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Employment Law e-alert

New complexities in enterprise agreement making

Many employers will be aware of the Better Off Overall Test (“**BOOT**”) that Fair Work Australia (“**FWA**”) will apply from 1 January 2010 when determining whether it will approve an enterprise agreement. In general terms the BOOT requires FWA to be satisfied that each employee who would otherwise be covered by an award will be better off overall under the terms of the proposed enterprise agreement.

The Fair Work (Transitional Provisions & Consequential Amendments) Regulations 2009 were recently amended to make provision for further matters which FWA needs to take into account in determining whether an enterprise agreement meets the BOOT if the modern award against which it will be assessed contains “transitional provisions”. These provisions have been incorporated into some modern awards in order to reduce the financial impact of increases or reductions to existing wage rates, penalties, loadings and allowances that may arise as a result of award modernisation. They permit employers to phase in these changes in annual increments of 20% over 5 years (from 1 July 2010 and on 1 July in each subsequent year until 2014).

We anticipate that most employers in Victoria, ACT, NT and in other states whose businesses have been subject to federal award coverage will not need to rely on these transitional provisions. The new BOOT requirements will therefore be of particular relevance to those employers who intend to rely on these phasing in provisions and who incorporate similar provisions into their enterprise agreements.

In respect of those employers therefore, when FWA applies the BOOT during the period 1 January 2010 to 31 December 2014 (“the Transitional Period”) it must compare the proposed enterprise agreement against the relevant underlying modern award on a line by line basis:

- (a) as at the time that the agreement is lodged with it; and
- (b) as the award will stand at separate (future) points in time over the life of the agreement (i.e. on 31 July of each subsequent year until the agreement reaches its nominal expiry date).

In considering the terms of the modern award, FWA will not have to take into account any variations to the underlying modern award that may be subsequently made.

The following illustrative example is derived from the Explanatory Statement to the new Regulations:

A transitional provision in a modern award may provide the following incremental increases in respect of casual loadings:

- 31 July 2010 8%
- 31 July 2011 10%
- 31 July 2012 15%

An enterprise agreement may provide for the following incremental increases in respect of casual loadings:

At the time of lodgement (between 1 January 2010 to 31 July 2011)	6%
31 July 2011	12%
31 July 2012	20%

On a line-by-line comparison, an employee entitled to the casual loading would be better off under the proposed agreement in only 2 of the 3 assessment points (i.e. on 31 July 2011 and 31 July 2012). Therefore, the agreement would fail the modified test because that employee will not be better off overall in the first assessment point (i.e. 6% at the time of lodgement) which is less than the minimum incremental increase in the modern award (i.e. 8% as at 31 July 2010).

In view of the above, a further layer of complexity is added to the approval of enterprise agreements that are underpinned by a modern award containing transitional provisions.

Parties who contemplate entering into enterprise agreements on or after 1 January 2010 should therefore consider whether the underlying modern award against which the BOOT will be assessed contains transitional provisions. If so they must ensure that employees who enter into that agreement will be better off overall not only at the time that the agreement is lodged with Fair Work Australia but also at each of the future points in time referred to above.

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