

Julia Gillard intervenes again in award modernisation

Julia Gillard, the Minister for Employment Education and Workplace Relations, has publically intervened once again to seek changes to the terms of modern awards. On 28 August the Minister asked the Australian Industrial Relations Commission to amend terms affecting piece rates and hours of work in the horticultural industry, penalty rates and hours of work in the call-centre industry, and overtime arrangements for part-time employee in the pharmaceutical and retail industries.

This latest intervention by the Minister follows considerable pressure from employers who are likely to face increases to employment costs due to the terms of the proposed 'modern' awards. The Minister intervened earlier in the year when she amended the government request to modernise the hospitality industry by separating cafes' and restaurants from hotels and pubs.

The Commission is now being asked to amend the proposed Horticulture Award to ensure that casual employees may be paid piece rates rather than minimum wages and incentives, as well as allowing more flexible hours of work to accommodate the vagaries of weather and the often small opportunity to harvest produce such as fruit.

The amendments to the Pharmaceutical and Retail Industry modern awards will likely change the requirement to pay overtime rates of pay to part-time employees who work additional hours. The term under the proposed modern awards requires employers to pay overtime even if the part-time employee agrees to work the additional hours and would not extend their total hours beyond 38 hours for the week.

The changes to call centre penalty rates and hours of work are designed to ensure employees performing such work are treated in the same manner as other employees within the industry that they perform the work.

The modernisation of Australian awards continues to create difficulties for employers as the Australian Industrial Relations Commission fails to apply truly modern approaches to hours of work, penalty rates and job classification structures. The failure of the Commission to undertake any useful research to

understand the industries in which it is creating awards and its overreliance on its own case law is leading to some bad decisions.

The fourth stage of the process to modernise the remaining list of awards is currently underway and *Exposure drafts* for the employment services, social welfare, and a raft of other industries are due later in September. When published, the public will have an opportunity for further comment before finalisation of the modern awards in December. All modern awards will commence operation on 1 January 2010.

If you have any questions on the impact of modern awards on your business please [contact us](#).

Fifty percent of businesses offer paid parental leave

A survey of reporting organisations to the Equal Opportunity for Women in the Workplace Agency (EOWA) sponsored by Alcoa, has shown that 50.8% of businesses are offering some form of paid leave to parents on the occasion of the birth of a child.

The survey of 2320 organisations throughout Australia found that the provision of paid maternity leave in reporting organisations varies by industry. The industries most likely to offer paid maternity leave are Education and training (83%), Financial and insurance services (81%) and Electricity, gas, water and waste services (80%). The industries least likely to provide paid maternity leave are Accommodation and food services (12%), Agriculture, forestry and fishing (13%) and Retail (19%).

The average duration of paid leave is 9.4 weeks across all reporting organisations. The most common duration provided by reporting organisations, is either six (27.5%) or twelve weeks (25.8%) with over half of all organisations' falling into one of these categories.

Less than one per cent of reporting organisations provide 18-weeks paid maternity leave, the maximum amount of paid leave to be introduced in the Australian Government PPL scheme.

[\[More\]](#)

Fair Work - best practice guides

Eleven *best practice guides* have been developed by the Fair Work Ombudsman to assist employers make better use of the provisions of the Fair Work Act and better understand other aspects of workplace laws.

The new guides cover work & family, consultation & co-operation, individual flexibility arrangements, employing young workers, gender pay equity, small business, workplace privacy, managing under-performance, effective dispute resolution and improving workplace productivity in bargaining.

We haven't reviewed the content of the guides yet so cannot offer a view on their usefulness. If you wish to access the information go to the Fair Work Ombudsman website at www.fwo.gov.au.

Employers in the employment services industry should also look for information on these subjects in [Employee Relations Online for Employment Services](#).

Fair work compliance campaigns

The Fair Work Ombudsman (the successor to the Workplace Ombudsman) conducts campaigns to ensure compliance with award conditions and pay scales targeted at specific industries. In September 2009 the Fair Work Ombudsman will be targeting security industry employers.

The [Fair Work Ombudsman](#) also targets employers within States and local areas. During the next twelve months and the Ombudsman will be continue a campaign on compliance with employment record keeping.

TIP OF THE MONTH: Understanding the General Protections under the Fair Work Act 2009

Introduction

The Fair Work Act 2009 establishes a series of *workplace rights* and *protections* for employees and prospective employees against discriminatory and prejudicial action such as termination of employment for reasons of a person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy,

religion, political opinion, national extraction or social origin.

These general protections also include rights and obligations that have been available prior to 1 July 2009 under the Workplace Relations Act 1996.

Protections

A person (employer or employee) must not take adverse action against another person

1. because the other person:
 - a. has a workplace right; or
 - b. has, or has not, exercised a workplace right; or
 - c. proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
2. to prevent the exercise of a workplace right by the other person.

A person must not take *adverse action* against another person (the second person) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

Adverse action

Adverse action in relation to an employee means an employer:

- A. dismisses the employee; or
- B. injures the employee in his or her employment; or
- C. alters the position of the employee to the employee's prejudice; or
- D. discriminates between the employee and other employees of the employer.

Adverse action in relation to a *prospective employee* means the prospective employer refuses to employ the prospective employee or discriminates against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee. For example, a prospective employer cannot require a prospective employee to agree to an individual flexibility arrangement (to alter the way in which award or agreement entitlements are applied) as a condition of employment.

Workplace rights

Workplace rights are rights and entitlements that an employee or prospective employee would have

under a workplace law or employment instrument. For example, the right to cash in annual leave, or participate in protected industrial action, or agree to an individual flexibility arrangement with an employer, or appoint a bargaining representative.

Discrimination

An employer must not take adverse action against a person who is an employee, or prospective employee, of an employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

However, the prohibition does not apply to action that is:

1. Not unlawful under any anti-discrimination law in force in the place where the action is taken (including state law); or
2. Taken because of the inherent requirements of the particular position concerned; or
3. If the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed--taken:
 - a. in good faith; and
 - b. to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Temporary absence from work because of illness or injury

An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury. A prescribed kind of illness or injury exists if

- A. The employee provides a medical certificate for the illness or injury, or a statutory declaration about the illness or injury, within 24 hours after the commencement of the absence; or such longer period as is reasonable in the circumstances.
- B. The employee is required by the terms of a workplace instrument to notify the employer of an absence from work and to substantiate the reason for the absence; and complies with those terms.
- C. The employee has provided the employer with evidence, such as a medical certificate, for taking paid personal/carer's leave for a personal illness or personal injury,

An illness or injury is NOT a prescribed kind of illness or injury if either:

- i. The employee's absence extends for more than 3 months or the total absences of the employee, within a 12 month period, have been more than 3 months (whether based on a single illness or injury or separate illnesses or injuries); and
- ii. The employee is not on personal/carer's leave (however described) for the duration of the absence.

Note that a period of paid personal/carer's leave (however described) does not include a period when the employee is absent from work while receiving compensation under a law of the Commonwealth, a State or a Territory that is about workers' compensation.

Who can apply for a remedy and what happens if there is a dispute?

An employee or union may notify Fair Work Australia. If the parties to the dispute agree, Fair Work Australia may convene a private conference of the parties and deal with the dispute by mediation or conciliation, and may make recommendations and express an opinion on the merit of the claim.

If the matter is not resolved the aggrieved person may make an application for a general protection court order. If the Federal Court or Federal Magistrates Court is satisfied that an employer has breached the General Protections it may make one or more of the following orders:

- An injunction, to prevent, stop or remedy the effects of a contravention;
- Compensation for loss that a person has suffered because of the contravention;
- Reinstatement

Conclusions

The codification of existing rights and obligations into this set of '*general protections*' tends to focus attention on areas that employers should tread carefully. In particular, modern awards and enterprise agreements will all contain provisions to allow employers and employees to agree on arrangements that suit the lifestyles of employees and the needs of the employer. It is expected that this will be a vehicle for employees to pursue hours of work that enable them to balance family commitments. Employers will need to be careful in how they manage such expectations. A change of roster or a reduction in hours may be considered

adverse action and subject to a dispute. It will be a wise employer that obtains advice before acting.

Further information and resources on the new system are available to subscribers to [Employee relations online for Employment services](#). 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

Review of Public holidays

On 29 June 2009, the Minister for Industrial Relations, John Hatzistergos endorsed the undertaking of a review to consider the current and future operation of the *Banks and Bank Holidays Act 1912*.

On 17 August 2009, an [Options paper](#) was released canvassing alternative public holiday arrangements. Professor Riley invites all members of the community to review the suggested options and to make comments or submissions on the practical effect of public holiday arrangements.

[\[More\]](#)

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 will be increased by \$12.00 from 1 August 2009.

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

The increases provided by this decision will take effect from the first pay period on or after 1 August 2008.

[\[More\]](#)

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](#).