

Enterprise Awards Terminated Immediately

The Federal Court of Australia has upheld Fair Work Australia's decision to immediately terminate two enterprise awards. The industry-wide new modern award now applies to the employers. Employers with enterprise awards should develop a strategy to deal with their potential termination.

The Full Bench of Fair Work Australia had struck down the two enterprise awards following a failed application by the employers to modernise them. The applications had failed mainly on the grounds that the employers' operations didn't differ enough from others in the same industry to allow for a different regime. This was despite holding that the modern award provisions could be less flexible for the employers.¹

Under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* ("Transitional Act"), where an application to modernise an enterprise award is unsuccessful the enterprise award terminates when that decision comes into operation.²

When deciding whether or not to modernise an enterprise award, Fair Work Australia must consider the circumstances that led to making an enterprise award rather than an award with general application; whether there is a modern award that would cover those covered by the enterprise award and the content of such an award; the terms and conditions of employment in the relevant industry; the extent to which the enterprise award provides enterprise-specific terms and conditions, the likely impact on those covered by the enterprise award and the views of those covered by the enterprise award.³

The employers will now be covered by the modern award. For these particular employers – who have enterprise agreements in operation – this may affect the approval of future agreements if the future agreement is not *Better off Overall* than the modern award.

Implications for Employers

The final date for making applications to modernise or terminate enterprise awards is 31 December 2013.⁴ Unless there is a strong case of difference from the general industry – and terms that are more beneficial to the employee than the modern award – an application to modernise that enterprise award may result in the immediate termination of that award.

If you have an enterprise award we recommend developing a strategy to deal with the modernisation process and its effects. EMA can assist with this planning.

Article prepared by **Rebekah French**
Consultant, Melbourne Office

¹ See *Yum Restaurants Australia Pty Ltd v Shop, Distributive and Allied Employees Association* [2022] FWA 1077 and *Kentucky Fried Chicken Pty Ltd v Shop Distributive and Allied Employees Association* [2011] FWA 1078; see also *Molanka Pty Ltd; D.A. Management Pty Ltd; Reiconn Pty Ltd* [2010] FWA 3906.

² *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, item 9(3) of Schedule 6.

³ *Transitional Act*, item, 4(5), Schedule 6.

⁴ *Transitional Act*, item 10, Schedule 6.

South Australia

Level 8, 50 Grenfell Street
Adelaide SA 5000
Ph (08) 8203 1700
Fax (08) 8212 7800

Victoria

Level 5, 189 Flinders Lane
Melbourne VIC 3000
Ph (03) 9650 2800
Fax (03) 9650 8226

