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The federal industrial relations system

A guide for Aboriginal and Torres Strait Islander corporations and their employees

This guide sets out the main elements of the federal industrial relations system and how they affect corporations incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) and their employees.

Who is covered by the federal industrial relations system?

Most (but not all) Australian workplaces are covered by the federal industrial relations system established by the *Fair Work Act 2009* (the Fair Work Act).

Generally, all employees and employers in the Australian Capital Territory and Northern Territory are covered by the federal industrial relations system.

In New South Wales, South Australia, Queensland, Tasmania and Victoria, most employers and employees are covered by the federal industrial relations system. However, there are a limited number of employers and employees who remain under the state system. The employees who are not covered by the federal industrial relations system are generally either state government or local government employees. There are some minor differences between the states in relation to exactly who is covered.

The situation is more complex in Western Australia, which is discussed separately below.

More detailed information about who is covered in each of the states and territories can be obtained from the Fair Work Ombudsman's website at: <https://www.fairwork.gov.au/about-us/workplace-laws/fair-work-system>.

It is important to note that there are some parts of the Fair Work Act (for instance, the protections from unlawful termination and sexual harassment) which apply to all employers, even if the employer is otherwise not covered by the federal industrial relations system.

What are the main features of the federal system?

The most important features of the federal industrial relations system under the Fair Work Act are set out below.

The safety net

The National Employment Standards

The Fair Work Act includes a set of standard terms and conditions of employment. These are called the National Employment Standards (the NES).

With some minor exceptions (for example, some conditions do not apply to casual employees), these terms and conditions of employment apply to every employee covered by the federal system.

The terms and conditions in the NES cover things like hours of work, requests for flexible working arrangements, various kinds of leave, superannuation, and notice of termination and redundancy. They also give certain casual employees a pathway for converting from casual to permanent employment. The NES require employers to give new employees a copy of the Fair Work Information Statement, which is published by the Fair Work Ombudsman, to inform them of their rights. There are also additional Information Statements which are published by the Fair Work Ombudsman and which must be given to casual employees and employees on a fixed term contract.

No employee who is covered by the federal industrial relations system can be given less than what applies to them under the NES.

But they can be given more.

For example, under the NES, a full-time employee who is not a casual employee is entitled to four weeks of annual leave credits for each year they work. The employer could choose to give the employee more – say, six weeks of annual leave credits a year. But the employer could not give the employee less, say, three weeks of annual leave credits a year, even if that was in exchange for a higher rate of pay.

So the NES operates as a set of minimum standards, for **all** employees in the federal system.

The NES is an important part of what is known as the safety net.

More detailed information about the NES can be obtained from the Fair Work Ombudsman's website at:

<https://www.fairwork.gov.au/employment-conditions/national-employment-standards>

Modern awards

The other part of the safety net under the federal system is the set of modern awards.

There are more than 120 modern awards, and they apply across most industries and occupations in Australia. The modern awards generally cover different terms and conditions of employment than those covered by the NES. But in some areas the terms and conditions overlap a little, and in some cases modern awards provide better terms and conditions than the NES.

Modern awards cannot undercut the NES – nothing can – but they can top up the NES.

For example, a modern award might provide that employees get five weeks of annual leave for each year of service. If that modern award applies to an Aboriginal and Torres Strait Islander corporation, the corporation will have to give the

employees covered by that modern award five weeks of annual leave credits each year (rather than the four weeks provided for under the NES).

This means that employers who are covered by the federal system have to do at least two things to make sure that they are giving their employees their proper entitlements:

- they have to make sure that **all** of their employees are getting their minimum entitlements under the NES, and
- they need to work out which modern award (if any) applies to each of their employees. (How to do this is discussed in more detail in the 'How to Guide') Next they need to make sure their employees are getting the right entitlements under the relevant modern award that applies to them.

Key differences between the NES and modern awards are that the NES applies to all employees covered by the federal system, and it is just one set of standards. By contrast, a modern award will apply to most, but not all, employees covered by the federal system. So, for example, there are some occupational groups who are 'award-free' and who are therefore not covered by any modern award.

'Award-free' employees do not have minimum terms and conditions of employment set by a modern award, however they are still entitled to the minimum standards set out in the NES. 'Award free' employees are also entitled to be paid (at a minimum) the national minimum wage, which is set annually by the Fair Work Commission. More information about the national minimum wage is available from the Fair Work Ombudsman's website at: <https://www.fairwork.gov.au/pay-and-wages/minimum-wages>

Another difference between the NES and the modern awards is that while almost exactly the same set of conditions under the NES applies to all employees under the federal system, there are some differences in the content of different modern awards.

And, finally, it is quite possible that one employer might be covered by a single modern award for virtually all of their employees. Yet it will often be the case that several modern awards will apply to one employer. In this situation the employer will need to be even more careful to give the right entitlements to their employees.

Beyond the safety net

The Fair Work Act allows for employees to be given entitlements above what is in the NES and modern awards. There are several mechanisms for doing this.

Enterprise agreements

One of the main ways for an employer who is covered by the federal industrial relations system to give their employees above-award conditions is by making a collective agreement with them. This is known as an enterprise agreement.

An enterprise agreement can give employees all sorts of entitlements beyond the content of the NES or the relevant modern award. But an enterprise agreement cannot undercut the NES, and it cannot undercut the relevant modern award for that employee. An enterprise agreement must leave the employees it covers 'better off overall' than they would be under the NES and the relevant modern award.

Individual flexibility arrangements made under enterprise agreements

If (and only if) an employer has made an enterprise agreement with their employees, the employer can, if they want to, put in place 'individual flexibility arrangements' with individual employees. This is the only form of individual statutory agreement that can now be made under the Fair Work Act. It has not been possible to enter into a new Australian workplace agreement (AWA) since about April 2008.

Individual flexibility arrangements can give an employee entitlements that are better than they would receive under the enterprise agreement that applies to them. But an individual flexibility arrangement cannot undercut the terms and conditions in the enterprise agreement. (And it cannot undercut the relevant modern award, if there is one, and it cannot undercut the NES)

Contract

Regardless of whether the employer has entered into an enterprise agreement with their employees, it is open to an employer to top up the terms and conditions of employment of their employees by putting conditions into an employee's contract of employment.

The key thing to note here is that the contract of employment cannot undercut the conditions that are provided for in the NES, and the contract of employment cannot undercut the conditions provided for in any applicable modern award (and it cannot undercut the conditions provided for in a relevant enterprise agreement). An employer cannot contract out of any of these. The contract of employment can only top up the safety net. Conditions in the safety net cannot be traded off in a contract.

The situation in Western Australia

Western Australia is now the only State that has not referred its powers over industrial relations to the Commonwealth. This leaves industrial relations arrangements in Western Australia split between the Commonwealth and Western Australia.

The federal system – the Fair Work Act – applies to certain corporations in Western Australia, including ‘trading corporations’. If an Aboriginal and Torres Strait Islander corporation in Western Australia falls within the meaning of a trading corporation, it is covered by the federal industrial relations system.

How does an employer know if they are a trading corporation?

The test of what is a trading corporation is a difficult one to apply. It will essentially revolve around the question of whether the corporation is involved in buying and selling activities to produce revenue to any significant extent. The fact that a corporation is a not-for-profit body does not mean that it cannot be a trading corporation. A number of bodies whose trading activities have been a relatively small part of their overall activities have been found to be trading corporations. Even so, it seems likely that a significant number of Aboriginal and Torres Strait Islander corporations will not be trading corporations.

Unless it is quite clear that an Aboriginal and Torres Strait Islander corporation in Western Australia is, or is not, a trading corporation, it would be wise for the corporation to get legal advice on this issue.

An Aboriginal and Torres Strait Islander corporation in Western Australia that is not a trading corporation will generally come under the Western Australia State system.