



Workplace Relations Alert December 2009

Final Fair Work provisions about to commence: what you need to know before New Year

In these last few weeks before the new laws apply, you have the opportunity to make sure that your workplace is not caught off guard. In this Alert, we outline the latest changes, and suggest what you should do to respond to the forthcoming commencement of the new system.

As 2009 draws to a close, a number of crucial aspects of the new Fair Work regime have been finalised in readiness for their commencement on 1 January 2010.

Fair Work Information Statement

From 1 January 2010, employers under the national system will be required to provide all new employees with the *Fair Work Information Statement (FWIS)*. The FWIS gives employees information about the Fair Work regime, including about:

- > the 10 National Employment Standards;
- > modern awards;
- > agreement making;
- > individual flexibility arrangements;
- > freedom of association and workplace rights;
- > termination of employment;
- > right of entry; and
- > the Fair Work Ombudsman and Fair Work Australia.

An employer can provide the FWIS to employees in a number of different ways, including in person, or by post, email or fax. You can access the FWIS [here](#).

Finessing of transitional provisions

In September 2009 the Australian Industrial Relations Commission (AIRC) published model 'transitional provisions', which are designed to ease the transition from the old award system to the new modern award system. We summarised these provisions in our recent Alert '[Countdown to Award Modernisation](#)'.

The effect of the transitional provisions is that, while modern awards are generally operative from 1 January 2010, minimum wages and loadings under most modern awards will be phased-in through five instalments commencing on 1 July 2010 and concluding on 1 July 2015.

On 3 December 2009 the AIRC made three amendments to the model transitional provisions:

- > it clarified that the phasing-in arrangements apply wherever there is a difference between the old award obligation and new modern award obligation. For example, this will include where there is no relevant award-based transitional instrument, or where there is such an instrument but no equivalent provision in the modern award;
- > the provisions now specify that phasing-in will apply when there is a differential between award obligations under the new system, and obligations under the old system that would have existed but for the operation of an enterprise agreement made under the *Fair Work Act* before 1 January 2010; and
- > casual loadings derived from Australian Fair Pay and Classification pay scales are now relevant in identifying a differential between monetary obligations under the old system compared with the new modern award.

Final modern awards

The fourth and final tranche of modern awards was released by the AIRC on 4 December 2009.

This brings the total number of modern awards to 122. From 1 January 2010, those

awards will replace approximately 1560 federal and state awards.

Please let us know if you have any questions about a particular modern award that might cover employees in your workplace.

Miscellaneous Award 2010

The *Miscellaneous Award 2010* has attracted particular attention, since it has the potential to pull a number of previously award-free employees into the new modern award system. However, the potential for this is limited by the express statement in the final *Miscellaneous Award* excluding from its coverage managerial and professional employees such as:

- > accountants and finance;
- > marketing;
- > legal;
- > human resources;
- > public relations; and
- > information technology specialists.

The AIRC made it clear that the coverage of this award is intended to be narrow, the award is not intended to provide an all-encompassing safety net for any particular occupation or industry.

High income employee guarantees

A modern award does not **apply** to an employee where the employee is a 'high income employee' as defined under the *Fair*

Work Act. However, a modern award will still **cover** a *high income employee* without imposing most of the usual obligations or providing entitlements.

A 'high income employee' is one who has a guarantee, generally for a period of 12 months or more, of annual earnings exceeding the high income threshold (currently \$108,300). If an employee is employed for less than 12 months, it is also possible for the employer to give a guarantee.

A 'guarantee of annual earnings' is given where:

- > an employee is covered by a modern award;
- > the employer gives a written undertaking to pay the employee above the high income threshold;
- > the employee agrees to accept the undertaking; and
- > the guarantee is given within 14 days after the employee is employed or the day on which an existing employee agrees to vary the then contract of employment.

For this to be effective, an enterprise agreement must not apply to the employment at the time of giving the guarantee.

In the absence of an appropriate guarantee, the modern award will continue to apply to *high income employees*. Employers should therefore consider the addition of an appropriate clause in

their employment contracts. In relation to existing employees, the guarantee can be given by variation of the existing employment contract entered into soon after 1 January 2010.

Despite the existence of a high income guarantee, because the award will continue to cover the employee, a high income employee will retain the right to bring unfair dismissal proceedings.

Steps to take to ensure you are ready to comply with the Fair Work regime

- > Identify modern awards that apply.
- > Become familiar with all requirements of applicable modern awards.
- > Review existing employment contracts to ensure compliance modern awards and with *Fair Work Act* more generally.
- > Ensure availability of applicable awards in workplace.
- > Consider flexibility arrangements and/or new employment contracts.
- > Consider which employees are 'high income employees' and set high income guarantees in place.
- > Ensure FWIS becomes standard attachment to new starter letters of offer.
- > Consider whether enterprise agreements will assist you with productivity, flexibility and/or administrative efficiency.

For more information on this topic, or if you would like assistance in preparing for the new laws, please contact:

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