

Employment Update

8 September 2009

Award Modernisation

by David Thompson, Partner and Costa Brehas, Senior Associate

Background to Award Modernisation

In March 2008 the Minister for Employment and Workplace Relations ("the Minister") directed the Australian Industrial Relations Commission ("AIRC") to modernise awards. The Minister's power to do so came about as a result of amendments to the *Workplace Relations Act 1996* by the Rudd government at the time.

The primary object of award modernisation is to simplify and consolidate thousands of state and federal awards throughout Australia (i.e. pre-reform awards and Notional Agreements Preserving State Awards). It is understood that the AIRC intends to replace these awards with approximately 130 modern awards.

The AIRC has until the end of this year to modernise awards at which time the AIRC will cease to operate.

From 1 January 2010 these modern awards, along with the National Employment Standards ("NES"), will constitute the minimum safety net for most Australian employees.

The AIRC has essentially approached the task of modernising awards by:

- (a) identifying a number of industries and occupations; and
- (b) implementing 4 stages for the modernisation of awards in each of those industries and occupations.

To date, the AIRC has prepared draft modern awards for all industries and occupations except those in the last stage. It will finalise draft awards for Stage 4 industries and occupations by

December 2009. Copies of draft modern awards are available on the AIRC's website at www.airc.gov.au

Individual flexibility terms in modern awards

All modern awards will include a flexibility term which will enable employers to enter into an individual flexibility arrangement ("IFA") with individual employees in relation to certain specified matters. This may provide employers with some flexibility regarding matters such as overtime, penalty rates and altering start and finish times.

Employers must, however, ensure that IFAs result in the relevant employee being better off overall than the employee would have been under the applicable modern award.

Exclusion of high income employees from award coverage

Employers can agree with high income employees (who earn over \$100,000 – excluding super contributions and payments that cannot be determined in advance) that they will be excluded from modern award coverage for periods of at least 12 months at a time. To do so, an employer must also provide a written guarantee to the employee regarding his/her annual earnings during the agreed period/s.

The BOOT

From 1 January 2010, enterprise agreements must meet the "Better Off Overall" Test ("BOOT"). This will involve a comparison of the terms of those agreements with modern awards before they can be formally approved.

The BOOT provides that each employee who will be covered by the proposed enterprise agreement will be better off overall than the applicable modern award that would otherwise apply.

Resumption of modern award coverage when enterprise agreements end

Unlike the position under WorkChoices, modern award coverage will resume when an enterprise agreement ceases to operate.

Minimum wages returned to modern awards

Under WorkChoices, minimum wages were removed from awards and relocated to notional instruments known as an Australian Pay & Classification Scales ("APCS"). From 1 January 2010, minimum wages will, once again, be set out in modern awards and will be reviewed annually on 1 July by Fair Work Australia, the new body that replaces the AIRC.

Interaction between NES and modern award provisions

Generally, a term of a modern award that deals with any aspect of the NES will only prevail if it is not detrimental to the employee (ie the award condition must exceed the standard). The exception to this rule is that where a modern award contains industry specific redundancy provisions, then those provisions will operate to the exclusion of the NES.

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“Catch all” modern award

The Minister has also requested the AIRC to create a general modern award that covers employees who are not currently covered by an award and who perform work of similar nature to that which has historically been regulated by awards (including state awards).

Once this award is established, employers should consider its reach to determine if it will impact their existing employment arrangements.

Balancing the interests of employers and employees

On 2 September 2009, the AIRC handed down a decision concerning award modernisation in terms of which it:

- noted the potentially competing objectives in the Minister’s request that the modernisation of awards should not disadvantage employees nor increase costs for employers; and
- acknowledged that the introduction of modern awards will inevitably mean that wages and conditions will increase in some areas whereas in others they will decrease.

The AIRC has decided that although modern awards were intended to operate from 1 January 2010, the matters referred to above and various other factors (such as the current state of the national economy and the likely effects on various industries of various modern awards) justify delaying the operation of some provisions in modern awards to 1 July 2010 and phasing in those provisions over a 5 year period from that time.

The provisions that will be phased in relate to:

- minimum wages;
- casual and part time loadings; and
- Saturday, Sunday, public holiday, evening and other penalties.

Minimum wages derived from APCSS and existing provisions in awards (“**Old Awards**”) relating to the above matters will continue to apply until 1 July 2010.

Phasing in of increases in wages (for employers) / reductions in wages (for employees)

In order to enable those businesses and employees who will be adversely impacted by the award modernisation process to gradually ease into the new system, wage increases / reductions in wages will be phased in on an annual basis from 1 July 2010 in 20% increments.

Over award payments

If the wage that an employer pays to its employees exceeds the minimum wages payable under an Old Award (i.e. “over award payments”), that employer can set off any wage increases arising under a modern award against the relevant over award payment.

Phasing in of increases in loadings and penalties

Similar phasing in provisions as those set out above will also apply in respect of loadings and penalty rates.

Conclusion

Although award modernisation will ultimately result in a simpler and more cohesive award system throughout Australia, it is likely that many businesses will experience an increase in costs while many employees will experience a reduction in wages during the 5 year phasing in period referred to above.

Employers should take steps to ensure that they understand which awards apply to them and the effects of those awards on their business. Consideration should also be given to the benefits of entering into IFAs and to putting suitable enterprise agreements in place, for those employers who wish to vary award conditions to suit their business.

Contact us

Martin Dunne, Sydney (City)
+61 2 9391 3211
mdunne@hunthunt.com.au

Ian Miller, Sydney (North West)
+61 2 9804 5704
imiller@hunthunt.com.au

David Thompson, Melbourne
+61 3 8602 9252
dthompson@hunthunt.com.au

Rachel Drew, Brisbane
+61 7 3292 9717
rdrew@macrossans.com.au

Chris Sharp, Adelaide
+61 8 8414 3385
csharp@hunthunt.com.au

Darren Miller, Perth
+61 8 9488 1300
darren.miller@marksandsands.com.au

Gregory Geason, Hobart
+61 3 6231 0131
ggeason@hunttas.com.au

Chris Osborne, Darwin
+61 8 8924 2600
cosborne@huntnt.com.au

Justine Matthews, Newcastle
+61 2 4925 5500
jmatthews@hunthunt.com.au

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