

## TRANSITIONAL ARRANGEMENTS FOR OLD STATE AWARDS AND ADVERSE ACTION

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The referral to the Federal Government by several States, including Queensland, of the remaining State industrial relations powers created a single national employment system in the private sector. Sole trader, partnership and other non corporate employers (Division 2B employers) were transferred into the federal system, having previously been covered by state awards. These State Awards were transformed into federal instruments under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and became known as Division 2B State Awards.

Most of these awards were temporary, but although most have terminated, they are still very relevant to the operation of the superseding modern awards. Fair Work Australia has created transitional arrangements to adjust the application of modern awards that replaced Division 2B State Awards.

From February 1 2011, Division 2B employers must comply with the modern award subject to the phasing provisions in Schedule A of most modern awards, allowing for the progressive change in rates of wage, loadings and penalty rates over four years.

The phasing requirements are generally applied by reference to the notional agreements preserving state awards (NAPSAs), which were created in 2006 when corporate employers were transferred into the federal system, and not to the Division 2B State Awards. The rates between the two instruments are often different.

The result though is that from 1 February 2011, the award rates covering referred employers will mostly be identical to existing national system employers subject to the requirement that existing employees should suffer no reduction in take-home pay.

The confusing nature and complexity of these changes makes the obtaining of specialised employment advice more attractive than ever for Queensland employers affected by the transition.

### PRE-EMPTIVE USE OF THE ADVERSE ACTION PROVISIONS

A new Industrial Relations threat has emerged for employers, with recent decisions demonstrating that the adverse action provisions contained in the far reaching general protections part of the Fair Work Act 2009 (Cth) can be used pre-emptively against employers. The adverse action provisions are available to not only current, but prospective and former employees as well. A claim may be brought for adverse action if an employer takes **adverse action** against an employee because the employee has or exercises a **workplace right**.

Employers need to understand what a workplace right is, in order to mitigate opportunities for claims to be made. Examples of a **workplace right** include:

- The ability to complain or inquire about the employee's employment.

*For example the lodging of a complaint for workplace harassment or bullying.*

- A benefit or responsibility arising out of a workplace law or instrument.

*Being absent from work to care for a dependant.*

- The ability to initiate or take part in proceedings arising out of a workplace law or instrument.

*Participation in the creation of a collective agreement.*

If an employer takes action against an employee because the employee has a workplace right or exercises a workplace right, then the employee may be able to make a claim for adverse action.

**Adverse action** occurs where the employer:

- dismisses the employee;
- injures the employee in their employment;
- alters the position of the employee to the employee's prejudice; or
- discriminates between the employee and other employees of the employer.

New case law illustrates how the provisions can be used pre-emptively to restrict the employer, even before any action has been taken against the employee.

In *Jones v Queensland Tertiary Admissions Centre [2009] FCA 1382*, the employee, Jones, who was the CEO of Queensland Tertiary Admissions Centre (QTAC), successfully restrained her employer, QTAC, from taking any action against her until a final hearing was held by the successful application for an interim injunction.

Whilst participating in bargaining for an enterprise agreement, a number of complaints were made against Jones alleging bullying and harassment and a subsequent investigation was initiated by QTAC. Correspondence was delivered to Jones threatening disciplinary action over the complaints. Fearing termination, Jones used the general protection provision successfully claiming that adverse action was imminent because of a workplace right, being her role in the enterprise bargaining process. An interim injunction was ordered restraining QTAC from taking any action against Jones until a final hearing held over a year later.

Ultimately the Federal Court held that QTAC did not intend to take action against Jones because of a workplace right. However the case highlights the importance and necessity for justification when threatening to take action against an employee.

Employers need to be familiar with the circumstances where an employee potentially has a workplace right and to mitigate the possibility that any proposed action against the employee could be viewed as being a result of a workplace right. The threat of adverse action by an employer could create an avenue for exploitation by an employee to prevent even bona fide actions of the employer, such as legitimate disciplinary proceedings.

All action directed at employees and prospective employees of an employer should be transparent, documented and justifiable.

If you have any questions in relation to this bulletin please do not hesitate to contact any of the members of CG Law's workplace team.

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