



## AWARD MODERNISATION: ANOTHER "INTO THE ABYSS" DECISION

### TRANSITION PROVISIONS

The AIRC (yes – it is that beast!) handed down its decision with respect to transitional provisions in modern awards on 2 September 2009. The AIRC has, in adopting changes to key entitlements including wages, casual and part-time loadings and penalty rates in many modern awards, deferred until mid-2010 the operational date. The full bench has opted for a five-year phase-in mechanism designed to help employers and employees cope with the impact of award modernisation. The full bench said it approached the task of formulating the transitional provisions in light of the potentially competing twin award modernisation objectives of avoiding disadvantage to employees or increased costs for employers: some award conditions will increase, leading to cost increases, and others will decrease, leading to potential disadvantage for employees, depending upon the current award coverage.

The full bench also in the decision implements a mechanism to allow employees who suffer a reduction in take-home pay under the phase-in provisions to apply to FWA for a take-home pay order.

The orders will work on a similar basis to those available under the *T and C Act* but differ in being available to workers who start employment after the commencement of a modern award but during the phase-in (or out) period. Further details follow:

### MODEL CLAUSES

The Commission has proposed model clauses for inclusion in awards and model phasing provisions as a schedule to the award. It is their intention to include the model clauses in all stage 1 and 2 awards, where they are considered necessary. In some cases there will be no phasing schedules included in the modern award and therefore no phasing. Where parties have reached an alternative arrangement these will be included instead in the modern award on application.

Matters relating to the application of the phasing provisions can be dealt with under the dispute settling procedures of the award.

### ABSORPTION

The Commission has decided to include an absorption clause in awards. This will allow any monetary obligations imposed on employers to be absorbed into over award payments. Payments provided for in the transitional provisions are not considered over award payments.

### TAKE HOME PAY ORDERS FOR NEW EMPLOYEES

The *T and C Act* provides for the capacity for existing employees who suffer a reduction in take home pay to make application

for take home pay orders. The limitation on this provision is that you must be employed at the time the award comes into operation, you must be in substantially the same position.

The AIRC has decided that take home pay orders should be extended to new employees (post 1 January 2010) from reductions in take home pay that might come about from the operation of the transitional provisions. This will, in effect, provide limited protection for new employees who are employed in positions where rates/loadings are being phased down over the five year period from having their payments reduced.

This would suggest that new employees are protected as the transitional provisions move through the system on a like to like comparison against earlier transitional arrangements which applied to them. It does not suggest they can seek take home pay orders that go to matters not subject to transition that they were never entitled to i.e. loading for working ordinary time on Saturday morning.

The model clause would also tend to indicate that existing employees

will be protected from reductions in take home pay when they move into a new position that is subject to transition wages. By moving to a new position they would no longer be entitled to seek take home pay orders under the *T and C Act* but would be under the award provision.

### REVIEW OF TRANSITIONAL ARRANGEMENTS

Transition arrangements in an award can be reviewed in accordance with the terms of the award.

The AIRC has included a model commencement and transitional review clause in awards that allows the transitional provisions to be reviewed or varied on the AIRC's own motion or an application by a union, employer, employee.

### PHASING ARRANGEMENTS

Phasing arrangements will only be put in place with respect to:

- wages, including junior rates, trainees etc;
- casual and part-time loadings;
- Saturday, Sunday, public holiday, evening and other penalties; and
- shift allowances.

Phasing arrangements will apply to

both increases and reductions in wages and conditions and will occur in five instalments with 12 months between instalments.

Importantly the phasing will apply to all differences in wages; that is there will be no retention of state-based differentials at their current rate for five years.

Whilst the modern awards come into operation from 1 January 2010 the AIRC has decided that wages and other matters subject to phasing will not commence until 1 July 2010 with adjustments each 12 months following that date.

This means that, whilst the bulk of the modern award will start on 1 January 2010, the pre-modern award conditions relating to wages, casual and part-time loadings, specified penalties and shift allowances will continue to apply until 1 July 2010 when the phasing will commence.

The transitional provisions will apply to all employers covered by the modern award, regardless of when the modern award came to apply to them, and to all employees of the employer.

The AIRC recognised that the phasing arrangements, particularly with respect to the phasing in of reductions in wages and allowances will result in employees employed after 1 July 2010 receiving lower wages under the transition provisions than an employee employed prior to this date. They recognise this as unavoidable. The take-home pay provisions will not stop this from happening.

### **PHASING OF WAGE INCREASES/REDUCTIONS**

The transitional amount is the difference between the minimum wage for the classification in the modern award and the rate in the transitional wage instrument or award for that classification.

This transitional amount is the amount that is subject to phasing (in or out) but will also operate subject to no loss of take home pay.

The requirement on the employer is to pay the minimum rate in the modern award for the position plus/minus a % of the transitional amount plus any increases in minimum wages.

Note that the pre-modern award wage rates will not be adjusted for minimum wages increases.

Where rates of pay are expressed as a percentage of another rate (such as juniors, apprentices) the transitional rate is calculated by working out the percentage as a dollar figure for the pre modern award and modern award rate. The difference in the transitional rate.

### **LOADINGS AND PENALTY RATES**

The phasing arrangements for loading and penalty rates is calculated on the same basis as wages except that the transitional amount is expressed as a percentage.

The loading or penalty payable is therefore the modern award percentage plus or minus the relevant percentage of the transitional percentage.

The provisions may require clarification where a casual loading is expressed as a flat dollar amount instead of a percentage.

Additional consideration must also be given in circumstances where a casual has been entitled to an additional payment for annual leave. This amount needs to be built into the pre-modern award loading prior to the determination of the transitional amount.

Where there is no pre-existing loading or penalty rate, the modern award rate is to be phased in over five instalments.

### **SUPERANNUATION**

The Commission has indicated that variations to awards to include default funds will be considered through an application to vary the award.

## **ACTU Organising, Education and Campaign Centre Course**

### **General Protections in the new Fair Work Act 2009**

**Brisbane: 2 October  
9:00am - 4:00pm**

The new Fair Work Act 2009 provides important protections to employees, including the protection of a broad range of workplace rights and protection from discrimination in the workplace. It also protects employers from certain actions by employees and unions.

Come and learn about your members' rights under the new Act, and where and when to make claims about breaches of the general protections provisions.

#### **Aim**

To provide participants with information on the general protections provisions of the Fair Work Act 2009 and how they can be used to protect the rights of their members.

#### **Learning Outcomes**

At the end of the course, participants will be able to:

- Describe the general protections provisions in the Act regarding freedom of association, discrimination and sham contracting.
- Define the meaning of 'adverse action' under these provisions
- Identify the rights and responsibilities of union officials, members, employees and employers under these provisions
- Distinguish between dismissals covered by the general protections provisions and dismissals covered by the unfair dismissal and unlawful termination provisions of the Act.
- Describe the avenues available to make claims regarding the breach of each type of general protections provisions, and the processes for dealing with these claims.