

Discussion Paper
National Employment Standards
Exposure Draft
Response to Question 34

What issues arise from the intention that workplace agreements will not be able to override State and Territory long service leave laws?

1. Current legal position

While the *Workplace Relations Act 1996 (Cth)* (“**WR Act**”) is intended, for the most part, to comprehensively regulate employment and industrial activities and expressly exclude the operation of State and Territory industrial laws, the WR Act allows for the parallel operation of State and Territory long service leave legislation.

Relevantly, section 16 of the WR Act states:

16(1) This Act is intended to apply to the exclusion of all of the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:

(a) a State or Territory industrial law;

(b) a law that applies to employment generally and deals with leave other than long service leave;

....

16(2) However subsection (1) does not apply to a law of a State or Territory so far as:

...

*(c) the law deals with any of the matters (the **non-excluded matters**) described in subsection (3).*

16(3) The non-excluded matters are as follows:

...

(f) long service leave;

However, the WR Act allows State or Territory long service leave legislation to be overridden by an award or workplace agreement made under the WR Act.

Section 17(2)(d) of the WR Act states:

17(2) However, a term of an award or workplace agreement dealing with any of the following matters has effect subject to a law of a State or Territory dealing with the matter, except a law that is prescribed by the regulations as a law to which awards and workplace agreements are not subject:

...

(d) a matter prescribed by the regulations for the purposes of this paragraph.

Regulation 1.5(4)(b) of the *Workplace Relations Regulations 2006 (Cth)* provides that a law of a State or Territory is prescribed to the extent to which it deals with, or allows arrangements to be made for leave.

These provisions of the WR Act are of course consistent with general constitutional principles about the interaction between federal and State laws and the application of those principles in legislation.

2. Proposal that workplace agreements will not be able to override State and Territory long service leave laws

In addition to the general long service leave laws operating in each State and Territory, portable long service leave legislation schemes operate in several industries including in the building and construction industry in each State and Territory. The purpose of such schemes is to ensure that employees engaged in building and construction work are not disadvantaged given the project nature of their work.

Recently some State portable long service leave entities have adopted the approach that employers outside the traditional building and construction industry (in particular the energy industry) are covered by these portable long service leave schemes. Unlike in the building and construction industry, the energy industry has a stable workforce, with many employees who were originally engaged by the public entity prior to privatisation. For example one energy industry client estimates the average length of service within one of its employing entities to be 19 years. Employment is ongoing and not project based. This means that employees in the energy industry are not disadvantaged in the manner that building and construction employees may be disadvantaged if not for the existence of a portable long service leave scheme.

Long service leave entitlements for employees within the energy industry have historically been regulated by awards and workplace agreements and such entitlements are at least as favourable as the State statutory minima and in some cases are more beneficial.

The WR Act has allowed and continues to allow employers to override State or Territory long service leave legislation, including portable long service leave schemes, via award regulation and by entering into workplace agreements made under the WR Act and its predecessors.

The ability for employers and employees (and their unions where relevant) to reach agreement on appropriate terms and conditions of employment including in respect of long service leave is an integral part of the enterprise bargaining system which is designed to allow employers and employees to reach appropriate enterprise specific conditions (subject to a test of no disadvantage). Further, the ability to regulate long service leave in federal workplace agreements and override State legislation, including portable long service leave legislation, creates certainty by avoiding the need for debate and potential disputation as to whether an employer is covered by the relevant State or Territory legislation dealing with portable long service leave. In particular it avoids the need for a detailed analysis and provision of specialist advice about whether functions are necessarily part of the industry to which the portable long service leave legislation applies.

For these reasons the primacy of federal instruments over State laws should be preserved, subject to a test of no disadvantage to the employee as against the proposed long service leave NES.