

COMPARATIVE WAGE JUSTICE MAKES A COMEBACK VIA THE EQUAL REMUNERATION DECISION

Readers will be aware that on 1st February 2012 Fair Work Australia [decided](#) to increase the minimum award rates of pay for employees covered by the [Social Community Home Care and Disability Services Award 2010](#). The [Equal Remuneration Decision](#) covering Australian employees working in social, community home care and disability services will be phased-in over eight years. The increase to minimum wages has been welcomed by employers and employees working in the industry and in many ways are long overdue. However, the basis for the decision suggests that old fashioned 1970's comparative wage justice is back in vogue.

The Decision of the majority of the Full Bench of Fair Work Australia effectively adopted the terms of the Joint Submission of the Australian Government and the Australian Services Union (ASU). However, in a strong and cogent judgement Vice President Watson rejected the application and correctly characterised the true nature of the decision:

"The case is unprecedented by reference to international equal pay cases. It does not seek equal pay for men and women in a single business, or in an industry. Rather, it seeks to establish a large minimum overaward payment for all men and women in the entire SACS industry to a level approaching public sector wage levels. It has more in common with a case based on comparative wage justice than equal pay]"¹

He further warned that the majority decision was likely to set a dangerous precedent and effectively halted any new enterprise bargaining in the sector for at least nine years.

"The consequences of this are clear. If the claim in this matter is granted, it is inevitable that there will be very little or no enterprise bargaining in the entire SACS industry for very many years, probably decades. ... The precedent it creates for many other industries who cannot afford to pay significantly above the award and are female dominated highlights the need for great caution. It is not an overstatement to suggest that the future

*status of enterprise bargaining in this and other industries with similar attributes is at stake."*²

The industries that are vulnerable are aged care, employment services, and children services. The Decision has also perplexed many employers that employ staff under the Social Community Home Care and Disability Services Award 2010 particularly as the decision covers more issues than equal remuneration.

The key points to note from the decision are:

- The Decision does not apply to employers and employees covered by other modern awards that are performing caring work e.g. aged care and nursing. However, a flow-on to these employees is a real possibility due to the similar nature of the work performed which underlined the reason for the decision.
- Organisations that do employ staff in jobs classified under the Social Community Home Care and Disability Services Award 2010 are obliged to pass on the increases to minimum wages granted in the Equal Remuneration Order. However, the increases may be absorbed into over-award wages.
- The Equal Remuneration Order phases-in the increases in nine instalments over eight years and incorporates an additional four per cent to compensate for the sector's apparent lack of capacity to bargain collectively for over award wages.
- The adjustment to the modern award minimum wages will occur on 1 December each year and will be paid in addition to the Annual Wage Review adjustments on 1 July each year. This means, for example, that employees classified at Level 3 (entry level graduate) are likely to receive increases to the minimum wage payable to them of approximately 5.4 per cent each year (assuming the Annual Wage Review increases of 2.5 per cent).
- The decision does not oblige State and Australian Government funding agencies to meet the additional cost to providers of the higher wages.

Please contact [Maguire Consulting](#) if you need advice on how to translate the job classification or are unsure of the financial implications of the decision for your organisation.

¹ Paragraph 84

² Paragraph 119

Fair Work Act Review

[Submissions](#) to the Review of the Fair Work Act are now available to read and download.

On 20 December 2011, the Hon Bill Shorten MP, Minister for Employment and Workplace Relations announced the review, including [terms of reference](#).

The review is being conducted by Reserve Bank Board Member Dr John Edwards, former Federal Court Judge, the Honourable Michael Moore and legal and workplace relations academic Professor Emeritus Ron McCallum AO.

Workplace health and safety – the national harmonised system

Readers operating businesses in New South Wales, Queensland, Northern Territory and the ACT are now obliged to adhere to the 'harmonised' workplace health and safety laws.

The harmonisation of the laws means that health and safety within those States and Territories are now regulated by the [model workplace health and safety act](#) developed through the Council of Australian Governments. The impact of the laws will vary depending upon the changes that were made to ensure the local law was consistent with the national laws.

Go to the relevant State or Territory Government agency website for further information. Alternatively contact us to discuss the particular circumstances for your business.



ATO warns of Superannuation Campaign

The Australian Tax Office has warned employers that it will be looking very closely at employers in the cafe and restaurant, real estate services or carpentry services industries over the next six months. In particular, it claims that there is a high risk of employers in these industries of not meeting their superannuation responsibilities. The ATO is currently running an education campaign to educate employers in these industries to better understand the obligations.

[\[More\]](#)

Small business benchmarks

An interesting insight to the attitude of the Australian Tax Office to small business tax compliance is the ATO Small business benchmarks. The ATO publishes a series of benchmarks such as the cost of sales to total sales and the cost of labour to annual turnover to assess whether small business are declaring all of their taxable income.

The ATO suggests the benchmarks are a guide to help businesses meet their tax obligations by enabling them to compare their performance against similar businesses. In reality they are a tool to enable the ATO to focus its auditing activities.

[\[More\]](#)

Wage Price Index

During September to December 2011, the Wage Price Indexes across Australia rose 0.9%. The rise in the trend index through the year to the December quarter 2011 for all employee jobs was 3.7%. The WPI is a useful benchmark to compare movements in salaries in your own businesses.

The rise at the industry level ranged from 0.5% for Transport, postal and warehousing; Education and training; and Other services to 1.6% for Arts and recreation services. Public sector wage price index rose 0.7%, slightly lower than the Private and All sectors

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Modern Award Review 2012

In addition to the Review of the Fair Work Act 2009, Fair Work Australia is required to conduct a review of all modern awards two years after the commencement of the Act. The review is now underway.

Applications to vary a modern award as part of the review must be filed by Thursday, 8 March 2012. A more detailed timetable for the review of modern awards will be issued after 8 March 2012.

This should be an interesting exercise as the modern awards remain a contentious political issue and many employer groups are urging the Australian Government to refer the review to the Productivity Commission. Nevertheless, any employer that wishes to make a submission should [contact us](#) to discuss the issues of interest so that we may consider the feasibility of making an application to vary the modern award.

TIP OF THE MONTH: Is there an alternative to cashing-out annual and personal leave through enterprise bargaining?

The cashing out of annual and personal leave is prescribed by the National Employment Standards (NES) and is limited to balances in excess of the yearly accruals. The means of cashing out leave is further limited to a modern award or enterprise agreement. However, a clever employer may have discovered a method to overcome the limitations of the NES. The problem is the Federal Court and Fair Work Australia has different attitudes to the matter.

Fair Work Australia

The NES prohibits the cashing out of annual and personal leave except in accordance with the terms of a modern award or enterprise agreement. In 2009 Fair Work Australia refused to include cashing out of leave in the modern awards. Therefore this left only the vehicle of enterprise bargaining to cash out accrued employee leave for award covered employees.

In November 2011 a majority of the Full Bench of Fair Work Australia upheld an appeal against a decision not to approve an enterprise agreement that 'rolled-up' the entitlements to annual, personal, long service leave and overtime payments into a total hourly rate of pay.

The relevant clause in the [Hull-Moody Finishes Pty Ltd Enterprise Agreement 2011](#) provided a total hourly rate of pay loaded to provide compensation for penalty rates which would be payable under a relevant award and incorporates payment in advance for annual, long service and personal leave.

The Full Bench decided:

"...the payment arrangement in the Agreement does not exclude the NES because the NES is expressly adopted, each of the annual leave benefits in the NES are reflected in the Agreement and the payment arrangement does not amount to cashing out of annual leave."

"In determining this matter the focus must be on whether the benefits provided by the NES are retained or removed by operation of the payment arrangements. As the amount of leave available to be taken is equivalent to that provided for in the NES, and the Agreement provides for payment with respect to annual leave at the level required by s 90, we do not believe that the arrangement is inconsistent with the NES. It is unnecessary to consider the prohibition of cashing out or the conditions in the Act

*with regard to cashing out as the arrangement cannot properly be described as cashing out."*³

The key to the decision to approve the arrangement lies in the interpretation of the NES. In particular, the Full Bench said:

"The real difference between the conventional operation of the NES and the arrangement under this Agreement is the timing of payments. In our view there is no obligation in the NES to make a payment for annual leave at a particular time, although a delay in payment may be in a different category. Even if there was an obligation to pay for leave at the time it is taken, we do not believe that payment in advance amounts to the exclusion of the entitlement to payment."

Federal Court

In contrast, Justice Gray⁴ was asked to decide whether an additional weekly payment of 1.5 hours in lieu of paid personal leave provided in an Australian Workplace Agreement (AWA) amounted to unlawful cashing out in breach of the NES. Notwithstanding the similarities to the arrangements in the *Hull-Moody Finishes Pty Ltd Enterprise Agreement 2011* Justice Gray found that the payment was unlawful.

Conclusions

We now have a situation where the Full Bench of Fair Work Australia believes an over-award payment in lieu of personal and annual leave is permissible but the Federal Court does not agree. Fair Work Australia is obliged to follow the decisions of the more senior tribunal and therefore I would expect that the decision of Justice Gray will be adopted as precedent for any further agreements that are presented for approval by Fair Work Australia.

Please [contact](#) Paul Maguire to discuss the implications for your business if you are unsure or require assistance.



3 [2011] FWAFB 6709 paragraph 43-44

4 [2012] FCA 45