

Applications to modernise enterprise instruments

Background

During 2008–09, the Fair Work Commission (the Commission) made 122 modern awards covering many industries and occupations. Enterprise instruments were not considered during that award modernisation process.

The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Act) provides a separate process for employers or employees covered by an enterprise instrument to make an application to modernise their instrument (see Item 4 of [Schedule 6](#) to the [Transitional Act](#)).

What is an enterprise instrument?

An award (either a federal award or a former State award now operating as a Notional Agreement Preserving State Award or 'NAPSA') that applies to:

- a single enterprise only (or part of a single enterprise); or
- one or more enterprises, if the employers all carry on similar business activities under the same franchise and are:
 - franchisees of the same franchisor; or
 - related bodies corporate of the same franchisor; or
 - any combination of the above.

A list of instruments identified by staff of the Commission as 'enterprise instruments' can be found on the [Award modernisation—Termination of instruments](#) section of the Commission's website.

Where can I find a copy of my enterprise instrument?

Enterprise instruments can be viewed on the Commission's website by entering the title in the [Find an award](#) section.

Note the wage rates and allowances in this published version of the enterprise instrument may not be up-to-date and may not reflect the current rates payable.

For further information about wages and entitlements under an enterprise instrument please contact the Fair Work Ombudsman on 13 13 94 or visit www.fairwork.gov.au.

What if I have an enterprise agreement?

If you have a current enterprise agreement, it is not affected by this process. If your agreement refers to clauses in the enterprise instrument, these continue as if the instrument were still in force.

When you negotiate a new agreement after 1 January 2014, the Better Off Overall Test will compare the provisions in your proposed agreement with the modern award which then applies.

What do you need to do if you wish to retain an enterprise instrument?

You must make an application to the Fair Work Commission to 'modernise' the enterprise instrument. Please note that the criteria used by the Commission to determine whether a modern enterprise award should be made are quite onerous and your application may be unsuccessful.

What form do I use to make an application to modernise an enterprise instrument?

[Form F1](#) - *non-specific application form* should be used to make an application to modernise an enterprise instrument. The Form can be downloaded from the [Forms](#) section on the Commission's website.

The applications will be dealt with as soon as practicable after lodgement. The enterprise instrument will remain in force until the application to modernise it has been determined (even if this is after 31 December 2013).

Who can make an application?

An application to modernise an enterprise instrument may be made by a person covered by that instrument (generally, this would include the employer, an employee or a party named in the instrument (e.g. a respondent to the instrument, such as a union)).

Matters for consideration by the Fair Work Commission

Before granting an application to modernise an enterprise instrument the Commission must consider Item 4(5) of [Schedule 6](#) to the Transitional Act, which states that when deciding whether or not to make a modern enterprise award, and in determining the content of that award, the Commission must take into account:

- the circumstances that led to the making of the enterprise instrument;
- whether there is a modern award (other than the miscellaneous modern award) that would cover these employees if the enterprise instrument were not operating;
- the content of the modern award that would be applicable to the persons covered by the enterprise instrument;
- the terms and conditions of employment applying in the industry in which the persons covered by the enterprise instrument operate;
- the extent to which the enterprise instrument provides enterprise-specific terms and conditions of employment;
- the likely impact on the persons covered by the enterprise instrument, and the persons covered by the relevant modern award, of a decision to make, or not make, a modern enterprise award, including any impact on the ongoing viability or competitiveness of any enterprise carried on by those persons;
- the views of the persons covered by the enterprise instrument.

The Commission must also consider the **modern enterprise awards objective** (Item 6, [Schedule 6](#) Transitional Act) which provides that the **modern awards objective** ([s.134 Fair Work Act 2009](#)) and the **minimum wages objective** ([s.284 Fair Work Act 2009](#)) apply to the Commission making a modern enterprise award under Division 2 of Part 2 of [Schedule 6](#) to the Transitional Act.

Previous applications considered by the Fair Work Commission

A small number of applications have been made to modernise enterprise instruments prior to June 2013 but only one ([EM2011/1](#) re *Telstra*) has been successful.

For more information, please visit the [Award modernisation—Enterprise award applications](#) section of the Commission's website.

Template for draft award

As part of the process for making a modern enterprise award the Commission may request that the parties submit a draft award. While there is no template for making a new award, some resources including a Word template containing the text of some standard clauses is available on the [Award modernisation—Research](#) section of the Commission’s website.

Note: The provisions to be included in a modern enterprise award must also comply with the requirements of [ss.136–155A](#) of the *Fair Work Act 2009*.

What happens if an application is unsuccessful?

If the Commission decides not to make a modern enterprise award to replace an enterprise instrument, the enterprise instrument terminates when that decision comes into operation (even if that decision is made before 31 December 2013).

After termination the enterprise instrument will cease to operate, and the employer and its employees will be covered by a modern award applicable to their industry or occupation, if one exists.

To find out which modern award may apply, go to www.fairwork.gov.au or contact the Fair Work Ombudsman on 13 13 94.

What happens if an enterprise does not make an application to modernise their instrument?

If no application is made to modernise an enterprise instrument by 31 December 2013, the instrument will terminate after that date. From 1 January 2014, the employer and its employees will be covered by the modern award applicable to their industry or occupation, if one exists.

See also Statement [\[2013\] FWC 2790](#) issued by the Commission on 22 May 2013.

To find out which modern award may apply, go to www.fairwork.gov.au or contact the Fair Work Ombudsman on 13 13 94.

Applications to terminate an enterprise instrument

A person covered by an enterprise instrument may apply to the Commission to have the enterprise instrument terminated at any time prior to 31 December 2013. This application is made under Item 5 of [Schedule 6](#) to the Transitional Act using Commission [Form F1](#).

If the Commission terminates the enterprise instrument, the termination operates from the day specified in the decision.

Note that if no application is made to terminate an enterprise instrument, it will automatically be terminated at the end of 31 December 2013.

What happens when an enterprise instrument is terminated?

When your enterprise instrument is terminated, the employees and their employer will be covered by a modern award that covers your industry and the classifications of your employees.

To find out which modern award may apply, go to www.fairwork.gov.au or contact the Fair Work Ombudsman on 13 13 94.

What if there is no modern award that covers my employees?

If there is no modern award for your industry or some or all of your employees, you may wish to apply to vary an existing modern award to include those classifications.

Applications to vary existing modern awards

While the coverage clauses of modern industry and occupational modern awards expressly exclude employers and their employees who are covered by an enterprise instrument, an alternative to applying to modernise an enterprise instrument may be to apply to vary an existing modern award to extend the scope of the modern award or to include additional classifications that were covered by an enterprise instrument. If that application is successful, the employer or employees can then apply to terminate their enterprise instrument and they will be covered by the varied modern award.

See the [Award modernisation—Modern award variation applications](#) section of the Commission’s website for more information about applying to vary a modern award.

Who to contact for help

Any queries in relation to the process of making an application to modernise an enterprise instrument can be directed to the Commission via email to amod@fwc.gov.au.

Fair Work Commission staff cannot provide legal advice or assist in the preparation of your application. For this type of assistance, you may like to seek professional advice from a solicitor or an industrial relations consultant. If you are a member of an employer or employee organisation, they may also be able to provide some guidance.

Glossary of terms

better off overall test: The better off overall test is a test conducted by the Fair Work Commission (the Commission) to determine whether or not an employee would be better off being employed under a proposed enterprise agreement or under the modern award that would otherwise apply to their employment. Except in very limited circumstances, the Commission cannot approve an enterprise agreement unless it passes the better off overall test.

enterprise agreement: Enterprise agreements are agreements made between employers and employees of an enterprise about terms and conditions of employment. Enterprise agreements operate after they have been approved by the Commission. The *Fair Work Act 2009* defines an enterprise as a 'business, activity, project or undertaking'.

enterprise instrument: An enterprise instrument is:

- a former federal award operating as:
 - a pre-reform award, or
 - a state reference transitional award;
- a former State award operating as:
 - a 'notional agreement preserving State award' (NAPSA),
 - a Division 2B enterprise award, or
 - a preserved collective state agreement applying to a single enterprise.

Fair Work Ombudsman: The Fair Work Ombudsman is an office that was created under the Fair Work Act. It operates independently of the government and is a separate organisation to the Fair Work Commission.

The Fair Work Ombudsman's functions include promoting harmonious, productive and cooperative workplace relations and ensuring compliance with Commonwealth workplace laws.

modern award: Modern awards are documents that contain minimum terms and conditions of employment. They were created under the *Fair Work Act 2009* and came into effect on 1 January 2010. They relate to specific industries or occupations.

Together with the National Employment Standards (a set of minimum standards contained in the *Fair Work Act 2009*), modern awards provide a fair and relevant minimum safety net of terms and conditions.

modern enterprise award: A modern enterprise award is a modern award that covers a single enterprise (or a part of a single enterprise); or one or more enterprises, if the employers all carry on similar business activities under the same franchise as either franchisees or related bodies to the franchise.

modern enterprise awards objective: Under the modern enterprise awards objective the Fair Work Commission must recognise that a modern enterprise award may provide terms and conditions tailored to reflect employment arrangements that have been developed in relation to that enterprise. The modern enterprise awards objective is set out in section 168B of the *Fair Work Act 2009*.