

# Industrial Law Developments 2010

*1 January 2010 was a critical date for the Federal Government's Industrial Relations Reforms....*

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1 January 2010 was a critical date for the Federal Government's Industrial Relations Reforms with the commencement of the National Employment Standards (NES), Federal Modern Awards and the referral of "State Employees" into the Federal Industrial System.

## **National Employment Standards and the Modern Award**

The **NES** are enshrined in the *Fair Work Act 2009*. They regulate:

- hours of work;
- parental leave;
- flexible work for parents;
- annual leave, personal/carers leave, compassionate leave, community service leave;
- public holidays;
- notice of termination and redundancy; and
- the obligation to publish a Fair Work Information Statement to new employees.

It is imperative that employers secure a sound understanding of the NES and ensure compliance. This is particularly the case with the elements of the NES which are new, including obligations in respect of parental leave, flexible work for parents, notice of termination, redundancy and the publication of the Fair Work Information Statement to new employees. The operation of the NES is not without its complexity. There are some transitional rules regulating the operation of the NES and each employee's entitlement need to be considered carefully.

The other significant development in the Federal Industrial system on 1 January 2010 was the commencement of the federal Modern Awards. Modern Awards will apply to a National System Employee and National System Employer if the Award covers the employee and the employee is otherwise not exempt. (e.g. a high income earner, which is currently fixed at \$108,300.00 per annum). The operation of the Modern Awards is a result of a two year exercise by the Australian Industrial Relations Commission resulting in some 122 Modern Awards replacing an estimated 1,560 State and Federal Awards.

The first and important step for employers already in the Federal System is to identify which Modern Award applies to their business. The identification of the correct Award will be critical in calculating phasing in of wage rates, allowances and penalties contained in the Award.

The model phasing in provisions allows for annual incremental adjustments (i.e. of 20%) over the next five years of the Transitional Amounts (being the difference between minimum entitlements under a NPSA and the Modern Award). The first adjustment is to be made on the first pay period after 1 July 2010. The mathematics associated with the phasing in of the Transitional Amounts is complex.

Most small businesses will struggle to calculate their minimum obligations from 1 July 2010. In some instances an employer will be faced with the need to phase in increases and decreases in wage rates, penalties and allowances.

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Take for example, a business transitioning from the Retail Takeaway Food Award QLD to the Federal Fast Food Award 2010. It will have to phase in an increase in minimum wage rates, a decrease in a penalty rate for Saturday work and, a new loading for late work after 6.00pm. Expect applications for annual leave from payroll staff to peak in July 2010. Of some comfort to business is that increases in the minimum entitlements under the Federal Awards (as phased in) are capable of being absorbed by over award payments currently being made.

The importance of getting the minimum award entitlements correct cannot be underestimated as of course an employer can be prosecuted for getting it wrong. In a recent example where an employer in a fast food/take away industry failed to pay a district allowance under an award through ignorance of the obligation was ordered to back pay the allowance totalling approximately \$25,500.00 and was then prosecuted for the offence and was ordered to pay a penalty exceeding \$22,000.00.<sup>1</sup>

## State Employees

From 1 January 2010 those employers who have avoided the industrial rollercoaster from Work Choices to Fair Work (being Sole Traders, Partnerships and other unincorporated entities) are also now covered by the Federal Industrial System in consequence of legislation passed by the State and Federal Government in late 2009.

State Awards (now called a division 2B State Award) which regulated the parties' entitlements and obligations as at 31 December 2009 will continue to operate until 31 December 2010. During this period (and of course with some exceptions) a Federal Modern Award will not have application. There are interaction rules between the division 2B State Award and the NES. For example the obligation under the NES to give notice of termination and the provision of a Fair Work information statement will operate effective 1 January 2010.

## Conclusion

Those employers (Constitutional Corporations) who have "enjoyed" the rollercoaster which has been Work Choices to Fair Work again face a complicated process of transitioning onto a Modern Award. In the very short term those employers must:

1. identify the Modern Award applicable to their business; and
2. set about calculating their wage obligations as from 1 July 2010.

If there is a light at the end of the tunnel, it is that after the expiration of the various transitional timeframes all Queensland businesses in the private sector will enjoy the benefit of a *National Employment Scheme* removing the uncertainty for some employers as to which industrial scheme it is required to comply with. This national industrial euphoria is however subject always to a change of government which may, of course, result in further industrial chaos.

**Source: Mitchell Devine – Solicitor – McColm Matsinger Lawyers**

<sup>1</sup> Fair Work Ombudsman v Fortcrest Investments Pty Ltd (2010) FMCA 18 (18 January 2010)