

Fair Work (Norfolk Island) Rule 2016

made under section 32A of the Fair Work Act 2009

Compilation No. 1

Compilation date: 1 January 2022

Includes amendments up to: F2021L01872

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About this compilation

This compilation

This is a compilation of the *Fair Work (Norfolk Island) Rule 2016* that shows the text of the law as amended and in force on 1 January 2022 (the *compilation date*).

The notes at the end of this compilation (the *endnotes*) include information about amending laws and the amendment history of provisions of the compiled law.

Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. Any uncommenced amendments affecting the law are accessible on the Legislation Register (www.legislation.gov.au). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the series page on the Legislation Register for the compiled law.

Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. For more information on any modifications, see the series page on the Legislation Register for the compiled law.

Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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1 Name

This is the made under section 32A of the Fair Work Act 2009.

3 Authority

This instrument is made under section 32A of the Fair Work Act 2009.

4 Prescribed modifications of Fair Work legislation for its application in relation to Norfolk Island

- (1) For the application of the *Fair Work Act 2009* and the *Fair Work Regulations 2009* in relation to Norfolk Island, the modifications of that Act and those regulations set out in the applicable items of the Schedules to this instrument are prescribed.
- (2) Any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Ongoing modifications of the Fair Work Act 2009 relating to Norfolk Island

Note: See section 4.

Fair Work Act 2009

1 Section 12 (after paragraph (ca) of the definition of eligible State or Territory court)

Insert:

(cb) the Court of Petty Sessions of Norfolk Island;

2 Section 12

Insert:

Norfolk Island employment means employment of an employee in Norfolk Island in connection with an activity (whether of a commercial, governmental or other nature) carried on in Norfolk Island by the employer.

Queensland public sector employee means:

- (a) a public service employee (within the meaning of the *Public Service Act 2008* (Qld), as in force from time to time); or
- (b) a health service employee (within the meaning of the *Hospital and Health Boards Act 2011* (Qld), as in force from time to time); or
- (c) a senior health service employee (within the meaning of the *Hospital and Health Boards Act 2011* (Qld), as in force from time to time).

3 Section 12 (definition of reduction in take-home pay)

Repeal the definition, substitute:

reduction in take-home pay:

- (a) in relation to an employee in Norfolk Island employment—see subsection 168M(3); and
- (b) in relation to a transferring employee in relation to a transfer of business referred to in Part 6-3A—see subsection 768BR(3).

4 Section 12 (definition of take-home pay)

Repeal the definition, substitute:

take-home pay:

- (a) in relation to an employee in Norfolk Island employment—see subsection 168M(2); and
- (b) in relation to a transferring employee in relation to a transfer of business referred to in Part 6-3A—see subsection 768BR(2).

5 Section 12 (definition of take-home pay order)

Repeal the definition, substitute:

take-home pay order:

(a) in relation to an employee in Norfolk Island employment—see subsection 168N(1); and

(b) in relation to a transferring employee in relation to a transfer of business referred to in Part 6-3A—see subsection 768BS(1).

6 At the end of section 14

Add:

Employers of New South Wales public sector employees in Norfolk Island

(8) Despite paragraph (1)(f), a person who is an employer, within the meaning of the *Industrial Relations Act 1996* (NSW), is not a national system employer merely because the person employs, or usually employs, a public sector employee, within the meaning of that Act, in connection with an activity the person carries on in Norfolk Island.

Note:

This subsection does not affect the person's status as a national system employer if the person is a national system employer apart from paragraph (1)(f).

Employers of Queensland public sector employees in Norfolk Island

(9) Despite paragraph (1)(f), a person that would be an employer within the meaning of the *Industrial Relations Act 2016* (Qld) but for paragraph 7(1)(a) of that Act, is not a national system employer merely because the person employs, or usually employs, a Queensland public sector employee in connection with an activity the person carries on in Norfolk Island.

Note:

This subsection does not affect the person's status as a national system employer if the person is a national system employer apart from paragraph (1)(f).

Exceptions—certain Norfolk Island bodies

- (10) To avoid doubt, subsections (8) and (9) do not prevent either of the following from being a national system employer:
 - (a) the Norfolk Island Regional Council;
 - (b) a body established for a public purpose by or under a law in force in Norfolk Island other than an applied law (within the meaning of the *Norfolk Island Act 1979*).

Note:

For paragraph (b), certain laws of New South Wales and Queensland, which are both applied law jurisdictions under the *Norfolk Island Act 1979*, are in force in Norfolk Island as applied laws under that Act.

7 At the end of Division 4 of Part 1-2

Add:

23B Terms defined by reference to the Corporations Act 2001

For the purposes of interpreting an expression in this Act whose meaning is affected by the *Corporations Act 2001*, it is to be assumed that Norfolk Island were included for all purposes in the area covered by the definition of *this jurisdiction* in section 9 of that Act.

Note:

Examples of expressions in this Act whose meaning is affected by the *Corporations Act 2001* are:

- (a) "associated entity", "franchise" and "related body corporate" (see the definitions of those expressions in section 12);
- (b) "wholly-owned subsidiary" (see subsections 14(2) and (6)).

8 At the end of Part 2-2

Add:

Division 14—Operation of the National Employment Standards in relation to Norfolk Island employment

Subdivision A—What service counts for entitlements

131A Counting service before 1 July 2016 for non-accruing entitlements

General rule

- (1) An employee's service in Norfolk Island employment with an employer before 1 July 2016 counts as service of the employee with the employer for the purpose of determining the employee's entitlements under the National Employment Standards, other than entitlements to:
 - (a) paid annual leave; and
 - (b) paid personal/carer's leave; and
 - (c) notice of termination or payment in lieu of notice.
 - Note 1: References to the National Employment Standards include a reference to the extended parental leave provisions and the extended notice of termination provisions (see sections 746 and 761).
 - Note 2: Interaction between the National Employment Standards and transitional NI instruments under Schedule 1A is dealt with in that Schedule.
 - Note 3: Entitlements to paid annual leave, paid personal/carer's leave and notice of termination or payment in lieu of notice are dealt with in section 131B and Subdivision B.

No double entitlement

(2) If, before 1 July 2016, the employee has already had the benefit of an entitlement, the amount of which was calculated by reference to a period of service, subsection (1) does not result in that period of service with the employer being counted again when calculating the employee's entitlements of that kind under the National Employment Standards.

Limitation on application of general rule to redundancy pay

(3) Subsection (1) does not apply in relation to an employee and an employer for the purposes of Subdivision B of Division 11 of the National Employment Standards (which deals with redundancy pay) if the terms and conditions of employment that applied to the employee's employment by the employer immediately before 1 July 2016 did not provide for an entitlement to redundancy pay.

131B Counting service only on or after 1 July 2016 for accrual of certain entitlements under the National Employment Standards

- (1) For the purpose of determining the accrual of entitlements to the following under the National Employment Standards for Norfolk Island employment, only service in that employment on or after 1 July 2016 counts:
 - (a) paid annual leave;
 - (b) paid personal/carer's leave;
 - (c) notice of termination or payment in lieu of notice.

- (2) Paragraphs (1)(a) and (b) do not limit Subdivision B (which deals with leave accrued or started before 1 July 2016).
- (3) For the purposes of sections 119, 121 and 122 (which deal with redundancy pay), so far as they relate to an employee's Norfolk Island employment, only service in such employment on or after 1 July 2016 counts.
- (4) Subsection (3) does not apply if the terms and conditions of the employee's Norfolk Island employment immediately before 1 July 2016 provided for an entitlement to redundancy pay.

Note: In that case, service before 1 July 2016 counts for working out redundancy pay under the National Employment Standards (see subsection 131A(1)).

Subdivision B—Leave accrued or started before 1 July 2016

131C Paid annual leave accrued immediately before 1 July 2016

- (1) The provisions of the National Employment Standards relating to taking of paid annual leave (including rates of pay while taking leave), or cashing out that kind of leave, apply, as a minimum standard, to paid annual leave that:
 - (a) accrued before 1 July 2016 for Norfolk Island employment that continued on that day; and
 - (b) had not been taken or cashed out before 1 July 2016; as if it were paid annual leave that had accrued under the National Employment Standards.
- (2) In addition to any paid annual leave that an employee actually accrued before 1 July 2016 for particular Norfolk Island employment that continued on that day, the employee is taken for the purposes of subsection (1) to have accrued before 1 July 2016 for that employment the number of days of paid annual leave worked out using the following formula:

Number of days in the period described in subsection (3)

366

Number of days of paid annual leave the employee would have accrued for a full year of continuous service in that employment

- (3) For the purposes of subsection (2), the period:
 - (a) starts at the start of:
 - (i) the most recent anniversary (before 1 July 2016) of the day the employee started the employment; or
 - (ii) if the employment started on or after 1 July 2015—the day the employment started; and
 - (b) ends at the end of 30 June 2016.

However, the period does not include any days for which the employee actually (ignoring subsection (2)) accrued paid annual leave before 1 July 2016.

Leave paid for before 1 July 2016 and taken on or after that day

(4) If, before 1 July 2016, an employer of an employee in Norfolk Island employment paid the employee the employee's full entitlement to payment for a period of paid annual leave that accrued before that day and was to be taken on or after that day, the National Employment Standards do not apply to require the

employer to pay the employee any more for that leave. This has effect despite subsection (1).

131D Paid personal/carer's leave accrued immediately before 1 July 2016

The provisions of the National Employment Standards relating to taking of paid personal/carer's leave (including rates of pay while taking leave), or cashing out that kind of leave, apply, as a minimum standard, to paid leave that:

- (a) was to be available either:
 - (i) for absence from work for ill health; or
 - (ii) for a purpose described in paragraph 97(a) or (b); and
- (b) accrued before 1 July 2016 for Norfolk Island employment that continued on that day; and
- (c) had not been taken or cashed out before 1 July 2016; as if it were paid personal/carer's leave that had accrued under the National Employment Standards.

131E Continuation of leave started before 1 July 2016

General

- (1) If:
 - (a) immediately before 1 July 2016, an employee in Norfolk Island employment is taking a period of leave; and
 - (b) there is leave of an equivalent type under the National Employment Standards;

the employee is entitled to continue on leave of the equivalent type under the National Employment Standards for the remainder of the period.

Note: For example, if an employee is taking paid annual leave immediately before 1 July 2016, the employee is entitled to continue on paid annual leave under the National Employment Standards.

- (2) If an employee continues on leave under the National Employment Standards in accordance with subsection (1), the employee is entitled to adjust any of the following consistently with the provisions of the National Employment Standards in relation to that type of leave:
 - (a) the amount of leave the employee is taking or will take;
 - (b) the time at which the leave is taken;
 - (c) the arrangements for taking the leave.

Community service leave

- (3) An employee may, on or after 1 July 2016, be absent from his or her Norfolk Island employment under Division 8 of the National Employment Standards even if the period of absence began before that day.
- (4) If an employee is absent from his or her employment in accordance with subsection (3) of this section, subsection 111(5) of the National Employment Standards applies as if a reference to the first 10 days of absence were a reference to the first 10 days of absence occurring on or after 1 July 2016.

131F Continuation of steps taken before 1 July 2016 for leave on or after that day

Steps taken by employee in Norfolk Island employment

- (1) If, before 1 July 2016:
 - (a) an employee in Norfolk Island employment has taken a step that the employee is required to take so that the employee can, on or after 1 July 2016, take leave of a type of which there is an equivalent under the National Employment Standards; and
 - (b) an equivalent step is required under the National Employment Standards; the employee is taken to have taken the step under the National Employment Standards.
- (2) If an employee is taken, by subsection (1), to have taken a step, in relation to leave, under the National Employment Standards, the employee is entitled to adjust the step consistently with the provisions of the National Employment Standards in relation to that type of leave.

Note:

For example, an employee could vary the content of a notice given to the employer in relation to the leave, or vary the amount of leave the employee has notified the employer that the employee intends to take.

Steps taken by employer of employee in Norfolk Island employment

- (3) If, before 1 July 2016:
 - (a) an employer of an employee in Norfolk Island employment has taken a step that the employer is required to take so that the employee can, on or after 1 July 2016, take leave of a type of which there is an equivalent under the National Employment Standards; and
 - (b) an equivalent step is required under the National Employment Standards; the employer is taken to have taken the step under the National Employment Standards.
- (4) If an employer is taken, by subsection (3), to have taken a step, in relation to leave, under the National Employment Standards, the employer is entitled to adjust the step consistently with the provisions of the National Employment Standards in relation to that type of leave.

Subdivision C—Application of National Employment Standards about notice of termination and redundancy pay

131G Application of National Employment Standards about notice of termination

(1) Subdivision A of Division 11 of the National Employment Standards (which deals with notice of termination or payment in lieu of notice) applies to terminations of Norfolk Island employment occurring on or after 1 July 2016.

Note: The operation of the Subdivision may be affected by section 131B (which deals with what service counts for that Subdivision).

(2) However, that Subdivision does not apply to a termination of Norfolk Island employment if notice of the termination was given before 1 July 2016.

131H Application of National Employment Standards about redundancy pay

Subdivision B of Division 11 of the National Employment Standards (which deals with redundancy pay) applies to terminations of Norfolk Island employment occurring on or after 1 July 2016, even if notice of the termination was given before that day.

Note:

The operation of the Subdivision may be affected by sections 131A and 131B (which deal with what service counts for that Subdivision depending on whether the terms and conditions of the employee's employment by the employer immediately before 1 July 2016 provided for an entitlement to redundancy pay).

Subdivision D—Transfers of employment occurring before 1 July 2016

131J Treatment of transfers of employment occurring before 1 July 2016 for later operation of National Employment Standards

References to a transfer of employment in:

- (a) provisions of the National Employment Standards; and
- (b) subsections 22(5) and (6), as those subsections apply for the purposes of the National Employment Standards;

do not cover a situation where the employee became employed in Norfolk Island employment by the second employer before 1 July 2016.

9 At the end of Part 2-3

Add:

Division 9—Avoiding reductions in take-home pay from modern awards applying to Norfolk Island employment

168M Application of modern awards to Norfolk Island employment not intended to reduce take-home pay

- (1) There is not intended to be a reduction in take-home pay as a result of a modern award applying on or after 1 July 2018 to an employee in Norfolk Island employment to whom a transitional NI instrument applies on 30 June 2018 under Schedule 1A.
- (2) An employee's *take-home pay* is the pay an employee actually receives:
 - (a) including wages and incentive-based payments, and additional amounts such as allowances and overtime; but
 - (b) disregarding the effect of any deductions that are made as permitted by section 324.

Note: Deductions permitted by section 324 may (for example) include deductions under salary sacrificing arrangements.

- (3) An employee in Norfolk Island employment suffers a *reduction in take-home pay* if, and only if:
 - (a) on 30 June 2018 a transitional NI instrument applies to the employee under Schedule 1A; and
 - (b) on and after 1 July 2018 a modern award applies to the employee; and
 - (c) on and after 1 July 2018 the employee is employed in the same position as (or a position that is comparable to) the position he or she was employed in on 30 June 2018; and

- (d) the amount of the employee's take-home pay for working particular hours or for a particular quantity of work after 30 June 2018 is less than what would have been the employee's take-home pay for those hours or that quantity of work on 30 June 2018; and
- (e) that reduction in the employee's take-home pay is attributable to the termination of the transitional NI instrument and the application of the modern award.

Note: At the end of 30 June 2018:

- (a) transitional NI instruments are terminated by Schedule 1A; and
- (b) the limitation under subsection 47(2A) on modern awards applying to employees in Norfolk Island employment ends.

168N Orders remedying reductions in take-home pay

(1) If the FWC is satisfied that an employee, or a class of employees, to whom a modern award applies has suffered a reduction in take-home pay as described in subsection 168M(3), the FWC may make any order (a *take-home pay order*) requiring, or relating to, the payment of an amount or amounts to the employee or employees that the FWC considers appropriate to remedy the situation.

General provisions

- (2) The FWC may make a take-home pay order only on application by:
 - (a) an employee who has suffered a reduction in take-home pay as described in subsection 168M(3); or
 - (b) an organisation that is entitled to represent the industrial interests of such an employee; or
 - (c) a person acting on behalf of a class of such employees.
- (3) If the FWC is satisfied that an application for a take-home pay order has already been made in relation to an employee or a class of employees, the FWC may dismiss any later application that is made under these provisions in relation to the same employee or employees.

168P Ensuring that take-home pay orders are confined to the circumstances for which they are needed

- (1) The FWC must not make a take-home pay order under section 168N in relation to an employee or class of employees if:
 - (a) the FWC considers that the reduction in take-home pay is minor or insignificant; or
 - (b) the FWC is satisfied that the employee or employees have been adequately compensated in other ways for the reduction.
- (2) The FWC must ensure that a take-home pay order is expressed so that:
 - (a) it does not apply to an employee unless the employee has actually suffered a reduction in take-home pay as described in section 168M; and
 - (b) if the take-home pay payable to the employee under the modern award increases after the order is made, there is a corresponding reduction in any amount payable to the employee under the order.

168Q Contravening a take-home pay order

A person must not contravene a term of a take-home pay order made under section 168N that applies to the person.

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

Note 2: A civil penalty cannot be imposed for contravention of a term of a take-home pay order made under section 168N (see sections 545 and 546).

168R Take-home pay order continues to have effect so long as modern award continues to cover the employee or employees

A take-home pay order made under section 168N in relation to an employee or class of employees to whom a particular modern award applies continues to have effect in relation to those employees (subject to the terms of the order) for so long as the modern award continues to cover the employee or employees, even if it stops applying to the employee or employees because an enterprise agreement starts to apply.

168S Inconsistency between enterprise agreements and take-home pay orders and modern awards

An enterprise agreement has no effect in relation to an employee to the extent that it is less beneficial to the employee than the combination of:

- (a) a take-home pay order made under section 168N that applies to the employee; and
- (b) the modern award that applies to the employee.

Division 10—Operation of modern awards made before 1 July 2016 in relation to Norfolk Island

168T References to Australia in modern awards made before 1 July 2016

On and after 1 July 2016, a reference to Australia in a modern award made before that day has the same meaning as a reference in this Act to Australia has on and after that day.

Note: Accordingly, a reference to Australia in a modern award includes a reference to Norfolk Island

10 At the end of Division 2 of Part 2-7

Add:

306A References to Australia in equal remuneration orders made before 1 July 2016

On and after 1 July 2016, a reference to Australia in an equal remuneration order made before that day has the same meaning as a reference in this Act to Australia has on and after that day.

Note: Accordingly, a reference to Australia in an equal remuneration order includes a reference to Norfolk Island.

10A At the end of Division 2 of Part 3-1

Add:

339A Modification of application of this Part in relation to Queensland government employers and employees

Despite sections 338 and 339, this Part does not apply to action taken in Norfolk Island by or in relation to:

- (a) an employer of a Queensland public sector employee that would be a national system employer but for subsection 14(9); or
- (b) an individual so far as he or she is employed, or usually employed, by an employer mentioned in paragraph (a).

11 Subsection 539(2) (after table item 5)

Insert:

Part 2-3—Modern awards

5A section 168Q

- (a) the Federal Court;
 - Nil
- (b) an employee organisation;

(a) an employee;

- (b) the Federal Circuit Court;
- (c) an inspector (c) an eligible State or Territory court

12 After paragraph 541(3)(b)

Insert:

(ba) a term or provision of a take-home pay order made under section 168N;

13 After subsection 545(5)

Insert:

Court cannot order civil penalty for contravention of take-home pay order made under section 168N

- (6) A court cannot make an order under this section that:
 - (a) relates to a contravention or proposed contravention of section 168Q (which deals with compliance with a take-home pay order made under section 168N, which is about avoiding reductions in take-home pay from modern awards applying to Norfolk Island employment); and
 - (b) amounts to a civil penalty.

14 After subsection 546(5)

Insert:

Court cannot make pecuniary penalty order for contravention of take-home pay order made under section 168N

(6) A court cannot make a pecuniary penalty order for a contravention of section 168Q (which deals with compliance with a take-home pay order made under section 168N, which is about avoiding reductions in take-home pay from modern awards applying to Norfolk Island employment).

15 At the end of section 789FD

Add.

(4) Paragraph (3)(b) does not apply to a business or undertaking conducted in Norfolk Island by an employer of a Queensland public sector employee.

Note:

This does not prevent Part 6-4B applying in relation to a business or undertaking conducted by an employer of a Queensland public sector employee that is a constitutional corporation: see subparagraph (3)(a)(i).

Endnotes

Endnote 1—About the endnotes

The endnotes provide information about this compilation and the compiled law.

The following endnotes are included in every compilation:

Endnote 1—About the endnotes

Endnote 2—Abbreviation key

Endnote 3—Legislation history

Endnote 4—Amendment history

Abbreviation key—Endnote 2

The abbreviation key sets out abbreviations that may be used in the endnotes.

Legislation history and amendment history—Endnotes 3 and 4

Amending laws are annotated in the legislation history and amendment history.

The legislation history in endnote 3 provides information about each law that has amended (or will amend) the compiled law. The information includes commencement details for amending laws and details of any application, saving or transitional provisions that are not included in this compilation.

The amendment history in endnote 4 provides information about amendments at the provision (generally section or equivalent) level. It also includes information about any provision of the compiled law that has been repealed in accordance with a provision of the law.

Misdescribed amendments

A misdescribed amendment is an amendment that does not accurately describe the amendment to be made. If, despite the misdescription, the amendment can be given effect as intended, the amendment is incorporated into the compiled law and the abbreviation "(md)" added to the details of the amendment included in the amendment history.

If a misdescribed amendment cannot be given effect as intended, the abbreviation "(md not incorp)" is added to the details of the amendment included in the amendment history.

Endnote 2—Abbreviation key

ad = added or inserted

am = amended

amdt = amendment

c = clause(s)

C[x] = Compilation No. x

Ch = Chapter(s) def = definition(s)

Dict = Dictionary

disallowed = disallowed by Parliament

Div = Division(s)

exp = expires/expired or ceases/ceased to have

effect

F = Federal Register of Legislation

gaz = gazette

LA = Legislation Act 2003

LIA = Legislative Instruments Act 2003

(md) = misdescribed amendment can be given

effect

(md not incorp) = misdescribed amendment

cannot be given effect

mod = modified/modification

No. = Number(s)

o = order(s)

Ord = Ordinance

orig = original

par = paragraph(s)/subparagraph(s)

/sub-subparagraph(s)

pres = present

prev = previous

(prev...) = previously

Pt = Part(s)

r = regulation(s)/rule(s)

reloc = relocated

renum = renumbered

rep = repealed

rs = repealed and substituted

s = section(s)/subsection(s)

Sch = Schedule(s)

Sdiv = Subdivision(s)

SLI = Select Legislative Instrument

SR = Statutory Rules

Sub-Ch = Sub-Chapter(s)

SubPt = Subpart(s)

 $\underline{\text{underlining}} = \text{whole or part not}$

commenced or to be commenced

Endnote 3—Legislation history

Name	Registration	Commencement	Application, saving and transitional provisions
Fair Work (Norfolk Island) Rule 2016	30 June 2016 (F2016L01129)	1 July 2016	-
Fair Work (Norfolk Island) Amendment (Queensland Public Sector Employees) Rules 2021	21 December 2021 (F2021L01872)	1 January 2022	-

Endnote 4—Amendment history

Provision affected	How affected
s 2	rep LA s 48D
Schedule 1	
Item 2	am F2021L01872
Item 6	am F2021L01872
Item 10A	ad F2021L01872
Item 15	ad F2021L01872
Schedule 2	rep 2 July 2018 (Sch 2 item 27)