

TRANSITION TO MODERN AWARDS - SPREADING THE PAIN OVER FIVE YEARS

The Australian Industrial Relations Commission has decided to implement key elements of the Australian government's national system of modern awards over five years rather than all at once. The decision published on 2 September addresses the enormous political and financial headache of reducing multiple wage structures into a single coherent national system based on the employee's industry or occupation. The aim is to spread the pain but is more likely to add to the annual cost of employment. No employee may suffer a reduction in take home pay but an employer must pass on the higher rates.

The Commission has published a standard clause that will be included in all modern awards. The arrangements are quite complex and will challenge most employers ability to understand and apply it correctly. In summary the main elements of the transitional arrangements will be:

- The phasing in of terms and conditions in the modern award affecting pay i.e. minimum wages (including junior, trainee, apprentice and supported wage rates), casual and part-time loadings, weekend, public holiday and evening penalty rates, and shift allowances.
- The phasing-in will occur in five instalments implemented yearly and will apply to both increases and decreases to the award terms affecting pay.
- The instalments will each be 20% of the total increase or decrease in the modern award rate. For example, if the difference between the current award hourly rate of pay and the new modern award rate is \$2, then the increase will be introduced in instalments of 40c per hour.
- The phasing-in will commence from 1 July 2010 and will be completed by 1 July 2014.
- Until 1 July 2010 current pre-modern award conditions relating to minimum wages, casual and part-time loadings, Saturday, Sunday, public holiday, evening and other penalties and shift allowances will continue to apply

- Employees must not suffer reductions in *take-home pay* as a result of the introduction of the modern award rates. *Take home pay* is inclusive of wages, incentive based payments, allowances and overtime but disregarding the effect of deductions authorised by the employee (such as salary sacrifice).
- New employees must be paid the same rate as other employees i.e. the phased-in rate.
- Phasing-in will operate in conjunction with the Fair Work Australia annual wage review which will also operate from 1 July each year.
- Increases to pay occurring from the phasing-in may be absorbed against any over-award payments made to the employee.
- All other terms and conditions of employment provided under the modern award will apply from 1 January 2010.

Further and more detailed information on the operation of the modern awards and the transitional arrangements will be provided over the next few months. Subscribers to [Employee Relations Online for Employment Services](#) can access fact sheets addressing each of the major elements of award modernisation. However, if you have any questions on the impact of modern awards on your business please [contact us](#).

Unemployment rate steady at 5.8%

The Australian Bureau of Statistics (ABS) has reported Australia's unemployment rate has remained steady in August. However, underemployment has risen in the last quarter to 7.9%. The underutilisation rate (which measures the rate of persons either unemployed or looking for more hours of work) stands at 13.9%.

The Treasury has also revised its predictions of 8% unemployment as the Australian economy seems to have recovered from the initial shock of the collapse of US and international banking.

[\[More\]](#)

Stage 3 modern awards published

Forty-nine modern awards have been published by the Australian Industrial Relations Commission in its Stage 3 of award modernisation. Awards that may be of interest to readers include:

- [Building and Construction General On-site Award 2010](#)
- [Clerks—Private Sector Award 2010](#)
- [Contract Call Centres Award 2010](#)
- [Educational Services \(Post-Secondary Education\) Award 2010](#)
- [General Retail Industry Award 2010](#)
- [Graphic Arts, Printing and Publishing Award 2010](#)
- [Health Professionals and Support Services Award 2010](#)
- [Hospitality Industry \(General\) Award 2010](#)
- [Manufacturing and Associated Industries and Occupations Award 2010](#)
- [Meat Industry Award 2010](#)
- [Medical Practitioners Award 2010](#)

Safe Work Australia Bill passes Senate

On 7 September 2009 the Senate passed without amendments the Safe Work Australia Bill 2008. Safe Work Australia will now be established as an independent statutory agency with primary responsibility to improve occupational health and safety and workers' compensation arrangements across Australia.

According to the information provided by Safe Work Australia, this gives effect to the Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety, agreed by COAG on 3 July 2008. Safe Work Australia will operate under the Commonwealth Government's accountability and governance frameworks.

Under the new arrangements, the Safe Work Australia Council will be known as Safe Work Australia, with former Council members being re-appointed. Safe Work Australia will still have 15 members, including an independent Chair, nine members representing the Commonwealth and each State and Territory, two members representing the

interests of workers, two representing the interests of employers and the CEO of Safe Work Australia.

The primary aim of this body is to build a common approach to health and safety across all of the Australian States to create certainty for employers and minimise the waste that occurs in having 7 separate systems.

It is expected that the new statutory agency will become operational in November 2009.

[\[More\]](#)

TIP OF THE MONTH: Understanding the new transfer of business rules under the Fair Work Act 2009

Introduction

The Fair Work Act 2009 changed how employees transferring to a new employer under a transmission or transfer of business are treated. The law that commenced on 1 July 2009 now regulates the application of awards and agreements to employees that transfer from one employer to another on the basis of whether the work performed by the employee has transferred rather than the nature of the business in the hands of the new employer. This will capture a significantly larger range of transactions between businesses and related entities of a business including any business contemplating mergers, acquisitions, and the movement of functions between related entities or contracting of services.

Defining a transfer of business

A transfer of business from one employer (the old employer) to another employer (the new employer) is defined as when:

- The employment of an employee of the old employer has terminated; and
- Within 3 months after the termination, the employee becomes employed by the new employer; and
- The transferring employee performs the same, or substantially the same, work (the transferring work) for the new employer as she or he performed for the old employer; and
- There is a connection between the old employer and the new employer.

What is 'the same, or substantially the same' work?

The explanatory memo to the Act suggests that it is intended that this provision not be construed in a technical manner. It recognises that, in a transfer of business situation, there may well be some minor differences between the work performed for the respective employers. However, the requirement is satisfied where, overall, the work is the same or substantially the same – even if the precise duties of the employees, or the manner in which they are performed, have changed.

It may also be possible to categorise the work more generally. If for example, the old employer operates a retail business and sells it to the new employer, the work might be characterised generally as retail sales. The fact that an employee may have worked at the point of sale for the old employer but now works in merchandising for the new employer would not stop the employee from being defined as a *transferring* employee for the purpose of the Fair Work Act.

What is a connection between the new and old employer?

Transfer of assets

There is a connection between the old employer and the new employer if, the new employer, or an associated entity of the new employer, owns or has the beneficial use of some or all of the assets (whether tangible or intangible) previously owned or beneficially used by the old employer, and that are used in connection with (or relate to) the work that has transferred.

Outsourcing work

There is a connection between the old employer and the new employer if the transferring work is performed by one or more transferring employees, as employees of the new employer, because the old employer, or an associated entity of the old employer, has outsourced the transferring work to the new employer or an associated entity of the new employer. This is also the case when the new employer has taken work back to be performed in-house.

Associated entities

There is a connection between the old employer and the new employer if the new employer is an associated entity of the old employer when the transferring employee becomes employed by the new employer. Using the retail business analogy once again, an employee transferring between retail

stores that are owned by the same directors under a different company is still a *transferring* employee.

What employment instrument transfers with the employee?

The employment instruments that transfers with the employee may be:

- An enterprise agreement that has been approved by Fair Work Australia
- A workplace determination
- A named employer award (company award)
- An individual flexibility arrangement made under an enterprise agreement or named employer award applicable to a transferring employee
- A transitional instrument (pre-Fair Work Act awards and agreements).

What about new employees performing the same work?

If any new employees are recruited after the transmission of business and perform similar work they too will be entitled to the same named employer award or enterprise agreement conditions but only if the new employer is NOT covered by an enterprise agreement or a modern award that applies to the new employees.

How long does the transferring instrument apply?

The new employer will be covered by a named employer award or enterprise agreement that covered that employee under the old employer indefinitely or until replaced with another enterprise agreement. An existing enterprise agreement applying to employees of the new employer that may otherwise be capable of application to the transferring employees will not cover the transferring employees.

Can the affect of the transfer be overruled or amended?

Fair Work Australia is permitted to make certain orders that modify the general transfer of business rules. In particular, Fair Work Australia is able to make orders regarding the coverage of certain instruments and their application to transferring and non-transferring employees.

In deciding whether to make such orders Fair Work Australia must consider:

- The views of the new employer or a person who is likely to be the new employer; and the employees who would be affected by the order;
- Whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;
- If the order relates to an enterprise agreement—the nominal expiry date of the agreement;
- The financial position of the new employer,
- The efficient operation of the new employer's enterprise and the degree of fit between any transferable instrument and arrangements that already exist in the new employer's enterprise.

Transfers and the National Employment Standards

Recognition of prior service

When a transfer of business occurs after 1 January 2010, a new employer will be bound to recognise employees' service with the old employer when calculating certain National Employment Standards entitlements. These are:

- Personal/carer's leave,
- Parental leave and
- The right to request flexible work arrangements.

What about annual leave and redundancy payments?

In the case of annual leave and redundancy pay, the new employer has a choice whether to recognise service. If the new employer does not agree to recognise service, the old employer must pay out these entitlements. In addition, the National Employment Standards will allow for an employer's redundancy obligations to be waived on a transfer of business should an offer of employment be made by the new employer on substantially similar terms and conditions.

If an employee is transferred to an employer that is an associated entity of the previous employer, service with the previous employer will be deemed to be continuous for the purposes of all service-related National Employment Standards entitlements including annual leave and redundancy pay.

Are transferring employees required to undergo a qualifying period?

A six month qualifying period may be imposed on a transferring employee (and therefore restricting their right to claim unfair dismissal) only where the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised.

Conclusion

The Fair Work Act effectively sidesteps the High Court's position on the nature of transmission of businesses and the obligations on employers to transferring employees. The Australian High Court focused on the nature of the business in the hands of the new employer rather than the nature of the work performed by the employee where businesses are bought and sold or parts of a business are outsourced. It is now clear that the work performed by the employee is the critical factor regulating whether or not the employee carries with them to the new employer an applicable employment instrument and the recognition of their prior service.

What should an employer do before transferring a business?

Businesses should extend due diligence on the purchase or sale of a business to include the cost of transferring employees. Employers should request the disclosure of any award or agreements applicable to employees and a calculation of contingent as well as accrued liabilities to staff.

Employers will have some degree of room to move on the cost of employment of transferring employees' i.e. annual leave and redundancy, but will otherwise be bound to recognise the transferring employees' service and any applicable enterprise agreement or modern award. Transfer of employees between related entities will not affect the employer's obligations or the employee's entitlements as long as agreements and awards extend across the related entities. All service will be recognised for all purposes.

Finally, the employer should weight the benefits of an application to Fair Work Australia for an order that the transferring employment instrument not cover them or are modified to better fit the new business.

Further information and resources on the new system are available to subscribers to [Employee relations online for Employment services](#). Other Clients of Maguire Consulting may also access information by contacting [Paul Maguire](#).

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

New South Wales

Industrial Relations workshops

In November 2009 the Office of Industrial Relations will be delivering a range of free and paid workshops across NSW. The free Workplace Arrangements workshops outline the options available to businesses when employing staff. OIR workshops are suitable for businesses and organisations covered by either the state or national industrial relations system.

[\[More\]](#)

Queensland

State wage case 2009

The Full Bench of the Queensland Industrial Relations Commission has decided to grant the following:

- \$16.20 wage increase for State award employees;
- 2.5% allowance increase for award employees;
- \$16.20 increase to the Queensland Minimum Wage.

The operative date for increases is 1 September 2009.

[\[More\]](#)

Western Australia

State wage decision 2009

On Thursday 11 June 2009 the Western Australian Industrial Relations Commission handed down the 2009 State Wage decision, ordering a \$12.30 per week increase to the State minimum wage and adult award rates of pay. This will increase the State minimum wage to \$569.70 per week effective on and from the commencement of the first pay period on or after 1 October 2009.

[\[More\]](#)

Tasmania

State wage decision 2009

The weekly rates of pay in all public and private sector awards increased by \$12.00 from 1 August 2009.

All work related allowances increased by 1.9%. Meal allowances in the relevant awards will be increased to \$15.40 per meal. The minimum wage for Tasmania is now \$558.10 per week. The minimum amount payable under the Supported Wage System increased to \$71 per week

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South Australia

2009 General Review of award wages

The South Australian Industrial Relations Commission has decided to increase the minimum award rates pay as follows:

- The adult award rate of pay will be increased by \$14.00 per week.
- The new State Minimum Award Wage will be \$560.65 per week.
- The minimum rate for a full-time adult will be established at \$560.65 per week.
- The minimum supported wage will increase from \$69.00 per week to \$71.00 per week.

All awards and the MSR will be increased with effect from the first pay period on or after 1 October 2009. Proportionate adjustments will apply to juniors, trainees and other employees.

[\[More\]](#)

Further information

For information on these and all other subjects affecting your relationships with employees contact [Paul Maguire](#).