



Employment Law Update

December 2009

>>Award Modernisation: Are We There Yet? Nearly There Now!

An overview of the modern award system

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With the release of the AIRC decision on transitional arrangements for modern awards on 2 September, and the release of the final versions of the stage 3 modern awards on

4 September, and of the Stage 4 awards on 4 December, the main part of the modern awards system is now available.

In stark contrast to the earlier projects of award simplification and award rationalisation, award modernisation has given the award system the biggest overhaul in its history. While we will miss the quaint descriptions of long-gone occupations or lines of business sometimes encountered in old awards, the ease of reading the modern awards will be a great advantage for all who have to deal with them, as will the national uniformity they will bring.

>>Modern Awards Stages 1 to 4

The modern awards produced during stages 1, 2 and 3 of the award modernisation process are most easily accessed at the AIRC's website: www.airc.gov.au/awardmod/fullbench/awards.htm.

These awards provide the information employers and employees need to enable them to assess which awards will apply from 1 January 2010, either on an industry basis or, where an industry award does not cover the employees or all of the employees of a business, on an occupational basis.

In this regard, the main provisions to consult to find a good match are the Coverage clause (usually clause 4) and Classifications (usually Schedule B now that the transitional provisions have been included in Schedule A of each modern award). However, not everyone will find it easy to orient themselves within the new system. While the award modernisation process has done much to take account of modern forms of business (not dreamt of in the old awards system), there are still businesses that will feel like round pegs trying to fit into square holes in finding which award covers their business. Despite the ideal of

having an employer covered by an industry award covering all streams of employees, so that there is only one award to deal with, many will find that they still need to deal with several awards. For example, the Manufacturing Associated Industries and Occupations Award covers many streams of core manufacturing activities, but not ancillary employees: so clerks, drivers and warehouse staff will be covered by occupational awards. By contrast, the General Retail Industry Award covers a wide range of retail-related staff.

>>Look out for the new rules

While the goal has been to produce modern awards on the model of the typical awards in each industry in the old system, to achieve national coverage there have had to be changes of detail, so every employer (and particularly HR and payroll staff) need to be familiar with the new awards and the areas in which they differ from the old, and consider whether anything needs to change to ensure compliance.

To take just two examples:

- there will be a Miscellaneous Award, a catch-all award to cover any “award level” employees not otherwise covered by an industry or occupational award (so people are much less likely to fall through the holes in the safety net than before)
- the exemption from overtime under the NSW clerical award (for employees paid 15% or more above the top award rate) has been replaced with an “annualised salary” provision, allowing overtime to be covered by annual salary arrangements sufficiently in excess of the award rate (so employment contracts need to be clear about annual salary and what award entitlements are included in that salary).

>>Transitional Arrangements

While the overall goal of award modernisation was to rationalise the award system without disadvantaging anyone, creating uniformity from the morass of old awards inevitably involves winners and losers, such as employees

in some states whose award rates decrease to match general rates in their industry across the country, and employers who find that the rate of casual loading has increased to match that generally applicable nationally.

Since these adjustments potentially result in arbitrary winners and losers, the goal of the transitional arrangements is to smooth out the implementation of the changes. The 2 September decision on award modernisation (also at www.airc.gov.au/awardmod/fullbench/awards.htm) addresses these issues with respect to minimum wages, casual or part time loadings, weekend, public holiday and evening penalties, shift allowances or penalties (but not changes to other award conditions).

In brief the transitional arrangements are:

- when modern awards come into effect on 1 January 2010, minimum pay rates will not change from those existing at that date, so employers and employees have a further 6 months to digest the new system before wage rates are affected;
- if a modern award increases or decreases any of the entitlements referred to above, compared to pre-existing conditions, 20% of that change comes into effect on 1 July 2010, and a further 20% takes effect on each 1 July following until 1 July 2014, by when the full change will have come into effect.

So, to take a simple example, if an entitlement was \$10 and increases to \$15 under a modern award, the entitlement will remain at \$10 till 1 July 2010 when it will become \$11, then \$12 on 1 July 2011, and so on until 100% of the increase or decrease has taken effect on 1 July 2014.

While this sounds simple, the detailed calculation involved in establishing exactly what was due as at 31 December 2009, how it has changed under a modern award, and applying the gradual change provides plenty of scope for disputed arithmetic, particularly if, say, the rate is going up but the casual loading is going down at the same time. However, several other features of the transitional

arrangements go some way to reduce this complexity:

1. rates specified by modern awards are minimum rates only and do not affect the pay of employees who are paid above award: any modern award increases can be absorbed within the above award payment (see 2 September decision): the finer points of arithmetic will be more important in industries where pay is tied closely to award rates;

2. employees as at 1 January 2010 who would find their rate potentially reduced under a modern award are entitled to make an application to Fair Work Australia for a "take home pay order" to maintain their pre-existing pay until the modern award rate equals or exceeds that current rate of pay, so reducing pay in such circumstances to match the new rates will usually not be a practical option.

>>So what do employers need to do?

The priorities for employers are:

1. establish which modern award will apply either as an industry award, an occupational award, or the default award if nothing else applies;
2. compare the rates provided by the modern award with current award rates and conditions, and assess where changes in workplace and payroll practices will be necessary so as to comply with changes to non-monetary conditions from 1 January 2010 and with changes to monetary entitlements from 1 July 2010;

3. where rates vary from 1 July 2010 for employees on award wages, plan for the staged increases and decreases (noting that the availability of take home pay orders means that decreases may only apply to employees engaged after 1 January);

4. resolve commercially and practically how to handle the payroll issues arising from the staged increases, and communicate to staff what will occur when.

The wholesale review of the award system is an occasion for all employers to review how closely they comply with award terms and conditions. The changes mean there will be heightened awareness of these issues. The ease of access to modern awards, and their simpler style, mean that it is more likely that employees will assert their entitlements where employers are not complying.

Employer risk management therefore dictates that a check of compliance, and implementing such changes as are necessary, is a priority between now and 1 January 2010, for non-pay conditions, or between now and 1 July 2010 for pay rates.

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