

The Modern Awards Review 2023-24
NECA SUBMISSION

February 2024

Introduction

The Fair Work Commission is conducting a review of modern awards after receiving direction from the Minister for Employment and Workplace Relations. The Modern Awards Review 2023-24 will look at four topics:

- Arts and Culture Sector
- Job Security
- Work and Care
- Making awards easier to use

As the peak industry body for Australia's electrical and communications industry, the National Electrical and Communications Association (NECA) has drafted a submission, focusing on the fourth topic - how government can make awards easier to use, without reducing entitlements for workers. This submission provides feedback on the updated drafting of the clauses that specifically impact the electrical subcontracting industry.

Background

NECA is the peak body for Australia's electrical and communications industry, which employs 344,370 people and turns over more than \$82bn annually.

We represent over 6,500 businesses across Australia performing works including the design, installation, and maintenance of electrical and electronic equipment in the defence, construction, mining, air conditioning, refrigeration, manufacturing, communications, and renewable energy sectors.

NECA also plays an integral role in the development of the next generation of Australia's electrical and communications tradespeople, contractors and sub-contractors. Through its associated Group Training Organisations (GTOs) and Registered Training Organisations (RTOs), NECA offers employment and trade training to some 4,800 apprentices nationally.

NECA represents the interests of electrical and communication businesses to all levels of government and in regulatory, legislative and industry development forums. Our members make an essential economic contribution to the NSW economy – connecting businesses,

homes, and infrastructure – encouraging investment, improving reliability and energy security, and delivering affordable, environmentally sustainable outcomes.

Response

1. Superannuation Clauses

Existing Clause	Proposed Clause	NECA Comments
<p>X.1 Superannuation legislation</p> <p>(a) Superannuation legislation, including the Superannuation Guarantee (Administration) Act 1992 (Cth), the Superannuation Guarantee Charge Act 1992 (Cth), the Superannuation Industry (Supervision) Act 1993 (Cth) and the Superannuation (Resolution of Complaints) Act 1993 (Cth), deals with the superannuation rights and obligations of employers and employees. Under superannuation legislation individual employees generally have the opportunity to choose their own superannuation fund. If an employee does not choose a superannuation fund, any superannuation fund nominated in the award covering the employee applies.</p>	<p>X.1 Superannuation</p> <p>Superannuation entitlements are provided for in the NES and under superannuation legislation.</p> <p>X.2 Default funds</p> <p>Unless an employer is required by superannuation legislation to make contributions to another fund for the benefit of an employee, the employer must satisfy the NES requirements by making contributions to one of the following superannuation funds or its successor, provided that, in respect of new employees, the fund is able to accept new beneficiaries:</p> <p>(a) [Default Fund A]</p> <p>(b) [Default Fund B]</p> <p>...</p> <p>X.3 Absence from work while receiving workers compensation</p> <p>Subject to the governing rules of the relevant superannuation fund, the employer must make the</p>	<p>There is no reference to the employer's obligation to identify if the employee has a 'stapled fund' nor what superannuation is to be paid on.</p> <p>We note that employers are responsible for identifying if an employee has a superannuation fund linked or 'stapled to them.</p> <p>Further, we note that many employees are unclear on what they should be paying superannuation on.</p> <p><u>Suggested wording:</u></p> <p>Unless an employer is required by superannuation legislation to make contributions on ordinary time earnings to another fund (such as to a fund stapled to the</p>

<p>(b) The rights and obligations in these clauses supplement those in superannuation legislation.</p> <p>X.2 Employer contributions</p> <p>An employer must make such superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee.</p> <p>X.3 Voluntary employee contributions</p> <p>(a) Subject to the governing rules of the relevant superannuation fund, an employee may, in writing, authorise their employer to pay on behalf of the employee a specified amount from the post-taxation wages of the employee into the same superannuation fund as the employer makes the superannuation contributions provided for in clause X.2.</p> <p>(b) An employee may adjust the amount the employee has authorised their employer to pay from the wages of the employee from the first of the month following the giving of three months' written notice to their employer.</p>	<p>superannuation contributions required by the NES and pay the amounts authorised by any salary sacrifice arrangement for the period of absence from work (subject to a maximum of 52 weeks) of an employee due to work-related injury or work-related illness provided that:</p> <p>(i) the employee is receiving workers compensation payments or is receiving regular payments directly from the employer in accordance with statutory requirements; and</p> <p>the employee remains employed by the employer.</p>	<p>employee) for the benefit of an employee...</p> <p>This change would further require a definition such as:</p> <p>Ordinary Time Earnings: as defined in the <i>Superannuation Guarantee (Administration) Act 1992 (Cth)</i> as amended from time to time.</p>
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(c) The employer must pay the amount authorised under clauses X.3(a) or X.3(b) no later than 28 days after the end of the month in which the deduction authorised under clauses X.3(a) or X.3(b) was made.

X.4 Superannuation fund

Unless, to comply with superannuation legislation, the employer is required to make the superannuation contributions provided for in clause X.2 to another superannuation fund that is chosen by the employee, the employer must make the superannuation contributions provided for in clause X.2 and pay the amount authorised under clauses X.3(a) or X.3(b) to one of the following superannuation funds or its successor:

(a) [default fund A]

(b) [default fund B]

(c) ...

X.5 Absence from work

Subject to the governing rules of the relevant superannuation fund, the employer must also make the superannuation contributions provided for in clause X.2 and pay the amount authorised under clauses X.3(a) or X.3(b):

<p>(a) Paid leave—while the employee is on any paid leave.</p> <p>(b) Work-related injury or illness— For the period of absence from work (subject to a maximum of 52 weeks) of the employee due to work-related injury or work-related illness provided that:</p> <p>(i) the employee is receiving workers compensation payments or is receiving regular payments directly from the employer in accordance with statutory requirements; and</p> <p>the employee remains employed by the employer</p>		
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2. Time Off in Lieu Clauses

Existing Clause	Proposed Clause	NECA Comments
<p>X.1 Time off instead of payment for overtime</p> <p>(a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.</p> <p>(b) Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement under clause A.1.</p> <p>(c) An agreement must state each of the following:</p> <p>(i) the number of overtime hours to which it applies and when those hours were worked;</p> <p>(ii) that the employer and employee agree that the employee may take time off</p>	<p>X.1 Time off instead of payment for overtime</p> <p>(a) An employer and employee may agree in writing to the employee taking an equivalent amount of time off instead of being paid for a particular amount of overtime, provided that no undue influence or undue pressure is exerted on either party.</p> <p>(b) The employer must pay the employee as soon as practicable for any overtime hours that were subject to an agreement under subclause (a) and have not been taken off where:</p> <p>(i) the employee decides to cancel the agreement;</p> <p>(ii) the employee does not take the agreed time off within 6 months of the hours being worked; or</p> <p>the employment is terminated.</p>	<p>For clarity we suggest:</p> <p>At (a); insert “worked by the employee” after “particular amount of overtime.”</p> <p>At (b) (i) insert “overtime’ prior to “hours being worked”</p>

instead of being paid for the overtime;

(iii) that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked;

(iv) that any payment mentioned in subparagraph (iii) must be made in the next pay period following the request.

Note: An example of the type of agreement required by this clause is set out at Schedule [x]. There is no requirement to use the form of agreement set out at Schedule [x]. An agreement under clause A.1 can also be made by an exchange of emails between the employee and employer, or by other electronic means.

(d) The period of time off that an employee is entitled to take is the same as the number of overtime hours worked.

EXAMPLE: By making an agreement under clause A.1 an employee who

worked 2 overtime hours is entitled to 2 hours' time off.

- (e) Time off must be taken:
- (i) within the period of 6 months after the overtime is worked; and
 - (ii) at a time or times within that period of 6 months agreed by the employee and employer.
- (f) If the employee requests at any time to be paid for overtime covered by an agreement under clause A.1 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.
- (g) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (e), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.

- (h) The employer must keep a copy of any agreement under clause A.1 as an employee record.
- (i) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.
- (j) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause A.1 will apply, including the requirement for separate written agreements under paragraph (b) for overtime that has been worked.

Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

<p>(k) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause A.1 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.</p> <p>Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause A.1.</p>		
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3. Excessive Annual Leave Accrual Clauses

Existing Clause	Proposed Clause	NECA Comments
<p>32.6 Excessive leave accruals: general provision</p> <p>NOTE: Clauses 32.6 to 32.8 contain provisions, additional to the NES, about the taking of paid annual leave as a way of dealing with the accrual of excessive paid annual leave. See Part 2.2, Division 6 of the Act .</p> <p>(a) An employee has an excessive leave accrual if the employee has accrued more than 8 weeks' paid annual leave (or 10 weeks' paid annual leave for a shiftworker, as defined by clause 32.2).</p> <p>(b) If an employee has an excessive leave accrual, the employer or the employee may seek to confer with the other and genuinely try to reach agreement on how to reduce or eliminate the excessive leave accrual.</p> <p>(c) Clause 32.7 sets out how an employer may direct an employee who has an excessive leave accrual to take paid annual leave.</p>	<p>X.X Excessive leave accruals</p> <p>Despite anything else in this clause, an employer may direct an employee to take a period of paid annual leave if:</p> <p>(a) the employee has accrued at least 8 weeks of annual leave;</p> <p>(b) the employer gives the employee 8 weeks' notice to take the annual leave; and the employee retains at least 6 weeks of accrued annual leave after the direction is given by the employer.</p>	<p>Insert instead: Despite anything else in this clause, an employer may direct an employee to take a period of no less than one weeks paid annual leave if:</p> <p>At (a); insert instead: "the employee has accrued at least 8 weeks of annual leave, or 10 weeks if the employee is a shiftworker;"</p> <p>At (b); insert instead: "the employer gives the employee no less than 8 weeks' and no more than 12 months' notice to take the leave;"</p> <p>At (c); insert instead: "the employee retains at least 6 weeks of accrued annual leave when the leave directed to be taken is deducted from the employee's leave balance."</p> <p>There is currently no reference to employee</p>

<p>(d) Clause 32.8 sets out how an employee who has an excessive leave accrual may require an employer to grant paid annual leave requested by the employee.</p> <p>32.7 Excessive leave accruals: direction by employer that leave be taken</p> <p>(a) If an employer has genuinely tried to reach agreement with an employee under clause 32.6(b) but agreement is not reached (including because the employee refuses to confer), the employer may direct the employee in writing to take one or more periods of paid annual leave.</p> <p>(b) However, a direction by the employer under clause 32.7(a):</p> <p>(i) is of no effect if it would result at any time in the employee's remaining accrued entitlement to paid annual leave being less than 6 weeks when any other paid annual leave arrangements (whether made under clause 32.6 , 32.7 or 32.8 or otherwise agreed by the employer and employee)</p>		<p>initiated taking of excessive leave.</p> <p>Insert:</p> <p>An employee may give written notice to the employer requesting to take at least one period of no less than one weeks and no more than four weeks (5 weeks if the employee is a shiftworker) paid annual leave if:</p> <p>At (a) insert “the employee has had an accrued annual leave balance of at least 8 weeks (or 10 weeks for shift workers) for more than 6 months;”</p> <p>At (b) insert: “the employee has not been given approval or a direction by the employer to take excessive accrued annual leave, and the employee retains at least 6 weeks of accrued annual leave as a result of any excessive leave taken.”</p> <p>At (c) insert: “the employee gives the employer at least 8 weeks’ and no more than 12 months’ notice to take the annual leave”</p>
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<p>are taken into account; and</p> <p>(ii) must not require the employee to take any period of paid annual leave of less than one week; and</p> <p>(iii) must not require the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the direction is given; and</p> <p>(iv) must not be inconsistent with any leave arrangement agreed by the employer and employee.</p> <p>(c) The employee must take paid annual leave in accordance with a direction under clause 32.7(a) that is in effect.</p> <p>(d) An employee to whom a direction has been given under clause 32.7(a) may request to take a period of paid annual leave as if the direction had not been given.</p> <p>NOTE 1: Paid annual leave arising from a request mentioned in clause 32.7(d) may result in the direction ceasing to have effect. See clause 32.7(b)(i) .</p>		
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NOTE 2: Under section 88(2) of the Act , the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

**32.8 Excessive leave accruals:
request by employee for leave**

- (a) If an employee has genuinely tried to reach agreement with an employer under clause 32.6(b) but agreement is not reached (including because the employer refuses to confer), the employee may give a written notice to the employer requesting to take one or more periods of paid annual leave.
- (b) However, an employee may only give a notice to the employer under clause 32.8(a) if:
- (i) the employee has had an excessive leave accrual for more than 6 months at the time of giving the notice; and
 - (ii) the employee has not been given a direction under clause 32.7(a) that, when any other paid annual leave arrangements (whether made under clause 32.6 ,

<p>32.7 or 32.8 or otherwise agreed by the employer and employee) are taken into account, would eliminate the employee's excessive leave accrual.</p> <p>(c) A notice given by an employee under clause 32.8(a) must not:</p> <ul style="list-style-type: none">(i) if granted, result in the employee's remaining accrued entitlement to paid annual leave being at any time less than 6 weeks when any other paid annual leave arrangements (whether made under clause 32.6 , 32.7 or 32.8 or otherwise agreed by the employer and employee) are taken into account; or(ii) provide for the employee to take any period of paid annual leave of less than one week; or(iii) provide for the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the notice is given; or(iv) be inconsistent with any leave arrangement		
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<p>agreed by the employer and employee.</p> <p>(d) An employee is not entitled to request by a notice under clause 32.8(a) more than 4 weeks' paid annual leave (or 5 weeks' paid annual leave for a shiftworker, as defined by clause 32.2) in any period of 12 months.</p> <p>The employer must grant paid annual leave requested by a notice under clause 32.8(a).</p>		
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4. Annualised Salary Arrangement Clauses

Existing Clause	Proposed Clause	NECA Comments
<p>18. Annualised wage arrangements</p> <p>18.1 Annualised wage instead of award provisions</p> <p>(a) An employer may pay a full-time employee an annualised wage in satisfaction, subject to clause 18.1(c), of any or all of the following provisions of the award:</p> <p>(i) clause 13.8 (Make-up time); and</p> <p>(ii) clause 16 — Minimum rates ; and</p> <p>(iii) clause 19 — Allowances ; and</p> <p>(iv) clause 21 — Overtime (employees other than shiftworkers) ; and</p> <p>(v) clause 22 — Rest period after working overtime (employees other than shiftworkers) ; and</p> <p>(vi) clause 23 — Time off instead of payment for overtime (employees other than shiftworkers) ; and</p>	<p>18. Annualised wage arrangements</p> <p>18.1 Annualised wage instead of award provisions</p> <p>(a) An employer may pay an full-time employee an annualised wage in satisfaction, subject to clause 18.1(c), of any or all of the following provisions of the award:</p> <p>(i) clause 13.8 (Make-up time); and</p> <p>(ii) clause 16 — Minimum rates ; and</p> <p>(iii) clause 19 — Allowances ; and</p> <p>(iv) clause 21 — Overtime (employees other than shiftworkers) ; and</p> <p>(v) clause 22 — Rest period after working overtime (employees other than shiftworkers) ; and</p> <p>(vi) clause 23 — Time off instead of payment for overtime (employees other than shiftworkers) ; and</p> <p>(vii) clause 24 — Penalty</p>	<p>We note the Electrical, Electronics and Communications Contacting Award 2020 (which primarily covers our members) does not contain an annualised wages clause.</p>

<p>(vii) clause 24 — Penalty rates (employees other than shiftworkers) ; and</p> <p>(viii) clause 26 — Ordinary hours of work and rostering for shiftwork ; and</p> <p>(ix) clause 28 — Overtime for shiftwork ; and</p> <p>(x) clause 29 — Time off instead of payment for overtime for shiftwork ; and</p> <p>(xi) clause 30 — Rest period after working overtime for shiftwork ; and</p> <p>(xii) clause 31 — Penalty rates for shiftwork ; and</p> <p>(xiii) clause 32.3 — Annual leave loading .</p> <p>(b) Where an annualised wage is paid, the employer must advise the employee in writing, and keep a record of:</p> <p>(i) the annualised wage that is payable;</p> <p>(ii) which of the provisions of this award will be satisfied by payment of the annualised wage;</p> <p>(iii) the method by which the</p>	<p>rates (employees other than shiftworkers) ; and</p> <p>(viii) clause 26 — Ordinary hours of work and rostering for shiftwork ; and</p> <p>(ix) clause 28 — Overtime for shiftwork ; and</p> <p>(x) clause 29 — Time off instead of payment for overtime for shiftwork ; and</p> <p>(xi) clause 30 — Rest period after working overtime for shiftwork ; and</p> <p>(xii) clause 31 — Penalty rates for shiftwork ; and</p> <p>(xiii) clause 32.3 — Annual leave loading .</p> <p>(b) Where an annualised wage is paid, the employer must advise the employee in writing, and keep a record of:</p> <p>(i) the annualised wage that is payable; and</p> <p>(ii) which of the provisions of this award will be satisfied by payment of the annualised wage;.</p> <p>(iii) the method by which the annualised wage has been calculated,</p>	
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<p>annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and</p> <p>(iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause 18.1(c) .</p> <p>(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified pursuant to clause 18.1(b)(iv) , such hours will not be covered by the annualised wage and must separately be paid for in accordance with the</p>	<p>including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and</p> <p>(iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause 18.1(c).</p> <p>(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified pursuant to clause 18.1(b)(iv) , such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.</p> <p>18.2 Annualised wage not to disadvantage employees</p>	
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<p>applicable provisions of this award.</p> <p>18.2 Annualised wage not to disadvantage employees</p> <p>(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or, if the employment ceases earlier, over such lesser period as has been worked).</p> <p>(b) The employer must each 12 months from the commencement of the annualised wage arrangement or upon the termination of employment of the employee calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 14 days.</p>	<p>At least once per year, the employer must review the annualised wage of the employee to ensure that the compensation is no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid.</p> <p>(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or, if the employment ceases earlier, over such lesser period as has been worked).</p> <p>(b) The employer must each 12 months from the commencement of the annualised wage arrangement or upon the termination of employment of the employee calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the</p>	
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<p>(c) The employer must keep a record of the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause 18.2(b) . This record must be signed by the employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.</p> <p>18.3 Base rate of pay for employees on annualised wage arrangements</p> <p>For the purposes of the NES , the base rate of pay of an employee receiving an annualised wage under clause 18 comprises the portion of the annualised wage equivalent to the relevant rate of pay in clause 16 — Minimum rates and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.</p>	<p>employee the amount of the shortfall within 14 days.</p> <p>(c) The employer must keep a record of the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause 18.2(b) . This record must be signed by the employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.</p> <p>18.3 Base rate of pay for employees on annualised wage arrangements</p> <p>For the purposes of the NES, the base rate of pay of an employee receiving an annualised wage under clause 18 comprises the portion of the annualised wage equivalent to the relevant rate of pay in clause 16 — Minimum rates and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.</p>	
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NECA seeks to work constructively with the Federal Government on this important topic. To arrange NECA's further participation or should you wish to discuss any matter relating to the submission, please contact Kent Johns, Head of Government Relations and Regulatory Affairs on 0467 660 110 or Kent.Johns@neca.asn.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'O. Judd', written in a cursive style.

Oliver Judd
Chief Executive Officer
National Electrical and Communications Association