

### Award Modernisation

Award modernisation is the term used by the Rudd Government to update the award (wage) based system in Australia. Essentially the key objective is to reduce the number of awards that exist and operate in the workplace, but still cover all industries, with a miscellaneous modern award to cover certain employees who are not otherwise covered by any other modern award.

The Australian Industrial Relations Commission (AIRC) is in the process of completing the rationalisation of awards in Australia with the expected completion date of 31 December 2009. They will progressively publish the modern awards between now and the completion date.

### Commencement of Modern Awards

Modern awards (as well as the National Employment Standards) are intended to come into force and operate from 1 January 2010.

### Modern Awards – Who Will Be Covered?

If you operate a business as a constitutional corporation then your employees will be covered by the modern awards. The State Governments may be able to refer their powers to deal with employment matters to the Federal Government which will make the modern awards apply to more employers.

It is intended that by 1 January 2010 all current awards will be replaced by the modern awards.

### What happens if the take home pay of employees decreases?

Under the transitional provisions of the Fair Work Act, if an employee suffers a "modernisation-related reduction in take-home pay" and certain criteria are satisfied, the employee or group of employees can seek an order requiring the payment of money to remedy the situation.

The transitional fair work legislation sets out criteria to be satisfied before Fair Work Australia (FWA) can make such an order including:

- The Employer must be bound by the modern award;
- The modern award must apply to the employee;
- The employee is employed in the same (or comparable position) to that which they were employed in prior to the introduction of the modern award;
- The amount received by the employee has reduced despite the fact the hours have not materially changed;
- Overall, the reduction is due to the award modernisation process.

### High Income Employees?

Modern awards will not apply in circumstances where employees earning over the high income threshold (being \$100,000 per annum) have agreed in writing to accept a guarantee of annual earnings. This occurs where the employer guarantees the employee will receive earnings above the threshold. Such employees are then known as "high income employees".

The agreement can be made either before or during the employment and must generally be for a period of 12 months or more, however it can be for a shorter period in some circumstances.

The Fair Work Act contains detailed provisions setting out what earnings should be taken into account in determining whether or not the income of an employee exceeds the high income threshold. Earnings which will not be taken into account, include:

- amounts not capable of determination in advance;
- reimbursements of expenses; and
- employers' compulsory superannuation contributions.

### Varying Modern Awards

The Fair Work Act allows an employer and employee to agree to an individual flexibility arrangement pursuant to a flexibility term in a modern award. The flexibility term must, amongst other things:

- Identify the terms of the modern award, the effect of which may be varied by an individual flexibility arrangement;
- Require that the employee and employer genuinely agree to any individual flexibility arrangement;
- Require the employer to ensure that any individual flexibility arrangement must result in the employee being better off overall than the employee would have been if no individual flexibility arrangement had been agreed to.

If an employer has agreed to an individual flexibility arrangement the modern award has effect in relation to the employee and the employer as if it were varied by the flexibility arrangement and such arrangements do not change the effect of the modern award in relation to any other employee.

### Pre-existing Agreements

AWAs and ITEAs, certified agreements, collective agreements and State enterprise bargaining agreements will continue to operate from 1 January 2010 as "transitional instruments". There are to be no new individual agreements.

It is important to note that from 1 January 2010 employees must receive the minimum rate of pay under an applicable modern award even if they are covered by a transitional instrument.

### Conclusion

It is important for all employers to review the modern awards applicable to their industry and assess their impact on their business. Ferguson Cannon Lawyers are experts in employment law and the Fair Work Act and can help you with any aspect of human resources and employment law. Please contact Tony Pattinson to discuss your business.