Chapter 3

Modern awards

3.1 This chapter covers modern awards which together with the NES make up the safety net of minimum enforceable standards.

Modern awards

3.2 Part 2-3 deals with the second element of the safety net for those earning under $100,000, the creation of modern awards by the Australian Industrial Relations Commission (AIRC). Modern awards may be industry or occupation based and will provide additional minimum terms and conditions. Modern awards build on the NES and may include an additional 10 minimum conditions of employment which are tailored to the needs of a particular industry.

3.3 Despite previous attempts at simplification, awards have remained lengthy, prescriptive and unwieldy documents that have been amended and reviewed a number of times. The Minister noted that for awards to be an effective safety net, they need to be relevant to today's workplace needs and able to accommodate the flexibility that businesses and their employees expect. New awards are not to be regarded as simplification of old awards.

Proposed changes

3.4 Clause 139 provides that modern awards will cover the following ten matters:

- minimum wages and classifications;
- types of employment;
- arrangements for when work is performed;
- overtime rates;
- penalty rates;
- annualised wage or salary arrangements;
- allowances;
- leave related matters;
- superannuation; and
- procedures for consultation, representation and dispute settlement.

Award modernisation process underway

3.5 The award modernisation process was initiated by the Minister for Employment and Workplace Relations on 28 March 2008 pursuant to s576C(1) of the *Workplace Relations Act 1996* (the Act). This request was amended on 16 June 2008.

The process has required the AIRC to review all of the multiple-employer federal awards as well as many state awards operating in the national industrial system as Notional Agreements Preserving State Awards (NAPSAs). The AIRC completed its review at the end of 2008 with the stage one draft awards for priority industries.[1] These 17 modern awards will replace some 500 awards that currently cover those industries and occupations.[2] It expects to complete the award modernisation process by 31 December 2009[3] when the new industrial relations system will be fully operational.[4] The award modernisation process ensures that awards are simple to understand, easy to apply and reduce the regulatory burden of business. Another objective is that modern awards be economically sustainable and promote flexible modern work practices. In creating modern awards the AIRC must have regard to the need to assist employees to balance their work and family responsibilities effectively and to improve retention and participation of employees in the workforce.[5]

3.6 The award modernisation request requires that the AIRC include the following matters in modern awards:

- an award flexibility term (section 144);
- a dispute resolution term (section 146);
- terms providing ordinary hours of work (section 147);
- terms about rates of pay for pieceworkers (where necessary) (section 148);
- terms identifying shift workers eligible for five weeks' of annual leave under the NES; and
- terms facilitating the automatic variation of allowances (section 149).[6]

3.7 Some organisations were concerned that the award modernisation process might reduce wages and conditions, particularly for many award-dependent workers.[7] In contrast, many employer organisations have warned of higher costs leading to the

1 AIRC, Award Modernisation Stage 1 Decision, 19 December 2008.

2 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, p. 31.

3 Information available from AIRC website: http://www.airc.gov.au/awardmod/about.htm accessed 1 December 2008.

4 Hon Julia Gillard MP, Minister For Workplace Relations, Speech to Fair Work Australia Summit, Sydney, 29 April 2008.

5 Hon Julia Gillard MP, Minister For Workplace Relations, Speech to Fair Work Australia Summit, Sydney, 29 April 2008.

6 EM, p. xxviii.

7 See ACTU, *Submission 13*, p. 27; Women's Electoral Lobby Australia, *Submission 86*, p. 9.

need to let staff go. This concern overlooks the phasing out of state-based differences over five years and the award not coming into effect until January 2010.[8]

3.8 The committee majority notes the intention to create modern awards to cover employees who are not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards. In this regard it notes the submission from the National Aquaculture Council which expressed the preference for their industry not to be included in the award modernisation process and to remain award free as they already meet the standards in the NES. Mr Brian Jeffries explained:

> The large majority of the industry is currently non-award, and we regard that as another layer of regulation which is not required when the safety net and sometimes associated enterprise agreements are the framework in which it is necessary to operate. [9]

3.9 Mr Jeffries added that they have written to the AIRC and the Minister and are awaiting their responses.[10]

Committee view

3.10 The committee majority believes that employees in emerging industries where employees would traditionally be regulated by the award system should continue to be covered by an award as a matter of principle, as currently amicable arrangements can never be guaranteed. Given the intention of the government to extend awards to areas not previously covered, the committee majority's position is that this industry should not be award free.

3.11 The committee majority notes that the Minister issued an award modernisation request to the President of the Australian Industrial Relations Commission (AIRC) on 28 March 2008. The request outlines the principles the AIRC must take into account when undertaking the modernisation process. In the request, the Minister made clear that award modernisation is not intended to extend award coverage to classes of employees who, because of the nature or seniority of their role, have traditionally been award free. However, this does not preclude the extension of modern award coverage to new industries or occupations where the work performed by employees is of a similar nature to work that has historically been regulated by awards (including state awards). As with all stages of the process, parties will have the opportunity to make submissions and consult with the AIRC in cases where the AIRC extends award coverage to new areas.

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8 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, p. 35.

9 Mr Brian Jeffries, National Aquaculture Council, *Committee Hansard*, 29 January 2009, p. 33.

10 Ibid, p. 33.

Flexibility term

3.12 To address flexibility, clause 144 requires the inclusion of a flexibility term to vary the award according to the genuine needs of the employer and employee. Clause 144(4) requires the employer and employee to reach a genuine agreement and ensure the arrangement results in the employee being 'better off overall'. The model flexibility clause released by the AIRC in June 2008 creates a template for individual deals under the new workplace laws from January 2010. Protections ensure that flexibility arrangements do not disadvantage an employee.[11]

3.13 Employers and employees may agree to vary arrangements for when work is performed; overtime rates; penalty rates; allowances and leave loadings.[12] These arrangements are subject to protections to ensure that employees receive the full benefits of the safety net.[13] This flexibility to negotiate mutually beneficial employment arrangements should facilitate productivity growth. To illustrate this, the DEEWR submission cited a study conducted by Bradford University for British Telecommunications which found that the company's flexible working arrangements increased self-reported productivity by an average 20 percentage points.[14]

3.14 Unions have some concerns. The ACTU expressed concern that the bill does not mandate the protections developed by the AIRC during the award modernisation process and suggested that clause 144 should require:

- the agreement to detail each term of the award that has been varied, how it has been varied and how it makes the employee better off; and
- the employer to provide a written proposal to the employee and where their understanding of English is limited, to take steps to ensure the employee understand the proposal.[15]

3.15 The ASU pointed out that the model flexibility clause developed by the AIRC allows flexibility agreements to be terminated by either party with four weeks' notice and advocated that this should be mandated by the bill. It suggested that clause 144(4) be amended to include the terms contained in clause 203 (6).[16]

3.16 The Australian Services Union was concerned that flexibility arrangements have the potential to undermine collective outcomes and create individual statutory agreements by another name. It welcomed protections in the form of discouraging

11 Factsheet 3 'A strong and simple safety net'.

12 DEEWR, *Submission 63*, p. 62.

13 Ibid.

14 Ibid., p. 13.

15 ACTU, *Submission 13*, p. 30.

16 ASU, *Submission 56*, p. 45.

adverse action (clauses 340 to 342), coercion (clause 343), undue influence or pressure (clause 344) and misrepresentations (clause 345).[17]

3.17 The Textile, Clothing and Footwear Union of Australia (TCFUA) were troubled that individual flexibility arrangements could operate to undermine collective bargaining as well as workers' entitlements. Like the ASU, it was also concerned that these may become AWAs by another name. It argued that this situation could be worse than AWAs or Individual Transitional Employment Agreements (ITEAs) as such arrangements will not be monitored and urged greater safeguards.[18] Asian Women at Work also raised specific concerns for workers from a non-English speaking background.[19]

3.18 Advice to the committee from DEEWR was that flexibility terms will be subject to certain requirements, including protections for employees. For instance, the arrangements must be in writing and signed by both parties and a copy must be provided to the employee.[20] In addition the award flexibility term must provide for how a flexibility arrangement can be terminated. The AIRC has determined that the model flexibility term will provide that Individual Flexibility Agreements (IFAs) can be terminated by either party with four weeks notice.

Checking mechanism

3.19 Senators were advised that there is a mechanism in the legislation for supervising the use of flexibility arrangements. The Fair Work Ombudsman (FWO) as part of its compliance role would have the right to see and check the agreements.[21] Subject to the right of entry requirements, union officials concerned that an IFA was made in breach of the Act could inspect the relevant documents. Dr John Buchanan suggested that FWA be authorised to call in such agreements for spot audits – ideally on a sectoral or regional labour market basis – and that they should be made available for independent scrutiny by researchers. He suggested further that a worker disadvantaged by a flexibility agreement should be entitled to 10 times the amount of the breach in compensation. Penalties should also apply to consultants propagating template IFAs. This would provide an incentive to employees to notify FWA of such breaches and make employers think twice before promoting agreements of marginal legality.[22]

3.20 In responding to senators' concerns DEEWR emphasised that in the development of the model flexibility clause the AIRC was conscious of safeguards,

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17 ASU, *Submission 56*, p. 46.

18 TCFUA, *Submission 11*, pp. 17-18.

19 Ms Angela Zhang, Asian Women at Work, Tabled papers.

20 DEEWR, *Submission 63*, p. 62.

21 Professor Andrew Stewart, *Committee Hansard*, 28 January 2009, p. 11.

22 Dr John Buchanan, *Submission 150*, pp. 5-6.

and noted the requirements for the IFA to be in writing and ability to terminate the IFA in 28 days. They also advised that no party suggested to the AIRC that the IFA should be subject to a more formal approval process.[23]

Committee view

3.21 Employers appear confused over the use of IFAs with some suggesting they should be a condition of employment. IFAs provide additional flexibility on top of the award or a collective agreement to meet the genuine needs of employees and employers where such arrangements are genuinely agreed to. The IFA is not intended as an instrument to address conditions that apply across the entire workforce which should be included in workplace agreements.[24]

3.22 The committee notes that a more formal lodgement process for IFAs would create its own framework, and add processes, delays and additional compliance burden. It recognises the need for IFAs to be in writing and a copy kept and the role of the FWO in this area if employees have concerns. It does not wish to add more formality to the process but it is concerned to ensure that there is no abuse, particularly of vulnerable workers.

3.23 Please see Recommendation 2 in chapter 2.

Recommendation 3

3.24 **The committee majority recommends that FWA conduct regular and targeted investigations and analysis to ensure that individual flexibility arrangements are being used in accordance with the Act and are being used to provide genuine individual flexibility.**

Coverage of modern awards

Employees not traditionally covered by awards

3.25 Professor Peetz noted that as subclause 143(7) is presently expressed it could exclude occupations that are newly emerging or that do not currently exist from being covered by future modern awards. He recommended that the subclause be amended to avoid this ambiguity.[25]

High income threshold

3.26 In the interests of flexibility, clause 47(2) provides that modern awards will not apply to employees earning over $100,000 (indexed annually from 27 August 2007, and pro-rata for part time employees). The amount of the high income threshold

23 See AIRC decision 20 June 2008 [177].

24 For further detail please see the AIRC decisions 20 June 2008 and 19 December 2008.

25 Professor Peetz, *Submission 132*, pp. 11-12.

will be prescribed by regulations.[26] Departmental officials clarified that the indexation occurs at a fixed point ever year, and is a fixed formula linked to average weekly ordinary time earnings based on historical data of the previous year.[27]

3.27 These employees will still be covered by the NES but will be free to agree on terms to supplement the NES without reference to an award. They may still be covered by an enterprise agreement, an exemption applying if annual earnings are guaranteed in writing by the employer, and agreed with the employee in advance. Earnings not guaranteed in advance, such as performance bonuses, are not included. Non-monetary benefits may be included where their value can be calculated and is guaranteed in advance.[28]

3.28 Some organisations were concerned that these high income employees will be award free.[29] For example, the Media, Entertainment and Arts Alliance were concerned about the exclusion of high income employees from the award, explaining that a number of their members would fall into this category and would not be covered by an award.[30] This was also mentioned by the Australian Education Union.[31]

3.29 Unions WA expressed the view that the threshold has been set too low and will unfairly capture a wide range of employees who do not fit the criteria of being 'historically award free' or 'managerial employees'. In particular they noted the resources sector in WA where ordinary workers covered traditionally by the award system regularly earn more than $100,000 in direct wages alone.[32]

3.30 While noting that payment amounts which cannot be determined in advance are not included, the bill does not specifically exclude shift penalties that may result in employees in 24 hour industries, such as airlines or cash transport, earning more than $100,000. The ASU requested that the bill should be amended to reflect this or it should be clarified in the regulations.[33] Shift penalties were also discussed by the Victorian Private Sector Branch of the ASU which advocated that these employees should not be treated as high income employees as they stand to lose modern award protections.[34]

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26 EM, p. 208.

27 Mr John Kovacic, *Committee Hansard*, 11 December 2008, p. 47.

28 Factsheet 3 'A strong and simple safety net'.

29 See Unions NSW, *Submission 46*, p. 23.

30 The Media, Entertainment and Arts Alliance, *Submission 85*, p. 2.

31 Mr Robert Durbridge, AEU, Committee Hansard, 17 February 2009, p. 59.

32 Unions WA, *Submission 70*, p. 15.

33 ASU, *Submission 56*, pp. 48-49.

34 Australian Services Unions, Victorian Private Sector branch, *Submission 79*, p. 10.

3.31 The ACTU also criticised this exemption because it not only removes the application of award conditions of employment but suspends rights deriving from award coverage such as the rights to be represented at work, to be consulted about significant change and to access the dispute settlement procedure in the award. It requested the bill be amended to remove the power of the Minister to lower this threshold through regulation.[35] DEEWR explained that the award exemption will provide increased scope for flexible common law agreements which previously had to comply with all award provisions. Its submission assured the committee that the bill contains appropriate safeguards for employees entering into such an exemption.[36]

3.32 Professor Peetz submitted that setting out the high income threshold in the regulations rather than in the legislation raises the possibility that a future government could destroy the award system by setting the high income threshold at a low level. He recommended changes to the wording of the bill to rule out this possibility.[37] The NTEU made a similar suggestion.[38]

3.33 Dr John Buchanan shared these concerns, noting from his research that 'over one in four employees earning $100,000 per annum report that awards play a role in setting their wages and conditions and these people are set to suffer a reduction in their enforceable rights at work'. He agreed with the proposals put forward by Professor Peetz. In addition, he suggested that the rate should be adjusted not simply by reference to the CPI or Average Weekly Earnings but:

> …given that only about 5 per cent of employees earn more than $100,000 per year – the cap should be adjusted to ensure that no more than the top 5 per cent of employees are excluded from award coverage with the passing of time.[39]

Review of awards

3.34 FWA will review each modern award every four years to maintain a relevant and fair minimum safety net.[40] The bill also provides for more frequent and limited reviews, such as to remove ambiguity, uncertainty or discriminatory terms. The Minister noted that for the first time employers will be able to know and plan for revisions of the safety net.[41]

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35 ACTU, *Submission 13*, pp. 30-31.

36 DEEWR, *Submission 63*, pp. 62-63.

37 Professor David Peetz, *Submission 132*, p. 15.

38 NTEU, *Submission 105*, p. 3.

39 Dr John Buchanan, *Submission 150*, p. 5. See also Dr Buchanan, *Committee Hansard*, 18 February 2009, p. 41.

40 Factsheet 3 'A strong and simple safety net'.

41 Hon Julia Gillard MP, Minister for Employment and Workplace Relations, 'Introducing Australia's New Workplace relations System', Speech to the National Press Club, 17 September 2008.

3.35 The ACTU was concerned that modern award wages can only be reviewed on 'work value' grounds which does not allow FWA to adjust wages on other grounds. In particular it noted that FWA does not have the power to ensure that wages in awards continue to operate 'as a relevant and fair safety net against which to apply the better off overall test'. The ACTU also submitted that the timing of the first review should be 2010 as no genuine new terms and conditions that will benefit award covered employees will emerge from the award modernisation process.[42]

3.36 The Women's Electoral Lobby Australia suggested that, to make conditions for modern award variation consistent with the equal remuneration principles of the modern award objective and the minimum wages objective, an additional 'work value' reason be included as follows:

> (d) evidence that the work, skill and responsibility required or the conditions under which the work is done have been historically undervalued on a gender basis.[43]

Other issues

Superannuation

3.37 In its award modernisation decision of 19 December 2008, the AIRC decided to allow the continuation of any superannuation contribution to which the employer was making contributions on behalf of employees as on 12 September 2008. This was in order to minimise inconvenience for employers. Funds other than those provided for would not qualify as default funds, but employees were free to exercise their right to choose in favour of these funds.[44] The effect, as seen by corporate funds, was to lock them out of the default 'market', and to give traditional industry funds a significant commercial advantage.

3.38 Submissions from the sector have made the following arguments:

- default superannuation funds create a significant barrier to competition by creating mandated monopolies in three industries which are major employers: retail, textile clothing and footwear and higher education. Oligopolies are created in other industries such as manufacturing and hospitality;
- reducing competition will reduce services and competitive pressure on fees and prevent competition between industry funds;
- default funds will lock employers(and employees) in to contributing to funds which may be experiencing poor investment returns, increased fees, liquidity constraints or governance issues;

42 ACTU, *Submission 13*, p. 29.

43 Women's Electoral Lobby, *Submission 86*, p. 10.

44 AIRC, Award Modernisation Stage 1 Decision, 19 December 2008.

- the nomination of default funds is at odds with the international approach where for example employers in the UK and New Zealand able to choose from 46 and 36 schemes respectively.[45]

3.39 In addition to the issues listed above, Colonial First State cited increased cost and regulatory burdens for employers as an outcome of default funds and emphasised that competition continues to put downward pressure on fees. It also expressed concerns about the lack of transparency around the process of choosing the default funds.[46] Concerns about reducing competitive price pressures which reduce management fees were also raised by MLC. It argued that many companies actively choose particular default funds, sometimes engaging independent consultants to assist them select the most suitable by undertaking due diligence of the fund under consideration.[47]

3.40 Investment and Financial Services Association (IFSA), Colonial First State and MLC have recommended that employers should be free to select their own default fund. Alternatively, in addition to naming a default fund, modern awards should allow an alternative complying fund to be named as the default fund, or that employers be required to choose a default fund that is consistent with a list of criteria.[48]

3.41 ING Australia feared that a proportion of contributions would go to underperforming funds. Its submission claimed that Fair Work Australia, no less than its predecessor, the AIRC, had insufficient expertise in the field of investment to assess the adequacy of default fund arrangements. In commenting on the AIRC (and presumably on FWA) ING submitted that:

> …the Commission is not geared to provide guidance to the parties on the financial performance of funds. We also understand the Commission may not have information to compare other aspects of fund offerings – such as insurance, investment choice, access to financial advice, member education and member services – that are also important factors to assess when judging the suitability of a fund for default status.[49]

Committee View

3.42 The committee majority notes that a large percentage of employees on awards fail to make a choice of super fund when they start a new job. Therefore a default option must exist to ensure employees can receive their super guarantee. The view that default funds are anti-competitive is incorrect. Default funds do not remove employee

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45 See IFSA, *Submission 55*, pp. 2-3. See also Mr Richard Gilbert, IFSA, *Committee Hansard*, 18 February 2009, pp. 50-51; AMP, *Submission 145.*

46 Colonial First State, *Submission 51*, p. 1-3.

47 MLC, *Submission 108*, p. 3.

48 See IFSA, *Submission 55*, pp. 3-4; Colonial First State, *Submission 51*, p. 3, MLC, *Submission 108*, p. 3.

49 ING Australia, *Submission 93*, p.3.

choice. Since 1 July 2005 'choice of fund' laws have required employers to allow staff to choose their own fund if they wish. This will continue to apply. Further it will be open to employers and their employees to include their own choice of default fund when they make an enterprise agreement. The essence of the concerns raised by the corporate funds is that they are not eligible for their 'fair share' of default contributions. The marketing challenge for them is to compete for the custom of the great majority of employees who do not nominate a fund but who are entitled to do so. Also, employers and employees can agree to alternative default arrangements in employee bargaining agreements. The committee majority does not believe that arrangements should be established, outside of the protections of the bargaining stream.

3.43 In making its decision as to the inclusion of default funds, the AIRC has considered the submission of the industry. It is open to Fair Work Australia in its future award reviews to consider changes to the default funds and to have regard to the performance of funds in making that decision. In this regard, it is noted that APRA data shows that taken as a whole, the long term investment performance of retail funds is around 2% a year below that of industry funds.

3.44 As to whether the Fair Work Authority is unqualified to make judgements about the selection of funds, based on their financial performance, it is noted that the alternative suggested by the retail superannuation industry is that it is the employer who should make this decision on behalf of its employees, rather than the AIRC. Individual employers are in a worse position than the AIRC to make such a judgment. The committee majority also notes that submissions to the AIRC from employer associations supported the inclusion of default funds in awards and indicated that employers did not want to be responsible for making the choice of a default fund. The committee majority also observes that the current world financial crisis has shown that leading investment experts have made such ruinous decisions and this rules out any assumptions about who is best qualified to make sound investment decisions. The committee majority supports current arrangements because they meet, with least complexity, the aim of ensuring the maximisation of retirement incomes for Australian employees.

Conclusion

3.45 Modern awards are, together with the NES, fundamental to ensuring a fair, simple and enduring safety net for all employees which cannot be stripped away. Unlike individual statutory agreements, individual flexibility agreements must build on the safety net, not reduce it. Flexibility for individual arrangements is ensured by employers and employees using the flexibility clause in each award to meet the genuine individual needs of the employer and the employee.