

## **Division 6—Base rate of pay under enterprise agreements**

### **206 Base rate of pay under an enterprise agreement must not be less than the modern award rate or the national minimum wage order rate etc.**

*If an employee is covered by a modern award that is in operation*

- (1) If:
  - (a) an enterprise agreement applies to an employee; and
  - (b) a modern award that is in operation covers the employee;the base rate of pay payable to the employee under the agreement (the ***agreement rate***) must not be less than the base rate of pay that would be payable to the employee under the modern award (the ***award rate***) if the modern award applied to the employee.
- (2) If the agreement rate is less than the award rate, the agreement has effect in relation to the employee as if the agreement rate were equal to the award rate.

*If an employer is required to pay an employee the national minimum wage etc.*

- (3) If:
  - (a) an enterprise agreement applies to an employee; and
  - (b) the employee is not covered by a modern award that is in operation; and
  - (c) a national minimum wage order would, but for the agreement applying to the employee, require the employee's employer to pay the employee a base rate of pay (the ***employee's order rate***) that at least equals the national minimum wage, or a special national minimum wage, set by the order;the base rate of pay payable to the employee under the enterprise agreement (the ***agreement rate***) must not be less than the employee's order rate.
- (4) If the agreement rate is less than the employee's order rate, the agreement has effect in relation to the employee as if the agreement rate were equal to the employee's order rate.

## **Part 2-6—Minimum wages**

### **Division 1—Introduction**

#### **282 Guide to this Part**

This Part provides for the FWC (constituted by an Expert Panel) to set and vary minimum wages for national system employees. For employees covered by modern awards, minimum wages are specified in the modern award. For award/agreement free employees, minimum wages are specified in the national minimum wage order.

Division 2 provides for the minimum wages objective. This requires the FWC to establish and maintain a safety net of fair minimum wages, taking into account certain social and economic factors.

Division 3 provides for the FWC (constituted by an Expert Panel) to conduct annual wage reviews. In an annual wage review, the FWC may set or vary minimum wages in modern awards, and must make a national minimum wage order. Minimum wages in modern awards can also be set, or varied (in limited circumstances), under Part 2-3 (which deals with modern awards).

Division 4 provides for national minimum wage orders and requires employers to comply with them. The orders set the national minimum wage, as well as special national minimum wages for junior employees, employees to whom training arrangements apply and employees with a disability. The orders also set the casual loading for award/agreement free employees.

National minimum wages and special national minimum wages apply to award/agreement free employees. However, they are also relevant to other employees as follows:

- (a) in setting or varying modern award minimum wages, the FWC must take the national minimum wage into account (see subsection 135(2) (in Part 2-3) and subsection 285(3) (in this Part));
- (b) for an employee who is not covered by a modern award and to whom an enterprise agreement applies, the employee's base rate of pay under the agreement must not be less than the relevant national minimum wage or special national minimum wage (see subsection 206(3) (in Part 2-4)).

For an employee who is covered by a modern award and to whom an enterprise agreement applies, the employee's base rate of pay under the agreement must not be less than the base rate of pay that would have been payable to the employee if the award applied (see subsection 206(1) (in Part 2-4)).

### **283 Meanings of *employee* and *employer***

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

## **Division 2—Overarching provisions**

### **284 The minimum wages objective**

*What is the minimum wages objective?*

- (1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:
  - (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and

- (b) promoting social inclusion through increased workforce participation; and
- (c) relative living standards and the needs of the low paid; and
- (d) the principle of equal remuneration for work of equal or comparable value; and
- (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

This is the ***minimum wages objective***.

*When does the minimum wages objective apply?*

- (2) The minimum wages objective applies to the performance or exercise of:
  - (a) the FWC's functions or powers under this Part; and
  - (b) the FWC's functions or powers under Part 2-3, so far as they relate to setting, varying or revoking modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the modern awards objective also applies (see section 134).

*Meaning of modern award minimum wages*

- (3) ***Modern award minimum wages*** are the rates of minimum wages in modern awards, including:
  - (a) wage rates for junior employees, employees to whom training arrangements apply and employees with a disability; and
  - (b) casual loadings; and
  - (c) piece rates.

*Meaning of setting and varying modern award minimum wages*

- (4) ***Setting*** modern award minimum wages is the initial setting of one or more new modern award minimum wages in a modern award, either in the award as originally made or by a later variation of the award.  
***Varying*** modern award minimum wages is varying the current rate of one or more modern award minimum wages.

## Division 3—Annual wage reviews

### Subdivision A—Main provisions

#### 285 Annual wage reviews to be conducted

- (1) The FWC must conduct and complete an ***annual wage review*** in each financial year.

Note 1: The FWC must be constituted by an Expert Panel to conduct annual wage reviews, and to make determinations and orders in those reviews (see section 617).

Note 2: The President may give directions about the conduct of annual wage reviews (see section 582).

- (2) In an annual wage review, the FWC:
  - (a) must review:
    - (i) modern award minimum wages; and
    - (ii) the national minimum wage order; and

- (b) may make one or more determinations varying modern awards to set, vary or revoke modern award minimum wages; and
- (c) must make a national minimum wage order.

Note: For provisions about national minimum wage orders, see Division 4.

- (3) In exercising its power in an annual wage review to make determinations referred to in paragraph (2)(b), the FWC must take into account the rate of the national minimum wage that it proposes to set in the review.

## **286 When annual wage review determinations varying modern awards come into operation**

*Determinations generally come into operation on 1 July*

- (1) A determination (a **variation determination**) varying one or more modern awards to set, vary or revoke modern award minimum wages that is made in an annual wage review comes into operation on 1 July in the next financial year.

*Later operation of determinations in exceptional circumstances*

- (2) If the FWC is satisfied that there are exceptional circumstances justifying why a variation determination should not come into operation until a later day, the FWC may specify that later day as the day on which it comes into operation. However, the determination must be limited just to the particular situation to which the exceptional circumstances relate.

Note: This may mean that the FWC needs to make more than one determination, if different circumstances apply to different employees.

- (3) If a later day is so specified, the variation determination comes into operation on that later day.

*Effect of determinations cannot be deferred*

- (4) The FWC cannot provide for the effect of a variation determination on modern award minimum wages to be deferred to a day that is later than the day on which the determination comes into operation.

*Determinations take effect from first full pay period*

- (5) A variation determination 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 determination comes into operation.

## **287 When national minimum wage orders come into operation etc.**

*Orders come into operation on 1 July*

- (1) A national minimum wage order that is made in an annual wage review comes into operation on 1 July in the next financial year (the **year of operation**).

*Setting of different wages or loadings only permitted in exceptional circumstances*

- (2) The national minimum wage or the casual loading for award/agreement free employees set by the order must be the same for all employees, unless:

- (a) the FWC is satisfied that there are exceptional circumstances justifying setting different wages or loadings; and
  - (b) the setting of different wages or loadings is limited just to the extent necessary because of the particular situation to which the exceptional circumstances relate.
- (3) A special national minimum wage set by the order for a specified class of employees must be the same for all employees in that class, unless:
- (a) the FWC is satisfied that there are exceptional circumstances justifying setting different wages; and
  - (b) the setting of different wages is limited just to the extent necessary because of the particular situation to which the exceptional circumstances relate.

*Adjustments taking effect during year of operation only permitted in exceptional circumstances*

- (4) The order may provide that an adjustment of the national minimum wage, the casual loading for award/agreement free employees, or a special national minimum wage, set by the order takes effect (whether for some or all employees to whom that wage or loading applies) on a specified day in the year of operation that is later than 1 July, but only if:
- (a) the FWC is satisfied that there are exceptional circumstances justifying the adjustment taking effect on that day; and
  - (b) the adjustment is limited just to the particular situation to which the exceptional circumstances relate.

*When orders take effect*

- (5) The order takes effect in relation to a particular employee from the start of the employee's first full pay period that starts on or after 1 July in the year of operation. However, an adjustment referred to in subsection (4) takes effect in relation to a particular employee from the start of the employee's first full pay period that starts on or after the day specified as referred to in that subsection.

## **Subdivision B—Provisions about conduct of annual wage reviews**

### **288 General**

This Subdivision contains some specific provisions relevant to the conduct of annual wage reviews. For other provisions relevant to the conduct of annual wage reviews, see the general provisions about the FWC's processes in Part 5-1.

- Note: Relevant provisions of Part 5-1 include the following:
- (a) section 582 (which deals with the President's power to give directions);
  - (b) section 590 (which deals with the FWC's discretion to inform itself as it considers appropriate, including by commissioning research);
  - (c) section 596 (which deals with being represented in a matter before the FWC);
  - (d) section 601 (which deals with writing and publication requirements).

### **289 Everyone to have a reasonable opportunity to make and comment on submissions**

- (1) The FWC must, in relation to each annual wage review, ensure that all persons and bodies have a reasonable opportunity to make written submissions to the FWC for consideration in the review.

- (2) The FWC must publish all submissions made to the FWC for consideration in the review.
- (3) However, if a submission made by a person or body includes information that is claimed by the person or body to be confidential or commercially sensitive, and the FWC is satisfied that the information is confidential or commercially sensitive, the FWC:
  - (a) may decide not to publish the information; and
  - (b) may instead publish:
    - (i) a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive); or
    - (ii) if the FWC considers that it is not practicable to prepare a summary that would comply with subparagraph (i)—a statement that confidential or commercially sensitive information in the submission has not been published.
- (4) A reference in this Act (other than in this section) to a submission under this section includes a reference to a summary or statement referred to in paragraph (3)(b).
- (5) The FWC must ensure that all persons and bodies have a reasonable opportunity to make comments to the FWC, for consideration in the review, on the material published under subsections (2) and (3).
- (6) The publishing of material under subsections (2) and (3) may be on the FWC's website or by any other means that the FWC considers appropriate.

## **290 President may direct investigations and reports**

- (1) The President may give a direction under section 582 requiring that a matter be investigated, and that a report about the matter be prepared, for consideration in an annual wage review.
- (2) The direction:
  - (a) may be given to:
    - (i) an Expert Panel; or
    - (ii) an Expert Panel Member; or
    - (iii) a Full Bench that includes one or more Expert Panel Members; and
  - (b) must require the report to be given to the Expert Panel that is constituted to conduct the annual wage review, unless the direction is given to that Expert Panel.

## **291 Research must be published**

- (1) If the FWC undertakes or commissions research for the purposes of an annual wage review, the FWC must publish the research so that submissions can be made addressing issues covered by the research.
- (2) The publication may be on the FWC's website or by any other means that the FWC considers appropriate.

## **292 Varied wage rates must be published**

- (1) If the FWC makes one or more determinations varying modern award minimum wages in an annual wage review, the FWC must publish the rates of those wages as so varied:
  - (a) for wages in a modern award (other than a modern enterprise award or a State reference public sector modern award)—before 1 July in the next financial year; and
  - (b) for wages in a modern enterprise award or a State reference public sector modern award—as soon as practicable.

Note: The FWC must also publish the modern award as varied (see section 168).

- (2) The publication may be on the FWC’s website or by any other means that the FWC considers appropriate.

## **Division 4—National minimum wage orders**

### **293 Contravening a national minimum wage order**

An employer must not contravene a term of a national minimum wage order.

Note: This section is a civil remedy provision (see Part 4-1).

### **294 Content of national minimum wage order—main provisions**

#### *Setting minimum wages and the casual loading*

- (1) A national minimum wage order:
  - (a) must set the national minimum wage; and
  - (b) must set special national minimum wages for all award/agreement free employees in the following classes:
    - (i) junior employees;
    - (ii) employees to whom training arrangements apply;
    - (iii) employees with a disability; and
  - (c) must set the casual loading for award/agreement free employees.

Note: A national minimum wage order must be made in each annual wage review (see section 285).

#### *Requiring employers to pay minimum wages and the casual loading*

- (2) The order:
  - (a) must require employers to pay employees to whom the national minimum wage applies a base rate of pay that at least equals the national minimum wage; and
  - (b) must require employers to pay to employees to whom a special national minimum wage applies a base rate of pay that at least equals that special national minimum wage; and
  - (c) must require employers to pay, to award/agreement free employees who are casual employees, a casual loading that at least equals the casual loading for award/agreement free employees (as applied to the employees’ base rates of pay).

*What employees does the national minimum wage apply to?*

- (3) The national minimum wage applies to all award/agreement free employees who are not:
- (a) junior employees; or
  - (b) employees to whom training arrangements apply; or
  - (c) employees with a disability.

*What employees does a special national minimum wage apply to?*

- (4) A special national minimum wage applies to the employees to whom it is expressed in the order to apply. Those employees must be:
- (a) all junior employees who are award/agreement free employees, or a specified class of those employees; or
  - (b) all employees to whom training arrangements apply and who are award/agreement free employees, or a specified class of those employees; or
  - (c) all employees with a disability who are award/agreement free employees, or a specified class of those employees.

## **295 Content of national minimum wage order—other matters**

*Expressing minimum wages and the casual loading*

- (1) In a national minimum wage order:
- (a) the national minimum wage, and the special national minimum wages, set by the order must be expressed in a way that produces a monetary amount per hour; and
  - (b) the casual loading for award/agreement free employees must be expressed as a percentage.

Note: The means by which the national minimum wage or a special national minimum wage may be expressed include:

- (a) a monetary amount per hour; or
- (b) a monetary amount for a specified number of hours; or
- (c) a method for calculating a monetary amount per hour.

*Terms about how the order applies*

- (2) The order may also include terms about how the order, or any of the requirements in it, applies.

## **296 Variation of national minimum wage order to remove ambiguity or uncertainty or correct error**

*Permitted variations*

- (1) The FWC may make a determination varying a national minimum wage order to remove an ambiguity or uncertainty or to correct an error.

Note: The FWC must be constituted by an Expert Panel to vary a national minimum wage order (see section 617).

- (2) If the FWC varies a national minimum wage order, the FWC must, as soon as practicable, publish the order as varied on its website or by any other means that the FWC considers appropriate.

*No other variation or revocation permitted*

- (3) A national minimum wage order:
- (a) cannot be varied except as referred to in subsection (1); and



(b) cannot be revoked.

## **297 When determinations varying national minimum wage orders come into operation**

*Determinations come into operation on specified day*

- (1) A determination varying a national minimum wage order under section 296 comes into operation on the day specified in the determination.

Note: For when a national minimum wage order comes into operation, see section 287.

- (2) The specified day must not be earlier than the day on which the determination is made, unless the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.

*Determinations take effect from first full pay period*

- (3) The determination 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 determination comes into operation.

## **298 Special rule about retrospective variations of national minimum wage orders**

*Application of this section*

- (1) This section applies if a determination varying a national minimum wage order has a retrospective effect because it comes into operation under subsection 297(2) on a day before the day on which the determination is made.

*No creation of liability to pay pecuniary penalty for past conduct*

- (2) If:
- (a) a person engaged in conduct before the determination was made; and
  - (b) but for the retrospective effect of the determination, the conduct would not have contravened a term of the national minimum wage order or an enterprise agreement;

a court must not order the person to pay a pecuniary penalty under Division 2 of Part 4-1 in relation to the conduct, on the grounds that the conduct contravened a term of the national minimum wage order or enterprise agreement.

Note 1: This subsection does not affect the powers of a court to make other kinds of orders under Division 2 of Part 4-1.

Note 2: A determination varying a national minimum wage order could result in a contravention of a term of an enterprise agreement because of the effect of subsection 206(4).

## **299 When a national minimum wage order is in operation**

A national minimum wage order continues in operation until the next national minimum wage order comes into operation.

Note: For when a national minimum wage order comes into operation, see section 287.

