

## **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.

#### **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.

	<p>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.</p> <p><i>Terms permitted by subsection (4) or (5) do not contravene subsection (1)</i></p> <p>(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> <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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