

The time for talk is over - the fair work safety net of modern awards and national employment standards applies now

If you hadn't noticed the Fair Work Act commenced operation in full on 1 January 2010. The ten National Employment Standards ("NES") and 122 modern industry and occupational awards now prescribe the national minimum safety net of pay and conditions. In April Fair Work Australia will deliver its first award wage safety net decision.

The modern awards replaced approximately 1560 federal and state awards on 1 January 2010. See the Christmas 2009 edition of Employee Relations MONTHLY for a full commentary on the impact and the actions that employers' should be undertaking to comply with the new laws

Transitional provisions

The key challenge that employers must address before 1 July is to calculate the modern award minimum rates of pay applicable to each of their employees. Complex transitional provisions apply to all award covered employees from 1 July 2010. Unless you commence this task now then you risk paying either too much or too little in wages.

Where there is a difference (either higher or lower) in modern awards minimum wages, casual and part-time loadings, evening, weekend and public holiday penalties, industry and shift allowances, to current transitional awards and pay scales then those differences in pay will be phased in over five (5) years commencing 1 July 2010.

This means that employers can continue to apply the minimum rates, loadings, allowance and penalties that they currently use until 1 July. However, from that date they must be ready to apply the adjusted minimum rates. In order to accurately calculate the transitional rates you should grade of all employees into the job classifications of applicable modern awards now.

[Contact us](#) if you need assistance in performing this task.

Annual award wage safety net review

The 2009–10 annual wage review is being conducted by the Minimum Wage Panel of Fair Work Australia. Submissions have been received from various interested parties including the ACTU and employer bodies. The Panel is assessing these claims and will accept submissions in reply up until 30 April 2010.

The ACTU is seeking a \$27 per week increase to the federal minimum wage (FMW), and all award and transitional award wages.

There will be an opportunity for consultations with the members of the Minimum Wage Panel in the week commencing 17 May 2010. The consultations will be in Melbourne with the possibility of video links to other cities if required. Time will be limited and parties wishing to take part in the consultations should express their interest in doing so by 3 May 2010.

A decision is expected in June and whatever result will commence effective from 1 July 2010.

[\[More\]](#)

Arbitration and enterprise agreements

Readers may have noticed reports of a decision of Fair Work Australia of 21 January this year where Commissioner Smith refused to approve an enterprise agreement for Woolworths Produce and Recycling Distribution Centre employees because it did not provide for compulsory arbitration of disputes.

Commissioner Smith's reasoning was that the law required that *'... access to arbitration was a prerequisite to the approval of an agreement.'*

The decision has been overturned on appeal [\(2010\) FWA 1464](#). The decision is significant in that it confirms the view that enterprise agreements do not have to provide an avenue to arbitration unless both employer and employees agree to do so.

TIP OF THE MONTH: Understanding the difference between an employee and an independent contractor

Employers will sometimes engage a person to perform work for the business and pay them an agreed fee under a contract for service. A typical example is a person engaged to deliver sessional training or educational services to clients of the business or to staff undergoing training toward a recognised qualification. The person may have an Australian Business Number (ABN) and may provide an invoice for payment for work performed. However, what was once a clear and simple business relationship has over time become complex.

We now must ask ourselves the question: Is this person really an independent contractor? The answer will matter as it affects the employer's obligations to:

- Pay superannuation guarantee
- Insure the person for accident compensation
- Pay modern award rates of pay and conditions
- Apply the minimum National standards for annual, personal, parental, long service leave and public holidays

A failure to correctly identify a person engaged as an independent contractor, as an employee may result in penalties for the employer as well as an obligation to re-pay award wages, penalties, overtime, annual leave and superannuation.

How do you determine whether a person is an independent contractor?

Laws in respect of superannuation, accident compensation, awards and minimum standards of employment vary in the manner to which this question is answered. Nevertheless, there is sufficient commonality across the applicable laws to guide employers toward a sensible answer.

For example, each of legislative instruments regulating the above subjects will apply the following common law tests to ascertain the true nature of the relationship.

Control test

The Control test refers to the degree of control exercised by the employer over the worker. For

example, does the employer decide when and where the work is to be performed? Is the worker required to follow the directions of the employer in the performance of work? Does the employer control the manner in which the work is performed? Is the worker required to perform the work themselves? If the answer is YES, then it is likely that the person is an employee and not an independent contractor.

Integration test

The Integration test examines the extent to which the worker is integrated into the business that he or she is working. For example, is the person working for other businesses? Is the person supplying their own equipment and facilities? Do they complete and provide their own invoices? Do they work through a corporate entity? Do they display their own business name or the name of the employer on equipment and marketing material? In other words, if the worker relies upon or is treated the same as an employee then it is likely that they will be an employee.

Results test

The Results test considers whether the worker is employed to achieve a specific result rather than employed generally to perform work under the direction of the employer. Performance of the tasks required of a particular job will normally be at the discretion of the independent contractor. Payment of an agreed fee will depend upon the satisfactory completion of the task or delivery of a result. The independent contractor bears the risk of losing a payment, or rectifying faults, for failure to satisfactorily complete the job or deliver the result agreed between the parties.

Other considerations

Laws regulating superannuation guarantee and accident compensation in particular, cast a wider net to capture persons that might otherwise be considered an independent contractor under one or more of the common law tests listed above.

For example, the obligation to pay superannuation of 9% of an employee's ordinary time earnings extends to a person who works under a contract that is *solely or principally for the labour* of the person. (Subsection 12(3) SGAA).

Where the terms of the contract, in light of the subsequent conduct of the parties, indicate:

- a. the individual is remunerated (either wholly or principally) for their personal labour and skills;

b. the individual must perform the contractual work personally (there is no right of delegation); and

c. the individual is not paid to achieve a result,

the contract is considered to be wholly or principally for the labour of the individual engaged and he or she will be an employee under that sub-section regardless of whether or not they operate as a business.

Accident compensation laws enacted by the States also 'deem' particular persons to be employees for the purpose of insurance and payment of compensation.

The legislation also establishes formula or tests devised to assess whether or not the person will be covered as a 'worker.' For example, the '*Indicative test*' prescribed in the Victorian regulations scores the answers to 9 questions on the nature of the contractor's business. If the score is 9 or higher (and there are no contra-indications) then the contractor will not be considered a worker for the purpose of workers compensation. If the score is less than 9, the person is deemed to be an employee.

What about companies?

Where a person performs work for another party through an entity such as a company or trust, there is generally no employer and employee relationship between the individual and the other party. This is because the company or trust (not the individual person) has entered into an agreement. In such instances the intermediary company will be responsible for superannuation, accident compensation and award wages in the same way any other employer would be responsible. This is specifically recognised in respect of the obligation to pay superannuation (SGR2005/1). Nevertheless, Australian courts will look beyond the corporate veil to examine the true nature of the relationship using the common law tests described above. Therefore, the existence of a corporate entity may be indicative of a commercial but it will not be conclusive.

An Australian Business Number (ABN) will not be sufficient to define a person as an independent contractor. The fact that an individual has an ABN does not prevent that individual from also being engaged as an employee in another role or position. Someone who carries on a business or trade in their own right other than as an employee might also at certain times perform work for another as an employee.

A corporate structure is not of any consequence unless the nature of the contractual relationship falls within one or other of the exemptions provided under the various State accident compensation laws. For

example, in Victoria the employer will be required to pay insurance in respect of a worker unless the contract for service fits the following exemptions:

- (i) the provision of labour is ancillary to the provision of materials and/or equipment.
- (ii) the services rendered under the contract are not ordinarily required by the principal, and the contractor ordinarily renders those services to the public generally.
- (iii) contracts for the provisions of services of a kind ordinarily required by the principal for less than 180 days in a financial year.
- (iv) contracts where services are provided for a period or periods in aggregate that do not exceed 90 days in a financial year.
- (v) contracts where the contractor employs or engages other persons, whether employees or contractors, to perform some or all of the work required under the contract.
- (vi) contracts where the contractor employs or engages other persons, whether employees or contractors, to perform some or all of the work required under the contract.
- (vii) a contract under which a person provides services for or in relation to the door-to-door sale of goods.

Conclusion

When one reads through the array of cases and legislation on this matter it seems clear that the answer to the question of whether a person is an independent contractor will invariably be addressed under Australian law through the agency of a further question: - Who is best able to pay?

A contract for service may provide enormous flexibility for employers and create new opportunities for the contractor, but unless the contract delivers benefits and fulfils obligations commensurate with minimum conditions of employment under awards, the NES, superannuation and accident compensation then it will invariably be considered a 'sham' arrangement.

This is not to discourage employers from entering into *business to business* contracts with people that are suitably qualified and well placed to deliver services that employees would otherwise be expected to perform. This may be the business model through which you can best compete in the market. However, such arrangements will carry risks.

Contact [Paul Maguire](mailto:Paul.Maguire@maguire.com.au) if you wish to discuss this matter or need specific advice for your business.

AROUND THE STATES - What's making news in state jurisdictions?

New South Wales

Referral of powers

All NSW employers and employees covered by the NSW industrial relations system (mainly sole traders and partnerships) moved into the national system on 1 January 2010. The State awards applicable to those employers and employees will continue in force until 31 December 2010 and be known as Division 2B Awards. After that date the modern awards will apply.

Easter Shop Trading Hours

Trading restrictions apply to Good Friday and Easter Sunday. General shops in NSW such as department and hardware stores, supermarkets, take away liquor and clothing shops cannot trade unless they have an exemption.

[\[More\]](#)

Victoria

EEO Bill

The Victorian government has introduced a new Equal Opportunity Bill into the Victorian Parliament. If passed it will give the Victorian Equal Opportunity and Human Rights Commission the ability to investigate '*persistent and systemic discrimination*' without first requiring a complaint to be made.

The Minister in charge Rob Hulls claims that the emphasis will be on prevention and early intervention to eliminate systemic discrimination. However, it is clear that the real intent of the Bill is to empower the Victorian Equal Opportunity and Human Rights Commission to force particular employers to conform to its own ideological view of appropriate behaviour.

[\[More\]](#)

Queensland

Referral of powers

The Queensland Government has referred the state's industrial relations powers for the private sector to the Commonwealth with an effective date of 1 January 2010.

As from this date all employers and employees, with the exception of state and local government, will be

covered by the national industrial relations system administered by the Commonwealth Government.

[\[More\]](#)

Western Australia

Referral of powers

The Western Australian government has decided not refer its industrial relations powers to the Commonwealth. It will continue to operate the two tier system.

Tasmania

Referral of powers

The Tasmanian Industrial Relations (Commonwealth powers) Act 2009 has been passed by the Tasmanian Parliament. This Act facilitates the referral of industrial relation powers necessary for a single national system for the private sector. The Local Government sector and the Community Sector are now under the national system but not the Public Sector which will continue under the aegis of the Tasmanian Industrial Commission.

South Australia

Referral of powers

The South Australian Parliament has passed the Fair Work (Commonwealth Powers) Act 2009. It received the Governors assent on 1 December 2009. The Act enables the entire SA private sector to participate in the national system commencing on 1 January 2010.

Reminder - Fair Work Information Statement

The [Fair Work Information Statement](#) must be provided to all new employees engaged on or after 1 January 2010. Download it and retain a copy.

Further assistance

Get assistance from [Maguire Consulting](#) wherever you are unsure or would prefer us to guide you.