master Builders would observe that many of the matters highlighted by Cole remain in the Award today.

To assist industry comply, Master Builders has historically published a manual to help explain its terms. Despite that fact, the level of complexity and the fact that there are a range of allowances payable for many different tasks and situations, a multitude of which are outmoded, means that the Award is an instrument that continues to hamper productivity.

It contains prescriptive requirements relating to work practices and therefore makes compliance with the basic safety net difficult. The Award contributes to the complication of human resource management and payment errors by employers.

We now also find references to the NES in the Award, in fact in some cases, the provisions are reproduced, for example recent industrial relations reforms have required the adoption of FW Act provisions into the Modern Award[14]; while the intent may be well-meaning i.e. to have all industrial relations requirements in one place, within the current environment, this will never be the case.

An example of overreach and an uncomfortable interaction between the NES and Modern Awards, is the industry specific redundancy scheme under the Award.

The definition of redundancy under the NES is the termination of employment because the employer has determined that the employee's job no longer exists, is not needed or if the employer becomes insolvent or bankrupt. This reflects the ordinary and commonly accepted meaning of 'genuine

[8] [2018] FWCFB 6019
[9] Clause 20.3
[10] 18.1(a) – between noon and 1 pm unless otherwise agreed by a majority of employees
[11] See 30.2, for example an employee required to work on the Saturday following Good Friday must be afforded at least 4 hours' work or be paid for 4 hours at the appropriate rate.
[12] See for example the requirement to pay overtime for all time worked outside ordinary hours 29.4(a)
[13] http://docs.employment.gov.au/node/29150 Page 22
[14] See clause 16A

redundancy' as devised by the then Australian Conciliation and Arbitration Commission in the 1984 Termination, Change and Redundancy Case (TCR Case).

In the TCR case it was made clear that the right to redundancy referred to situations at the initiative of the employer, whether directly as a result of technological change or company restructuring or indirectly because of insolvency or liquidation. This was again confirmed in the 2004 Redundancy Case in which it was stated that the intended operation of severance pay was primarily directed at ameliorating the 'inconvenience and hardship' of sudden job loss and compensation for non-transferable credits.

However, the construction industry through the Award has its own (and much broader) definition.

This arrangement is permitted through the operation of s.123(4) of the FW Act which excludes the operation of the NES redundancy arrangements from 'employees to whom an industry-specific redundancy scheme in a modern award applies'.

The Award includes such an arrangement and (amongst other things) provides that a redundancy exists if employment ceases for any reason other than misconduct or refusal of duty. This means that an employer is obliged to pay severance whether the employee is terminated by the employer, resigns, retires, loses a required qualification, becomes totally incapacitated for work, dies or is retrenched (just to name a few scenarios).

It is absurd that there be a payment incentive to resign. Not only does this negatively impact on staff retentions, but employers should not be required to budget for resignation payments over which they have no control. The provision as it stands does not represent a fair minimum safety net.

This scheme also applies to small business – contrary to the prima facie view that redundancy obligations should not.

Compounding this is that under s.141 the FW Act imposes severe limitations on the ability of the FWC to vary an industry specific scheme. Under the current regulatory environment making changes to the arrangements is virtually impossible.