

Senate Standing Committee on Education and Employment

QUESTIONS ON NOTICE Additional Estimates 2015 - 2016

Outcome 2 - Workplace Relations and Economic Strategy

Department of Employment Question No. EMSQ16-000011

Senator Lines provided in writing.

Question

Penalty rates - Better off overall

How does the Fair Work Commission ascertain whether an employee is better off overall when penalty rates are traded away?
What are the considerations taken into place?

Answer

Section 193 of the *Fair Work Act 2009* sets out the better off overall test for enterprise agreements. Subsection 193 (1) provides that an enterprise agreement that is not a greenfields agreement passes the better off overall test if the Fair Work Commission (FWC) is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

Subsection 193 (2) provides that if, under the flexibility term in the relevant modern award, an individual flexibility arrangement has been agreed to by an award covered employee and his or her employer, the FWC must disregard the individual flexibility arrangement for the purposes of determining whether the agreement passes the better off overall test.

Subsection 193(7) provides that, for the purposes of determining whether an enterprise agreement passes the better off overall test, if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the relevant modern award applied to that class, the FWC is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee.