

## CRITICAL DEVELOPMENTS IN INDUSTRIAL RELATIONS

Over the past two weeks, two significant events have occurred, which will impact on your current industrial relations' practices and procedures. They are:

- a statement by the Australian Industrial Relations Commission (**AIRC**), issued on 2 September 2009, which deals with the transitional arrangements for moving from the current award system to the Modern Award system; and
- the passing through parliament of the Safe Work Bill 2008 (Cth).

This e-mail alert deals only with the AIRC statement while we will address the Safe Work Bill over the coming weeks.

### THE AIRC STATEMENT

As you are aware, the Modern Awards and National Employment Standards are set to commence on 1 January 2010. Recent media coverage of the process for making Modern Awards suggested that the introduction of Modern Awards will be delayed by six months. This is not the complete story.

Modern Awards are definitely still scheduled to commence on 1 January 2010.

The AIRC's Statement simply discusses the transitional arrangements of moving from the current award system to the Modern Award system. As you can no doubt appreciate, the transition from one award system to another is complex and involves consideration of a broad range of issues, including the cost impact on employers. It is useful to review some comments issued by the AIRC in its Statement to give context to the crucial items contained in its Statement:

*The impact of award modernisation on particular sectors of the economy and upon the economy overall is a matter of great significance in the award modernisation process. While this decision is concerned mainly with the transitional arrangements rather than the substantive terms of modern awards, the economic environment is still an important consideration. Some parties suggested that in some industries the operation of modern awards, or some parts of them, should be delayed for periods of up to five years on economic grounds. On the material presented to us concerning the national and international economy it is clear that we should take a cautious approach where cost increases are in prospect. We have decided that any cost increases resulting from the introduction of modern awards should be spread over a lengthy period, as contemplated by s.576T of the WR Act, unless there is broad agreement that some other approach should be adopted in relation to a particular modern award. While this is our general approach there are some departures from it.*

In summary, the important and relevant points for you, as employers, are as follows:

- Modern awards deal only with minimum terms and conditions of employment, therefore the monetary obligations imposed on employers by a particular Modern Award may be absorbed into an 'over award' payment. That is, the over award payment can 'absorb' increases to the minimum rates of pay and other entitlements. Employers ought to clearly document any such arrangements to avoid confusion and possible future litigation.

- The Modern Award is not intended to result in a reduction in the take-home pay of an employee covered by the Modern Award. If (for example) an employee's take-home pay is reduced as a result of the introduction of the Modern Award, then the employee may make an application to Fair Work Australia for an order to rectify the reduction.
- In further dealing with the introduction of Modern Awards, the AIRC importantly recognised the following issue:

*It is desirable that all employers covered by the modern award in question should be bound by the same transitional provisions. So far as practicable, the same minimum obligations should apply to all employers and the same minimum entitlements should apply to all of the employer's employees. Employers who are obliged by the transitional provisions to pay minimum wages, penalties or loadings higher than those in the modern award during the transition period might be at a significant disadvantage if employers were permitted to come into the industry after 1 January 2010 and operate under the modern award conditions. Such a situation might have serious consequences for competitiveness and perhaps also for employment.*

To alleviate this risk, the AIRC has confirmed that minimum wages (including, junior employee rates, rates for disabled employees, piecework rates and industry allowances), loadings, penalty rates and shift allowances contained in Modern Awards will apply to:

1. Employers covered by an existing federal award or NAPSA.
2. Employers which, but for the operation of an existing workplace agreement, would have been covered by the Modern Award.
3. Employers which would have been covered by a federal award or NAPSA had then been employers in the relevant industry or occupations covered by the Modern Award prior to 1 January 2010.

- Most (but not all) Modern Awards will allow for a 'phasing in' of certain terms and conditions of employment. That is, existing conditions relating to the following entitlements will remain in place until **1 July 2010** (and will not commence on 1 January 2010):

- minimum wages;
- casual and part-time loadings;
- penalty rates; and
- shift allowances.

- If the existing minimum rate of pay is lower than the rate of pay stipulated in the Modern Award (for the classification of employee concerned), then from the following dates, an employer must pay no less than the Modern Award rate of pay, minus the following proportions of the 'transitional amount':

–	1 July 2010	80%
–	1 July 2011	60%
–	1 July 2012	40%
–	1 July 2013	20%

(The 'transitional amount' is the difference between the Modern Award rate of pay and the minimum rate prescribed in the existing industrial instruments.)

A working example is as follows:

The Current NAPSA stipulates that a level 3 clerical employee is to be paid \$16 per hour (and you pay your employee this rate of pay)

The Modern Award stipulates that a similar level employee is to be paid \$19 per hour

The 'transitional amount' is \$3

The rate of pay for the employee for the full pay period following 1 July 2010 is \$16.60

(That is, 80% of \$3 (the transitional amount) is \$2.40. The resulting calculation is \$19 less 80% of the transitional amount (\$2.40) is \$16.60).

- Conversely, if the existing minimum wage is higher than the Modern Award rate of pay, then an employer must pay no less than the existing minimum wage. However, from the following dates, the employer must pay no less than the minimum wage Stipulated in the Modern Award plus the specified proportion of the 'transitional amount'.

–	1 July 2010	80%
–	1 July 2011	60%
–	1 July 2012	40%
–	1 July 2013	20%

Using the same working example:

This time, the Current NAPSA stipulates the rate of \$19 per hour and the Modern Award rate of pay is \$16 per hour.

The transitional amount is (again) \$3.

For the full pay period after 1 July 2010, the minimum rate is \$18.40.

(The resulting calculation is \$16 plus 80% of the transitional amount (\$2.40), which equates to \$18.40)

- The same calculations set out above (which apply to minimum wages) also apply to loadings and penalty rates. However, if (for example), the loading is expressed as a percentage, then the difference is calculated in relation to the percentage only.

Obviously, the above information is particularly important in enabling you to identify the minimum entitlements for your employees. Whilst there has been a slight reprieve in terms of compliance with a number of employee entitlements, it is essential that employers inform themselves of the correct arrangements to avoid future prosecution.

Please do not hesitate to contact a member of our CG Law workplace team if you have any questions.

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