

*Your responses suggest that you although the modern award, which covers your employment, is in operation, it does not apply in your circumstances.*

(Fair Work Act 2009)

#### **47 When a modern award *applies* to an employer, employee, organisation or outworker entity**

*Modern awards do not apply to high income employees*

- (2) However, a modern award does not apply to an employee (or to an employer, or an employee organisation, in relation to the employee) at a time when the employee is a high income employee.

#### **57 Interaction between modern awards and enterprise agreements**

- (1) A modern award does not apply to an employee in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment.

(Fair Work Act 2009)

#### **48 When a modern award *covers* an employer, employee, organisation or outworker entity**

*When a modern award **covers** an employee, employer, organisation or outworker entity*

- (1) A modern award **covers** an employee, employer, organisation or outworker entity if the award is expressed to cover the employee, employer, organisation or outworker entity.

Note: In a modern award, coverage of an outworker entity must be expressed to relate only to outworker terms: see subsection 143(4).

*Effect of other provisions of this Act, FWC orders or court orders on coverage*

- (2) A modern award also **covers** an employee, employer, organisation or outworker entity if any of the following provides, or has the effect, that the award covers the employee, employer, organisation or outworker entity:
  - (a) a provision of this Act or of the Registered Organisations Act;
  - (b) an FWC order made under a provision of this Act;
  - (c) an order of a court.
- (3) Despite subsections (1) and (2), a modern award does not **cover** an employee, employer, organisation or outworker entity if any of the following provides, or has the effect, that the award does not cover the employee, employer or organisation or outworker entity:
  - (a) a provision of this Act;
  - (b) an FWC order made under a provision of this Act;
  - (c) an order of a court.

*Modern awards that have ceased to operate*

- (4) Despite subsections (1) and (2), a modern award that has ceased to operate does not **cover** an employee, employer, organisation or outworker entity.

*Modern awards cover employees in relation to particular employment*

- (5) A reference to a modern award covering an employee is a reference to the award covering the employee in relation to particular employment.

## **49 When a modern award is in operation**

*When a modern award comes into operation*

- (1) A modern award comes into operation:
- (a) on 1 July in the next financial year after it is made; or
  - (b) if it is made on 1 July in a financial year—on that day.
- (2) However, if the FWC specifies another day as the day on which the modern award comes into operation, it comes into operation on that other day. The FWC must not specify another day unless it is satisfied that it is appropriate to do so.
- (3) The specified day must not be earlier than the day on which the modern award is made.

Note: For when a State reference public sector modern award comes into operation, see section 168J.

*When a determination revoking a modern award comes into operation*

- (4) A determination revoking a modern award comes into operation on the day specified in the determination.
- (5) The specified day must not be earlier than the day on which the determination is made.

*Modern awards and revocation determinations take effect from first full pay period*

- (6) A modern award, or a determination revoking a modern award, does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after the day the award or determination comes into operation.

*Modern awards operate until revoked*

- (7) A modern award continues in operation until it is revoked.

(Fair Work Act 2009)

## **47 When a modern award *applies* to an employer, employee, organisation or outworker entity**

*When a modern award **applies** to an employee, employer, organisation or outworker entity*

- (1) A modern award **applies** to an employee, employer, organisation or outworker entity if:

- (a) the modern award covers the employee, employer, organisation or outworker entity; and
- (b) the modern award is in operation; and
- (c) no other provision of this Act provides, or has the effect, that the modern award does not apply to the employee, employer, organisation or outworker entity.

Note 1: Section 57 provides that a modern award does not apply to an employee (or to an employer, or an employee organisation, in relation to the employee) in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment.

Note 2: In a modern award, coverage of an outworker entity must be expressed to relate only to outworker terms: see subsection 143(4).

*Modern awards do not apply to high income employees*

- (2) However, a modern award does not apply to an employee (or to an employer, or an employee organisation, in relation to the employee) at a time when the employee is a high income employee.

*Modern awards apply to employees in relation to particular employment*

- (3) A reference in this Act to a modern award applying to an employee is a reference to the award applying to the employee in relation to particular employment.

## **57 Interaction between modern awards and enterprise agreements**

- (1) A modern award does not apply to an employee in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment.
- (2) If a modern award does not apply to an employee in relation to particular employment because of subsection (1), the award does not apply to an employer, or an employee organisation, in relation to the employee.

(Fair Work Act 2009)

# **Part 2-2—The National Employment Standards**

## **Division 1—Introduction**

### **59 Guide to this Part**

This Part contains the National Employment Standards.

Division 2 identifies the National Employment Standards, the detail of which is set out in Divisions 3 to 12.

Division 13 contains miscellaneous provisions relating to the National Employment Standards.

The National Employment Standards are minimum standards that apply to the employment of national system employees. Part 2-1 (which deals with the core provisions for this Chapter) contains the obligation for employers to comply with the National Employment Standards (see section 44).

The National Employment Standards also underpin what can be included in modern awards and enterprise agreements. Part 2-1 provides that the National Employment Standards cannot be excluded by modern awards or enterprise agreements, and contains other provisions about the interaction between the National Employment Standards and modern awards or enterprise agreements (see sections 55 and 56).

Divisions 2 and 3 of Part 6-3 extend the operation of the parental leave and notice of termination provisions of the National Employment Standards to employees who are not national system employees.

(Fair Work Act 2009)

### 193 Passing the better off overall test

*When a non-greenfields agreement passes the better off overall test*

- (1) An enterprise agreement that is not a greenfields agreement **passes the better off overall test** under this section if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

*FWC must disregard individual flexibility arrangement*

- (2) If, under the flexibility term in the relevant modern award, an individual flexibility arrangement has been agreed to by an award covered employee and his or her employer, the FWC must disregard the individual flexibility arrangement for the purposes of determining whether the agreement passes the better off overall test.

*When a greenfields agreement passes the better off overall test*

- (3) A greenfields agreement **passes the better off overall test** under this section if the FWC is satisfied, as at the test time, that each prospective award covered employee for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

*Award covered employee*

- (4) An **award covered employee** for an enterprise agreement is an employee who:
  - (a) is covered by the agreement; and
  - (b) at the test time, is covered by a modern award (the **relevant modern award**) that:
    - (i) is in operation; and
    - (ii) covers the employee in relation to the work that he or she is to perform under the agreement; and
    - (iii) covers his or her employer.

*Prospective award covered employee*

- (5) A **prospective award covered employee** for an enterprise agreement is a person who, if he or she were an employee at the test time of an employer covered by the agreement:

- (a) would be covered by the agreement; and
- (b) would be covered by a modern award (the *relevant modern award*) that:
  - (i) is in operation; and
  - (ii) would cover the person in relation to the work that he or she would perform under the agreement; and
  - (iii) covers the employer.

*Test time*

- (6) The *test time* is the time the application for approval of the agreement by the FWC was made under subsection 182(4) or section 185.

*FWC may assume employee better off overall in certain circumstances*

- (7) For the purposes of determining whether an enterprise agreement passes the better off overall test, if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the relevant modern award applied to that class, the FWC is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee.

(Fair Work Act 2009)

## **55 Interaction between the National Employment Standards and a modern award or enterprise agreement**

*National Employment Standards must not be excluded*

- (1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.

*Terms expressly permitted by Part 2-2 or regulations may be included*

- (2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:
  - (a) by a provision of Part 2-2 (which deals with the National Employment Standards); or
  - (b) by regulations made for the purposes of section 127.

Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain terms must be taken into account.

- (3) The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).

Note: See also the note to section 63 (which deals with the effect of averaging arrangements).

*Ancillary and supplementary terms may be included*

- (4) A modern award or enterprise agreement may also include the following kinds of terms:

- (a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;
- (b) terms that supplement the National Employment Standards; but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

- Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:
- (a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or
  - (b) that specify when payment under section 90 for paid annual leave must be made.
- Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:
- (a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or
  - (b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).
- Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

*Enterprise agreements may include terms that have the same effect as provisions of the National Employment Standards*

- (5) An enterprise agreement may include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards, whether or not ancillary or supplementary terms are included as referred to in subsection (4).

*Effect of terms that give an employee the same entitlement as under the National Employment Standards*

- (6) To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that the terms give an employee an entitlement (the **award or agreement entitlement**) that is the same as an entitlement (the **NES entitlement**) of the employee under the National Employment Standards:
  - (a) those terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit; and
  - (b) the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard, to the award or agreement entitlement.

- Note: For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year, the provisions of the National Employment Standards relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to 4 weeks of that leave.

*Terms permitted by subsection (4) or (5) do not contravene subsection (1)*

- (7) To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).

	<p>Note: A term of a modern award has no effect to the extent that it contravenes this section (see section 56). An enterprise agreement that includes a term that contravenes this section must not be approved (see section 186) and a term of an enterprise agreement has no effect to the extent that it contravenes this section (see section 56).</p>
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