

EMPLOYMENT UPDATE

DECEMBER 09

BRACE YOURSELF FOR MORE CHANGES

1 January 2010 is going to be an even bigger date for changes in workplace relations for employers than anticipated.

On 1 January 2010, the balance of the *Fair Work Act* commences and now, in addition to this, the Queensland Parliament has passed the [Fair Work \(Commonwealth Powers\) and Other Provisions Bill](#) which refers the States industrial relations powers for the private sector to the Federal Government. This aims to simplify the industrial relations system and moves to complete the transition which begun under the Howard government to create a national industrial relations system. Today, the Federal Government passed the *Fair Work Amendments (State Referrals and Other Measures) Bill* in the final minutes of the last sitting for this year.

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The legislation will take effect on the 1 January 2010 - coinciding with the introduction of the Modern Awards; the National Employment Standards and the "Better Off Overall Test" for assessing enterprise agreements.

The purpose of the legislation has put an end to the confusion and duplication that has existed for decades due to having a State and Federal industrial relations system and enables all private sector employers and employees to participate in a single, national industrial relations system. This is with the exception of Western Australia as, to date, the Western

Australian Government has declined to refer its industrial relations powers to the Federal Government.

Since the implementation of *Work Choices* in 2006 the employment relationships of all "constitutional corporations" and their employees have been regulated by Federal workplace relations legislation. This has caused more confusion for employers often unsure whether they fell within the Federal or State jurisdiction. The key question was whether the employer was a 'trading or financial corporation' – whilst this is black and white for those employers who are Pty Ltd businesses, it is not so clear for incorporated organisations, such as not-for-profit organisations.



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From 1 January 2010, this key question will no longer be relevant - all Queensland employers and employees, regardless of their corporate status will be regulated by the Federal *Fair Work Act 2009*. This is a very significant change for industrial relations in Australia and we consider a very positive development. It will see the operation of one national system which will determine minimum conditions of employment; awards; enterprise bargaining; disputes, unfair dismissals, union right of entry and much more. It will remove the confusion about which system an employer operates in, and will allow national businesses to apply the same entitlements and legislation for all employees (with the exception of Western Australian).

What happens after 1 January 2010?

After 1 January 2010, unincorporated employers and their employees who have been in the State industrial relations system to date – and covered by State awards – will automatically move into the Federal system. The impact of this is:

- State awards that apply to employees prior to 1 January 2010 will continue to apply for a period of 12 months from 1 January 2010 before

they are terminated and replaced with the relevant modern award. They will be known as a Division 2B State Awards. During the 12 month period, Fair Work Australia will consider whether transitional arrangements for the incoming employers and employees should be introduced into the modern awards.

- State employers and employees who are not covered by a State award but who are capable of being covered by a modern award due to the industry they work in or their occupation, will be covered by the modern award from 1 January 2010. Therefore, it is possible that some employees who are currently award-free in the State system may be covered by a modern award in the Federal system.
- Fair Work Australia will have the power to make 'take-home pay orders' where an employee is moving from a Division 2B State Award to a modern award in order to ensure they do not earn less under the modern award.
- A no-detriment test will be applied to Division 2B State Awards to ensure the awards comply with the National Employment Standards and they must pay above minimum wage rates as set in the national minimum wage order.
- If the employer and employees covered by a Division 2B State Award decide to enter into a Federal enterprise agreement after 1 January 2010, they agreement will be assessed against the Division 2B Award using the Better Off Overall Test.
- State Certified Agreements will be known as Division 2B State Employment Agreements and they will continue to apply until they expire or are terminated in accordance with the legislation. However, they will be required to provide entitlements no less favourable than the entitlements in the National Employment Standards and minimum wage in the relevant Federal modern award or the national minimum wage order. The *Fair Work Act* prohibited content rules will not apply to these agreements whilst they are in operation. Where Division 2B State Employment Agreements confer power on a State industrial body (or third parties) to resolve disputes, they will continue to be able to exercise that power. If a Division 2B State Employment Agreement does not have a Dispute Resolution clause, the model clause from the *Fair Work Act* will be deemed to be included.
- Employees that are transferring from the State system on 1 January 2010, who are not covered by an award or agreement, will be entitled to receive the greater of their relevant salary under the State minimum wage or the national minimum wage/modern award wage.
- The National Employment Standards will apply to all employees from 1 January 2010 unless the entitlement an employee is receiving under the Division 2B State Award or Division 2B State Agreement is a greater entitlement. **We will**

summarise the National Employment Standard in an Employment Update before the end of month.

- Employees who have accrued entitlements under a State award will have those entitlements preserved – for example, leave entitlements. These entitlements will transfer with the employee into the Federal system.
- Federal unfair dismissal laws will apply for dismissals that take place after 1 January 2010. Businesses that have **less than 15** full-time equivalent employees will need to comply with the Small Business Fair Dismissal Code when terminating an employee's employment if the employee has more than 12 months' continuous service. If terminated within the first 12 months of their employment, the employee is exempt from commencing unfair dismissal proceedings. Where an employer has **more than 15** full-time equivalent employees the Small Business Fair Dismissal Code does not apply and the employees are exempt from commencing an unfair dismissal claim where they have less than 6 months' continuous service.
- High income earners, being employees that earn more than \$108,300 per annum (currently), will not be covered by the modern awards and are not eligible to commence an unfair dismissal claim.

The referral of the State's industrial relations powers to the Federal Government does not include public service employees – that is,

employees of the Queensland Government or local authorities. These employees will continue to be covered by the State industrial relations system, State awards and State Certified Agreements. However, Government-owned corporations will fall within the Federal system.

legal advice either before or very soon after 1 January 2010.

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2 December 2009

What this means for Employers?

- Small businesses are likely to be the most affected by this change as most small businesses are partnerships or sole traders and therefore, previously governed by the State industrial relations system.
- Employers **MUST** be prepared on 1 January 2010 for the changes by becoming aware of the new laws, in particular unfair dismissal laws for small businesses; the National Employment Standards and the relevant modern awards for their workplace.
- All employers (whether transferring from the State system or existing National System Employer) should consider having their contracts of employment reviewed to ensure compliance with the National Employment Standards and the relevant award – whether it be the modern award or a Division 2B State Award.
- This is bound to cause confusion and we strongly recommend that if you are unsure about award coverage, the status of your certified agreement, or any of the other changes happening from 1 January 2010, that you seek

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