

\$21.66 a week - Minimum Wage Decision 2008

The Australian Fair Pay Commission has decided to increase the federal minimum wage and pay scales for all federal award employees. The increase will operate from the first pay period on or after 1 October 2008.

There are two elements to the decision:

- An increase of \$21.66 per week (\$0.57 per hour) to the standard Federal Minimum Wage (FMW) bringing the weekly rate to \$543.78. The standard FMW increases from \$13.74 to \$14.31 per hour; and
- An increase of approximately \$21.66 per week (\$0.57 per hour) for adult rates of pay in Australian Pay and Classification Scales (Pay Scales).

Professor Harper, Chair of the Australian Fair Pay Commission said that the "... wage rise together with relevant tax and social security changes, will provide low income households with real increases in disposable income." He also said "On balance the Commission believes that this decision will have only a minor impact on wage and inflation outcomes in the economy as a whole."

The decision will not affect employers and employees still operating under pre-27 March 2006 certified agreements or Australian workplace agreements. However, employers that have entered into workplace agreements since that date must ensure that the rates of pay under such agreements is not less than the minimum rates for prescribed under applicable pay scales.

[\[More\]](#)

Flexible award clause not so flexible

A model *award flexibility clause* designed to be included in each new modern award has been developed by the Australian Industrial Relations Commission. The clause has been developed as part of the 'award modernisation' process initiated by the Rudd Government under its *Transition to Forward with Fairness* legislation.

The Government's award modernisation request required the Australian Industrial Relations Commission to

"... prepare a model flexibility clause to enable an employer and an individual employee to agree on arrangements to meet the genuine individual needs of the employer and the employee. The Commission must ensure that the flexibility clause cannot be used to disadvantage the individual employee."

True to form, the Commission has prepared a model clause with a focus predominately on the protection against disadvantage rather than the enabling of flexibility. There are serious limitations on how flexible such agreements can make the employment arrangements.

Firstly, the award terms which may be varied in a flexibility clause are limited to:

- Arrangements for when work is performed;
- Overtime rates;
- Penalty rates;
- Allowances; and
- Annual leave loading.

The flexibility clause dealing with these conditions will operate in parallel to an award clause that allows annualisation of wages, allowances and penalty rates.

Secondly, an agreement made pursuant to a flexibility clause may only be made after employment has commenced. A contract containing a flexibility clause may not be offered as a condition of employment.

This part of the decision is hard to understand. It potentially creates a situation where a new employee is placed on award conditions whilst other employees are working under more flexible and generous arrangements such as time off in lieu of overtime, and have access to family friendly leave.

A strategy may have to be adopted whereby new employees are offered flexible employment conditions after the probationary period of employment.

Thirdly, the Commission has decided that an employee will not be disadvantaged by the agreement only if there is, on balance, no reduction in the overall terms and conditions of an individual employee's employment compared to the applicable award, workplace agreement or any Commonwealth, State or Territory law. This is essentially the 'No disadvantage' test currently applied to individual transitional employment agreements.

Agreements made under the flexibility clause must be in writing and signed by the employer and individual employee. There is no requirement to lodge the agreement with the Commission or the Workplace Authority, but the employer must provide a copy of the agreement to the employee and retain a copy.

Another part of the decision that demonstrates how out of touch the Commission is with a modern workplace is the requirement that flexibility agreements may be unilaterally terminated by either the employer or employee by four weeks' written notice or at any time by agreement between the employer and employee. An employer or an employee is unlikely to commit to an arrangement such as a job share or purchased leave that can be undone within four weeks and terminated without cause. The cost implications for the employer are obvious and the disruption to the employee considerable.

Finally, employers have almost 18 months to consider how these clauses may be applied in their businesses. The flexibility clauses included in modernised awards will not operate before 1 January 2010.

The initial interest in these clauses was in the potential to overcome irrelevances in the awards and implement employment arrangements that suited the business and its employees without having to undertake the cost and time of formalised collective workplace agreements.

Small to medium enterprises rely upon highly flexible work practices to succeed against larger competitors. It remains to be seen whether such agreements will provide any flexibility to those businesses.

Personal Income Tax cuts commenced 1 July 2008

The new PAYG withholding tax tables' operatives from 1 July 2008 are available on the ATO website.

[\[More\]](#)

TIP OF THE MONTH: Superannuation guarantee – new rule defining employee earnings base

From 1 July 2008, employers must use *ordinary time earnings* to calculate super guarantee contributions for their employees. The change is to ensure uniformity in calculation of employee earnings base for super guarantee purposes. On the face of it the change is not particularly controversial. However, the changes are subtle and may necessitate some adjustments by employers to ensure they comply with the law.

Ordinary time earnings

Superannuation guarantee payments are calculated on the employee's *notional earnings base* and until 1 July 2008 the earnings base may have been calculated by reference to an award, a superannuation trust deed or an individual agreement.

The definition of ordinary time earnings applicable under the superannuation guarantee laws generally include all earnings for ordinary hours of work and may include a wider range of employee payments than previously provided under an award, trust deed or individual contract. For example, ordinary time earnings, includes:

- Over-award payments
- Commissions
- Shift loadings
- Allowances, and
- Paid leave.

whereas many awards limit the earnings base to award and over-award payments.

On the other hand, the general rule says that ordinary time earnings do not include overtime, fringe benefits, workers compensation payments and termination payments. There are however, some important exceptions to the rule that should be understood.

The exceptions to the rule

Overtime

An employee who is required under a workplace agreement to regularly work a specified number of hours in excess of the standard 38 hours per week may be entitled to superannuation on those hours.

For example, an employee who is rostered to work 42 hours per week and paid 4 hours overtime will be entitled to superannuation on those additional four hours because they are regular, normal or customary. On the other hand, if an employee is contracted to 'reasonable additional hours' in excess of the standard 38 hour week but the number is neither specified or in reality frequent, then superannuation would not be payable on those hours.

Allowances

An expense allowance that is paid with the expectation that it will be fully expended in producing income such as a car allowance or travel and accommodation for sales staff is not considered by the ATO to be part of ordinary time earnings and therefore does not attract superannuation. A meal allowance paid during a period of overtime would also not be included in ordinary time earnings.

However, allowances paid other than a reimbursement of expenses or expense allowance is considered to be part of ordinary time earnings. For example, a 'sleepover' allowance or site allowance are not paid as expense allowances and therefore superannuation is payable.

Workers compensation

Workers compensation payments, including top-up or make-up payments, are considered to be ordinary time earnings where some work is performed, but not if the employee does not perform any work.

The ATO Rulings

Employers that wish to explore the question of ordinary time earnings in greater depth should read [Superannuation Guarantee Ruling SGR 94/4](#) and the ATO Interpretative Decision [ID 2007/73](#) entitled Superannuation guarantee: Ordinary hours of work for employees covered by both an award and an agreement.

The interpretative decision is worth noting as it sets out the attitude of the Australian courts to the definition of ordinary time earnings.

In particular, it cites the Federal Court of Australia in Quest Personnel Temping Pty Ltd v. Federal Commissioner of Taxation [2002] FCA 85 as follows:

"... there may be cases in which the working of hours beyond fixed standard hours becomes so regular, normal, customary or usual that the additional hours are to be regarded as ordinary hours for a particular employee. This may be so notwithstanding that the additional hours are remunerated at overtime rates or penalty rates."

The implication of such a definition is that superannuation may be payable in the following typical employment scenarios:

- (1) Part-time employees that regularly work in excess of their contracted hours even if they receive a casual loading or overtime payment; and
- (2) Employees that regularly accrue paid time off in lieu of overtime (TOIL).

Conclusions

The ATO rulings do not address the two specific scenarios above. I have simply speculated that they might be considered ordinary time earnings. The starting point in determining the obligations is the assumption that superannuation is not payable on overtime hours of work. However, the answer as to whether or not superannuation is payable in these circumstances will probably turn on the facts of each particular case.

What should an employer do?

The Australian Tax Office recommends that employers take the following steps (if not done so already) to comply with the change:

- Review the ATO [Checklist](#) for salary or wages and ordinary time earnings' to see what is included and excluded from ordinary time earnings and ensure you are calculating your super contributions based on ordinary time earnings
- Update your software and payroll systems as the ATO will not be issuing electronic media specifications for ordinary time earnings
- Have the correct systems ready to handle any change in your super contributions, and
- Have a strategy to inform your employees of possible changes to their super contributions

The ATO Assist website indicates that SGR 94/4 is currently being reviewed. A draft of the updated ruling on ordinary time earnings is due to be published in late 2008.

In the interim and where the checklist does not provide clarity on a particular case then the ATO ought to be asked for its view. Alternatively any employer that is unsure of their obligations should seek [advice](#).

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

New South Wales

NSW State Wage Case 2008

On 27 June 2008 the Full Bench of the New South Wales Industrial Relations Commission handed down its decision on the State Wage Case 2008.

Award wages and work related allowances will be increased by 4% per week.

The increases will occur only when the parties to each State award apply to the NSW Industrial Relations Commission. Generally, the increases will be applied no earlier than twelve months from the date on which the award rates were last increased in accordance with the State Wage Case of June 2007.

This increase to State awards DOES NOT apply to businesses covered by notional agreements preserving state awards (NAPSA).

[\[More\]](#)

SACS NSW State award wage increases 1 July 2008

The next scheduled increase to the NSW State Social and Community Services Award is effective from 1 July 2008. This increase does not apply to employers operating under the federal system.

Please note that the Australian Fair Pay Commission has addressed the relationship between its decision to adjust the minimum pay scales (under the federal system) and the work value decision impacting on the SACS pay scales.

[\[More\]](#)

AMA NSW collective bargaining

The Australian Competition and Consumer Commission has issued a draft determination proposing to authorise* a collective bargaining arrangement put forward by the Australian Medical Association.

AMA NSW proposes to collectively negotiate with NSW Health and public health organisations, including area health services, the terms of contracts for visiting medical officers in the NSW public hospital system. The ACCC needs to approve the bargaining under the Australian Trade Practices Act as the Visiting Medical Officers are not employees.

[\[More\]](#)

Victoria

Possible changes to Workcover

A report on AAP suggests that the Victorian government will consider 'ripping up' WorkCover laws and rewriting the legislation under a proposal that could cost employers up to \$146 million a year.

A leaked review of the Accident Compensation Act, obtained by the state opposition, recommends replacing the legislation with a new act. WorkCover Minister Tim Holding commissioned the independent review by Peter Hanks QC last December and his report is due to be delivered later this year.

The leaked document recommends the WorkCover legislation "in its entirety be recast". It recommends expanding the role of the Victorian WorkCover Authority bureaucracy and other bodies, as well as funding another six reviews.

The proposal would cost between \$85 million and \$146 million a year - an expense the opposition says employers will shoulder in higher premiums.

A spokesman for Mr Holding said the government had yet to receive a copy of the report and could not comment on its recommendations.

Tasmania

No Pay Sports Company fined \$53000

A sporting goods retailer has been fined \$52,800 for "strictly enforcing" a policy requiring staff in two of its Tasmanian stores to work for no pay. A Mart All Sports Pty Ltd required its Hobart employees to work between 15 and 30 minutes before and after the store opening hours for no pay. The company was fined 80% of the maximum penalty.

[\[More\]](#)

Western Australia

Work life balance best practice seminar

The Work Life Balance Best Practice Seminar was held by Labour Relations on 25 June 2008. The seminar aimed to showcase best practice work life balance and pay equity initiatives from around Australia. The seminar was attended by 200 people.

The presentations from the speakers are available online. [\[More\]](#)