

EMPLOYMENT UPDATE

MARCH 09

AWARD MODERNISATION UPDATE

The Award Modernisation process is moving along according to schedule. The Australian Industrial Relations Commission is to complete the process of modernising all existing awards and making Modern Awards for industries and occupations at a Federal level by 31 December 2009. The Modern Awards are to commence operation on 1 January 2010.

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The *Fair Work Bill* is still being debated in the Senate and the Government is hopeful it will successfully pass through the Senate this week. There is a lot of debate around the amendments to the proposed changes to workplace bargaining laws; union rights of entry; and the number of employees that equates to a 'small business'. We will report on the final legislation when it passes through the Senate and will be organising small workshops and a full day conference on the changes to the legislation to keep you fully informed.

In the meantime, the award modernisation process is moving along according to schedule. So far, the Australian Industrial Relations Commission ('AIRC') has reduced more than 500 awards running to 30,000 pages to just 17 modern awards and 607 pages, in the crucial first of four stages of award modernisation which is to be completed by 31 December 2009.

On 19 December 2008, the AIRC published the first 17 modern awards. These are:

- *Clerks – Private Sector Award 2010*
- *Hospitality Industry (General) Award 2010*
- *Black Coal Mining Industry Award 2010*

- *Fast Food Industry Award 2010*
- *General Retail Industry Award 2010*
- *Hair and Beauty Industry Award 2010*
- *Higher Education Industry – Academic Staff – Award 2010*
- *Higher Education Industry – General Staff – Award 2010*
- *Horse and Greyhound Training Award 2010*
- *Manufacturing and Associated Industries and Occupations Award 2010*
- *Mining Industry Award 2010*
- *Pharmacy Industry Award 2010*
- *Racing Clubs Events Award 2010*
- *Racing Industry Ground Maintenance Award 2010*
- *Rail Industry Award 2010*
- *Security Services Industry Award 2010*
- *Textile, Clothing, Footwear and Associated Industries Award 2010*

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Copies of these awards can be viewed at <http://www.airc.gov.au/awardmod/fullbench/awards.htm>

WHY HAVE 'MODERN AWARDS'?

We thought we would take this opportunity to explain the reasoning behind modernising awards. This is not a Labor Government incentive. It was first introduced under WorkChoices but the process did not commence until after the Labor Government came to power. The process being applied by the current government is not too dissimilar to that proposed under the former Liberal government.

Currently Federal awards only apply if an employer is a named respondent to the award or a member of an employer association that is a named respondent. The only other way a Federal award can apply is if the employee is a member of a union that is a named respondent. Whereas State awards, which are known as common rule awards, automatically apply to all employees where they fall within a classification in the industry the award covers. Therefore, if they are a Receptionist they automatically come under the *Clerical Employees Award – State 2002* – that is, unless there is a workplace agreement that applies to them. This is because workplace agreements override awards.

When WorkChoices started, all employers that were constitutional corporations automatically transferred to the Federal workplace relations system. Given that there were no Federal awards that could apply to the employees transferring with these employers, the Federal Government legislated that the relevant State award would transfer with the employer and its employees and be known as a Notional Agreement Preserving the State Award (commonly referred to a 'NAPSA'). The wage rates were removed from the NAPSA and put into a Pay Scale. This is the simplest way we can explain it.

This process has resulted in an enormous amount of confusion amongst employers as to what award applies and more so, which are the correct wage rates. For clarity, if the employer is a company it should **not** be referring to the Queensland Wageline wage rates but needs to be accessing the Federal Pay Scales for the NAPSA which can be found at www.workplaceauthority.gov.au. It should be noted that this has been the position since 27 March 2006 and if you have been paying the State wage rates and they are **less than** the wage rates in the Pay Scale then you are underpaying your employees and liable for the shortfall.

One of the purposes of the new Modern Awards is to tidy this up.

WHO WILL THE MODERN AWARDS APPLY TO?

The Modern Awards will apply to a class of employees, the same way as State awards have applied. Therefore, unlike current Federal Awards, there is no requirement to be a named respondent to the new Modern Awards. If you have people employed in an industry covered by the award it will automatically apply.

It is the intention that Modern Awards will cover all employees who perform work that has

traditionally been regulated by Awards. That is, if an employee was covered by an award before the Modern Awards commenced the employee should be covered by one of the Modern Awards from 1 January 2010. For this purpose, the drafting of the Modern Awards is being undertaken in 4 stages with each stage having a set of priority industries and occupations for which awards needs to be drafted. Basically, all of the current awards/NAPSAs relevant to a particular industry/occupation are compiled and consolidated into one Modern Award. The Modern Awards are also much shorter in length with the largest to date being only 87 pages long.

Another important amendment to the legislation that is connected to award modernisation is that it is anticipated employees earning over \$100,000 per annum (indexed) will be free to agree to their own pay and conditions without reference to awards. That is, they can agree that the award does not apply. This provision may change prior to the *Fair Work Bill* passing through the Senate but is likely to get through in one form or another.

FLEXIBILITY CLAUSES

An important part of the Award modernisation process is that that all Modern Awards will contain a flexibility clause enabling arrangements to be made between employers and employees to meet the genuine individual needs of employees.

On 18 December 2008, the day before the AIRC published the first round of Modern Awards (i.e. those listed above), the Minister for Employment and Workplace Relations, Julia Gillard, requested that the AIRC draft a new model award flexibility clause that ensures any individual employee who signs such a clause is "better off overall" and is not disadvantaged. The AIRC

was not able to entertain this request prior to releasing the first 17 Modern Awards on 19 December 2008 and therefore they have flagged it may be necessary to vary these Modern Awards to take into account the Minister's latest request.

GENERAL

It is also possible that the Modern Awards published to date will need to be reviewed once the *Fair Work Bill* passes through Parliament. This is because the AIRC has made the awards based on the Federal Government's Policy and the *Fair Work Bill*, and it is conscious that Parliament may make changes to the legislation which may require aspects of the Modern Awards to be reviewed.

MAIN IMPLICATIONS FOR EMPLOYERS

- Be aware of Modern Awards being made that will apply to your workplace from 1 January 2010 and make yourself familiar with their terms prior to this date.
- Copies of the awards are published on the AIRC website <http://www.airc.gov.au/awardmod/fullbench/awards.htm>
- Contracts of employment will need to be reviewed to take effect from 1 January 2010 as a result of the Modern Awards commencing as well as the National Employment Standard applying from this date.
- If you are considering negotiating a collective workplace agreement with your employees the current Federal Award or NAPSA will apply for the purpose of the Workplace Authority applying the *No Disadvantage Test* until the Modern Awards commence on 1 January 2010.
- From 1 January 2010, any agreements that have passed the No Disadvantage Test will continue to operate and any new agreement lodged after this date will be assessed using the Modern Award.
- It is further proposed in the *Fair Work Bill* that a new test be applied. The proposed new test is the *Better Off Overall Test* which requires the employees to be better off overall under the collective agreement to what they are under the relevant Modern Award. As a result of this new test and the proposed changes to workplace bargaining laws, we recommend that employers negotiate their collective agreement and ensure it is lodged with the Workplace Authority no later than 30 June 2009. This way the changes to the laws can be avoided and the collective agreement will override the Modern Award when it commences. The agreement will however, be subject to the National Employment Standards.
- If you would like to discuss this further please do not hesitate to contact us.

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