

# Workplace Relations Alert

## November 2009

This alert contains information on the following topics:

### Countdown to award modernisation

The modern award system will commence in almost 6 weeks, on 1 January 2010. As the date draws closer, the Australian Industrial Relations Commission (AIRC) has provided further illumination as to how the old award system will be reconciled with the new modern award system; and Minister Gillard has responded to public pressure by making further changes to the modernisation request dealing with particular awards.

### Moving to a national occupational health and safety scheme

In 2008, the federal government appointed a Panel to review existing OHS laws spread across nine jurisdictions throughout Australia. This alert provides an update.

### Countdown to award modernisation

#### The transition to modern awards

On 2 September 2009, the AIRC published model 'transitional provisions' that may be integrated into modern awards. The provisions deal with:

- absorption of award increases
- preservation of take-home pay, and
- the phasing-in of monetary obligations under a modern award.

Although they will not necessarily be universal, it appears that the transitional provisions have the potential to be included by the AIRC in all modern awards.

#### Do the phase-in arrangements apply to all employers and employees?

No. A number of factors are relevant, and in particular the phasing-in arrangements will apply only if:

- the relevant modern award contains the model transitional provisions, and
- before 1 January 2010, an employee was covered by an award (including a NAPSA or pre-reform federal award) or a pay scale which contained wages, loadings or penalty rates that were either higher or lower than the equivalent monetary obligations in the modern award.

#### Are all conditions under an award subject to the phase-in arrangements?

No. Only the following monetary obligations will be phased in under the model provisions:

- minimum wage rates and piecework rates (including junior rates)
- casual loadings
- part-time loadings
- Saturday, Sunday, public holiday, evening or other penalties, and
- shift allowances/penalties.

All other modern award provisions will apply from 1 January 2010. This includes all non-monetary provisions, and also work and expense-related allowances.

#### How will the phase-in work?

The transitional provisions are underpinned by two important ideas:

- monetary obligations contained in a modern award can be absorbed into over-award payments, and
- award modernisation (including the transitional arrangements) is not intended to result in a reduction in the take-home pay of employees covered by a modern award.

Subject to these principles, the monetary obligations identified above will be phased-in by reference to the 'transitional amount' (the differential between the modern award rate and old award rate). The phase-in will commence on 1 July 2010, continuing in annual increments of 20% until 1 July 2014. So:

- if the old rate is lower, the applicable rate for both existing and new employees will remain at the old rate until 1 July 2010, and then will increase by 20% of the transitional amount each year, and
- if the old rate is higher, the applicable rate for existing employees will remain at the old rate until the new rate catches up with it through award increases (because of the no reduction in take-home pay principle); BUT the applicable rate for new employees hired before 1 July 2010 will be the old rate, and for new employees hired in each stage of the transitional period, the adjusted (decreased) rate for that period.

The system is logical, but in practice may be very confusing.



Employers will need to identify whether the transitional provisions will be relevant to their employees. Issues of award coverage and disparity of wages and other monetary conditions between the old and new awards should be determined in order to best move forward in meeting the legal obligations under the new system. Because of the potential complexity, some employers for whom this is feasible may choose to simply pay the higher of the old and new rates to all employees; while others may seek to set rates in an enterprise agreement.

### Removal of exemption clause pulls additional employees into the award system

The ASU and the FSU have each made successful claims for the deletion of exemption clauses in two modern awards. These deletions are likely to have far-reaching effects.

Following a request from Minister Gillard, the AIRC has varied the *Clerks – Private Sector Award 2010* and the *Banking, Finance and Insurance Award 2010*, deleting the respective exemption clauses. The exemption clauses had the effect of excluding certain employees, who were paid above \$851 per week, from a significant number of award obligations. Because of the very wide coverage of the Clerks Award in particular, this has the effect of bringing a large number of employees effectively back into the award system.

However, rather than simply remove the possibility of annualised salaries replacing some award benefits, the AIRC replaced the exemption clause with an annualised salary clause. Under this provision, an employer may pay an employee an annualised salary in satisfaction of a number of key award obligations such as wages, penalties and overtime. The annual salary must, however, be no less than the amount the employee would otherwise have received under the award. This is a higher bar for an employer to meet compared with the exemption provision.

To soften the blow of these new arrangements transitional provisions will allow employers to apply an exemption under either modern award until 30 June 2010.

If your employees include clerical workers or workers in the finance sector, and the exemptions in the current awards have applied to them, you will need to recalculate packages to ensure that their annualised salaries meet the requirements of the new provisions.

## Moving to a national occupational health and safety scheme

There has been considerable media coverage of moves towards the introduction of new national occupational health and safety (OHS) laws.

In 2008, the federal government appointed a Panel to review existing OHS laws, which are spread across nine jurisdictions throughout Australia. The Panel made hundreds of recommendations for reform, with the aim of establishing one national scheme. A draft bill to be known as the Safe Work Act was produced in late September 2009. It is expected that the new national OHS scheme will become operative from late 2011.

The draft legislation incorporates the primary recommendations of the Panel, including:

- establishment of one national model OHS Act, the Safe Work Act itself
- establishment of one supervising body, Safe Work Australia
- increased penalties of up to three times the current maximum level. For example, the maximum penalty for corporations would be up to \$3 million. Maximum penalties for individual officers of companies for worst case offences would be up to \$1.5 million and five years' jail
- change of focus on directors' and officers' liabilities, so that there is a pro-active duty to take action on OHS matters

- imposition of a duty of 'due diligence' for directors and officers
- retention of prosecution rights through either the regulator, Safe Work Australia or the Commonwealth DPP for criminal offences, rather than unions or individuals bringing such claims, and
- onus on the prosecution rather than the 'reverse onus' that currently applies in New South Wales and Queensland.

Recommendations of the Panel, the government's response, publication of the draft Safe Work Act and submissions of all interested parties were concluded on 9 November 2009. The Review Panel and the Workplace Relations Ministers' Council will assess the latest round of submissions.

It is expected that further amendments will be made to the draft legislation during the course of 2010, along with the development of industry-specific Codes of Practice. The legislation should be in place by the end of 2010 for implementation in the following year.

Employers should stay aware of the progress of the draft legislation, particularly when reviewing occupational health and safety policies and procedures. Please let us know if you would like any assistance in working through your options and analysing the new laws.



For more information, please contact our Workplace Relations and Employment Team:



**Mark Branagan**  
Partner  
+61 3 8080 3638  
[mark.branagan@thomsonplayfordcutlers.com.au](mailto:mark.branagan@thomsonplayfordcutlers.com.au)



**Jacquie Seemann**  
Partner  
+61 2 9020 5757  
[jacquie.seemann@thomsonplayfordcutlers.com.au](mailto:jacquie.seemann@thomsonplayfordcutlers.com.au)



**Tony Vernier**  
Partner  
+61 2 8248 3471  
[tony.vernier@thomsonplayfordcutlers.com.au](mailto:tony.vernier@thomsonplayfordcutlers.com.au)