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## Modern Awards

### 1 What are modern awards?

The modern awards contain minimum conditions of employment for employees in addition to those in the national employment standards. These include:

- 1.1 terms in relation to types of employment;
- 1.2 arrangements for when work is performed;
- 1.3 minimum wage rates;
- 1.4 overtime and penalty rates;
- 1.5 allowances;
- 1.6 additional provisions relating to leave;
- 1.7 superannuation;
- 1.8 provisions for consultation in relation to changes in the workplace; and
- 1.9 dispute resolution procedures.

The modern awards came into effect on 1 January 2010, and replace the existing federal and state awards covering employees across Australia. They will be reviewed every 4 years.

The practical effect for most workplaces in the aged and community services sector is that while most employees remain covered by an award, the award covering employees is different. The modern award may contain different wage rates, penalty rates and allowances as well as different standard hours. In some cases, the scope of the modern award is slightly different from the scope of the previous award.

Most modern awards are industry based – they attempt to cover all the different roles employees may perform within a particular industry, for example the Aged Care Award 2010. Some awards are occupation based – they cover employees based on what their role is, regardless of the industry in which they work, for example the Nurses Award 2010. In general an industry based award will apply first, and if any employee within that industry is not covered by that award because of their particular role, occupational awards will fill the gaps to cover those employees.

## 2 Which modern awards apply in the aged and community services sector?

There are several modern awards that may potentially cover employees in the aged care and community services sector. These awards, along with all other awards, are available for download [here](#).

Please note that while there is a formal review of the awards scheduled for 2014, there have been a number of changes made to the awards since 1 January 2010, and from time to time applications are made to further vary the awards. It is important to check from time to time that the version of the award you are using is still up to date.

### 2.1 [Aged Care Award 2010](#) (“Aged Care Award”)

The Aged Care Award covers all employees in the aged care industry that fall under one of the classifications listed in the award. The range of employees covered is fairly broad and will cover most workers in the industry. Examples of the employees that fall under the classifications in the award include:

- Personal care workers;
- Chefs and food services assistants;
- Clerks and receptionists; and
- Cleaners and maintenance workers.

### 2.2 [Social, Community, Home Care and Disability Services Industry Award 2010](#) (“SCHCDSI Award”)

The SCHCDSI Award covers a range of possible workplaces, including employees in the:

- Crisis assistance and supported housing sector;
- Social and community services sector;
- Home care sector; or
- Family day care sector.

It does not however, cover employees that fall under the Aged Care Award or Nurses Award.

### 2.3 [Nurses Award 2010](#) (“Nurses Award”)

The Nurses Award is not an industry award, but an occupational award. As the Aged Care Award does not include classifications for nurses, and the SCHCDSI Award does not apply to employees covered by the Nurses Award, this award covers employees involved in providing nursing care to people, including enrolled nurses, registered nurses, and nursing assistants.

### 2.4 [Clerks – Private Sector Award 2010](#) (“Clerks Award”)

The Clerks Award is another occupational award covering employees involved in work of a clerical nature. It only applies where an employee could not be classified as falling under one of the awards already listed above.

### 3 Classifying employees under Modern Awards

#### 4 Pay rates under an award are determined by the classification the employee falls under. Classifying employees correctly is important because incorrect classifications may lead to claims for underpayment and potential prosecution by the Fair Work Ombudsman.

Classification must be considered even where an employee is earning more than the minimum award rates. All of the modern awards discussed above require the employer to tell each employee their classification on commencement of employment, or on any subsequent change in classification.

It is also prudent to re-examine an employee's classification annually to determine if their role, skills or duties have changed to the extent that they have changed classification.

#### 4.1 How to classify an employee

Each modern award contains a set of classification definitions in the schedules at the end of the award. The definitions set out a number of characteristics that apply to the given classification. While each type of position has slightly different key characteristics, many classifications have similar things to consider. Some common considerations when classifying an employee are:

- Duties undertaken – what does the role entail?
- Supervision – does the employee act under supervision, or work independently? Do they supervise other employees?
- Autonomy – is the employee expected to follow fixed procedures, or act on their own initiative?
- Qualifications – does the employee hold qualifications relevant to the position?

Once you have obtained a firm idea of the employee's role, duties and skills, carefully read through the classifications of each individual modern award and, based on the employee's characteristics, consider the most appropriate classification.

This is an area in which members may wish to obtain legal advice.

### 5 Transitional arrangements in awards

Given the large number of awards being replaced, each with different entitlements, the impact of the wages and conditions in the modern awards varies between states, industries and employers.

To lessen the financial impact of the new arrangements on both employers and employees, most modern awards (including the four awards identified above) contain transitional provisions which allow increases and decreases in minimum conditions affecting pay to be phased in progressively over five years. If an award does contain

transitional arrangements, it will be found in a schedule at the end of the award, often Schedule A.

The Fair Work Ombudsman has developed a calculator to assist with calculating transitional rates. It is available [here](#).

## **5.1 How the transitional arrangements work**

These transitional arrangements can be summarised as follows:

- 5.1.1 The transitional arrangements do not affect all entitlements under modern awards. They affect only:
- (a) minimum wages, including piecework rates and industry allowances;
  - (b) casual and part-time loadings;
  - (c) Saturday, Sunday and public holiday penalty rates;
  - (d) evening and other penalty rates; and
  - (e) shift allowances.
- 5.1.2 Entitlements not affected by the transitional arrangements commenced in full from 1 January 2010, including allowances.
- 5.1.3 If an entitlement is affected by the arrangements, the rate of pay or loading applying under the previous award will apply until 1 July 2010.

*For employees covered by the Aged Care Award, Nurses Award or Clerks Award*

- 5.1.4 After 1 July 2010, the modern award entitlements will replace the old entitlements in five 20% increments, applied annually. The exact calculation to use will depend on whether the previous entitlement was more or less than the new entitlement. The simplest way to think of this is that the difference between the old entitlements decreases by 20% per year.

*For employees covered by the Social, Community, Home Care and Disability Services Award*

- 5.1.5 Under the SCHCDSI Award, new wage rates and industry allowances will not begin phasing until 1 July 2011. The first increment will therefore be 40%, and each subsequent increment will be 20%. Loadings and penalty rates under the SCHCDSI Award are the same as other awards and begin phasing in from 1 July 2010.

## **5.2 Calculation where the modern award entitlement is lower than the old entitlement**

From the first pay period after 1 July 2010, the employee must be paid the modern award rate, **plus** 80% of the difference between the modern award

and the current award. This percentage decreases by 20% each year from 1 July 2010 until 1 July 2014, when the full modern award rate becomes payable.

For example, for a maintenance worker in NSW to whom the Private Hospital and Residential Aged Care (Nursing Homes) Award 2002 had applied, working an afternoon shift from 2:00 pm to 7:00 pm would previously have received a 15% shift loading. Under the Aged Care Award 2010, the same shift would attract a 12.5% shift loading.

From 1 July 2010, the employee will receive the 12.5% shift loading **plus** 80% of the difference between the two loadings (80% of 2.5% = 2%), resulting in a transitional shift loading of 14.5%. This loading will apply from 1 July 2010 to 30 June 2011. From 1 July 2011, the loading will be 14% (12.5% plus 60% of the difference between the two loadings).

### **5.3 Calculation where the modern award entitlement is higher than the old entitlement**

From 1 July 2010, the employee must be paid the modern award rate, **minus** 80% of the difference between the modern award rate and the current award rate. This percentage decreases each year by 20% from 1 July 2010 until 1 July 2014, when the modern award rate is payable.

For example, a nurse in Victoria to whom the Nurses (Victorian Health Services) Award 2000 had applied would previously have received a penalty rate 150% for work performed on a Sunday. Under the Nurses Award 2010, work on a Sunday attracts a penalty rate of 175%.

From 1 July 2010, the employee will receive the 175% weekend penalty rate, **minus** 80% of the difference between the modern award rate and the old award rate (80% of 25% = 20%), resulting in a transitional rate of 155%. This loading will apply from 1 July 2010 to 30 June 2011. From 1 July 2011, the loading will be 160% (175% minus 60% of the difference between the two loadings).

### **5.4 Calculation where the modern award entitlement is not directly comparable with the old entitlement**

In some cases, the basis for calculation of an entitlement under the modern award cannot be compared to the basis for calculation of the same entitlement under the previous award. This is most commonly the case where one award provides for a fixed daily or weekly allowance in respect of certain duties, whereas the other award provides for a loading on the hourly rate of the employee performing those duties.

In those circumstances, the entitlement under the old award is phased out in 20% increments, and the entitlement under the modern award is phased in in 20% increments. This means that from 1 July 2010 the employee receives 80% of the old entitlement, and 20% of the new entitlement.

For example, a personal care worker in Victoria works a shift from 6:00 pm to midnight. Under the Health and Allied Services - Private Sector - Victoria

Consolidated Award 1998, for each shift the employee would be entitled to be paid an amount equal to 2.5% of the weekly base rate of pay for a Wage/Skill group 5 employee under that award. This equated to a fixed amount of \$15.76 per shift, with no bearing on the number of hours worked by the employee.

Under the Aged Care Award, the same employee would be entitled to a 15% loading on their hourly rate.

Under the phasing in provisions, for each shift the employee would receive:

- 80% of the old entitlement (80% of \$15.76), or \$12.61; **plus**
- 20% of the new entitlement (20% of 15%), or a 3% loading on their hourly rate.

From 1 July 2011, the allowance would be reduced to 60% of the old entitlement, and the loading would be increased to 40% of the new entitlement.

## 5.5 The impact of annual wage reviews

From 2010 onwards, each year the Minimum Wage Panel of Fair Work Australia will conduct an annual wage review. The 2010 annual wage order specified that from 1 July 2010, the minimum rates of pay in all modern awards will be increased by \$26 per week. Each modern award has been updated to reflect this change in hourly rates. Therefore, if you download a new version of a modern award, the minimum weekly wages do not need to be increased by a further \$26 per week, as this has already been taken into account.

The increase in minimum rates will also affect the calculation for phasing in. In order to determine the correct amount to pay employees when applying the formulae described in paragraphs 5.2 to 5.4 above, the amount specified in the annual wage order is added to the previous entitlement as well as the entitlement in the modern award.

For example, a level 1 food and domestic services assistant to whom the Health and Allied Services - Private Sector - Victoria Consolidated Award 1998 would previously have applied would have been entitled to a minimum weekly wage of \$554.16. The minimum weekly wage under the Aged Care Award (before the 2010 annual wage order) was \$580.00 per week. After the 2010 annual wage order, the minimum weekly wage under the Aged Care Award is \$606.00.

The calculation works as follows, in accordance with the formula where the modern award rate is higher:

- add the \$26 to the weekly rate under the previous award, bringing that rate up to \$580.16;
- use the current modern award rate (\$606.00), which incorporates the \$26.00 increase from the 2010 annual wage order;

- the transitional pay rate is \$606.00 minus 80% of the difference between the two rates. The difference between \$606.00 and \$580.16 is \$25.84. \$606.00 minus 80% of \$25.84 leaves \$585.33. This is the applicable wage rate from 1 July 2010 for a level 1 food and domestic services assistant.

Allowances based on a fixed amount are not affected by the annual wage review. Instead, each modern award has includes a term under the heading of Allowances entitled 'Adjustment of expense related allowances.' This term requires allowances to be increased by the specified consumer price index figure as published by the Australian Bureau of Statistics. This adjustment occurs at the same time as the employee's base rate is increased (ie, from 1 July 2010).

## 5.6 Take-home pay orders

If the result of the transition from an old award to a modern award is that there is a reduction in the take-home pay received by an employee, the employee can make an application for an order preserving the employee's previous pay rates.

More information about take-home pay orders can be viewed [here](#).

## 6 How do modern awards interact with other entitlements?

### 6.1 National Employment Standards

The National Employment Standards ("NES") are a minimum safety net of entitlements that may not be diminished by another workplace instrument. Although modern awards may provide entitlements that are more favourable than the NES, if the award includes any term that is less favourable to an employee than the NES, that term has no effect.

In other words, an award may give an employee more than the minimum standards provided by the NES, but never less.

### 6.2 Old Awards

Old Federal awards that came into operation before 1 January 2010 and notional agreements preserving State awards ("NAPSAs") continue to exist as 'award-based transitional instruments.' They continue to apply to employees until a modern award begins to cover such an employee. Once a modern award covers an employee, the old award ceases to have any effect.

This means that in almost all cases, the old awards applying to the aged and community services sector no longer have effect as awards. They do continue to have effect in several ways:

- 6.2.1 Old awards are an essential part of the phasing in process discussed in item 5 above.

- 6.2.2 The long service leave provisions of old awards are enforceable as entitlements under the NES.
- 6.2.3 If entitlements to redundancy pay under a NAPSA prior to 1 January 2010 were more favourable than the entitlement to redundancy pay under the NES, the modern award preserves these entitlements until 31 December 2014.
- 6.2.4 If there were entitlements to accident make-up pay under an old award or NAPSA, the modern awards preserve them until 31 December 2014.

### 6.3 Old Agreements

Agreements that came into operation before 1 July 2009 continue to exist as 'agreement-based transitional instruments.' The various types of agreement interact with modern awards in one of two different ways:

#### 6.3.1 **Old agreements that override a modern award to the extent of any inconsistency**

In some cases where both a modern award and an old agreement cover an employee, both the award and agreement will apply to the employee. However, the old agreement will prevail over the modern award to the extent of any inconsistency.

The three types of old agreements that fall under this category are:

- (a) Pre-reform certified agreements – agreements made between parties and certified by the Australian Industrial Relations Commission (“AIRC”) before the introduction of Work Choices on 27 March 2006;
- (b) Old IR agreements – agreements that were made under the *Industrial Relations Act 1988*, before the Act was changed to the *Workplace Relations Act 1996*; and
- (c) Section 170MX awards – determinations made before the introduction of Work Choices on 27 March 2006 by the AIRC where the bargaining process for making an agreement had failed.

For these types of agreements, the employee’s entitlements will be come from both the agreement and the modern award, but if there is some conflict between the agreement and award, the agreement should be followed.

#### 6.3.2 **Old agreements that override a modern award completely**

This situation applies where a type of old agreement that is not one of the three on the list above applies to an employee

(including collective agreements made after 27 March 2006 but before 1 July 2009, and all AWAs and ITEAs).

If both an old agreement of these types and a modern award cover an employee, then the modern award will not apply to the employee. This means that the employee's entitlements will be sourced entirely from the old agreement, regardless of the contents of the modern award.

#### **6.4 New Agreements**

Agreements made after 1 July 2009 are called 'enterprise agreements.' Where an enterprise agreement applies to an employee, a modern award will not apply to them. The enterprise agreement will completely replace the modern award while the agreement is in effect.

#### **6.5 Common law agreements**

If employees are engaged under common law employment agreements or contracts, and the contracts provide for payment in excess of the award rates, it is possible to incorporate the monetary entitlements contained in a modern award into the agreed wage. This means that over-award payments can effectively be set off against award entitlements.

However, it is important to ensure that the contract is properly drafted to make it clear that parties have agreed to the arrangement. It is also essential to ensure that the over-award payment adequately compensates the employee for the entitlement that they are trading off.

### **7 What are individual flexibility arrangements?**

Individual flexibility arrangements ("IFAs") are a new concept under the Fair Work Act. Under the Fair Work Act, all modern awards and enterprise agreements must contain an individual flexibility term.

#### **7.1 Individual flexibility terms in modern awards**

An individual flexibility term provides the mechanism for an employer and employee to negotiate changes to the modern award or enterprise agreement to suit individual needs. The extent to which changes to the agreement or award can be negotiated will depend on the individual flexibility term itself. In the model flexibility term, which is used in most awards (including the four mentioned above) an IFA may make changes to:

- working hours;
- overtime rates;
- penalty rates;
- allowances; and
- leave loading.

The IFA must be ‘genuinely agreed to’ between employer and employee and the employer must ensure that the IFA passes the ‘better off overall test.’

There is no set of criteria defining when an employee will be better off overall under an IFA. Generally this will require the employer to consider a number of factors. Some factors that are likely to be relevant are:

- a comparison of the financial benefits that the employee would receive with the IFA and without the IFA;
- whether the employee receives significant non-financial benefits from entering into the IFA, for example by allowing them additional time with their family;
- whether the employer or employee proposed the agreement – it has been suggested that an employee is more likely to have considered themselves better off overall if they were the one to propose the IFA.

## **7.2 An example of an individual flexibility arrangement**

The following example of an IFA suggests an arrangement that may pass the better off overall test, and why:

Chris is a full time employee who works in a clerical role at an aged care facility from Monday to Friday. He wishes to change his days of work from Sunday to Thursday to accommodate family responsibilities.

The Aged Care Award 2010 applies to Chris, so normally work on a Sunday would attract a penalty rate of 175%. The Aged Care Award allows the employer and an employee to make an individual flexibility arrangement that varies the terms of the award dealing with hours of work and penalty rates.

Chris approaches his employer. His employer does not wish to pay the penalty rate for Chris to work on a Sunday, so they agree that Chris can remain on his usual weekly wage, and work his normal hours Monday to Thursday and a half-day on Sunday.

The employer must ensure that Chris is better off overall under the individual flexibility arrangement than under the award. In Chris’s case, he has agreed under the individual flexibility arrangement to give up his Sunday penalty rate in return for reduced number of working hours that Chris can work at a non-standard time.

Relevant factors in Chris’s case that suggest the individual flexibility arrangement is likely to pass the better off overall test are:

- Chris gains the non-financial benefit of being able to accommodate his family responsibilities;
- Chris genuinely agreed to the arrangement; and
- The reduced hours Chris works at his previous weekly wage mean he is not financially worse off than if he had not entered the IFA.

### **7.3 Process for making an individual flexibility arrangement**

The exact process involved in making an IFA is contained in the individual flexibility term of the relevant modern award, but based on the model term, the process is as follows:

- 7.3.1 The employer and employee must genuinely make the agreement without coercion or duress.
- 7.3.2 If the employer is proposing the IFA, they must provide a written proposal to the employee. The proposal must be translated into a language the employee understands if necessary.
- 7.3.3 The IFA must be in writing and be signed by both the employer and the employee (or the employee's parent or guardian if they are under 18).
- 7.3.4 The IFA must state each term of the award that is being varied, how it is being varied, how the employee is better off overall as a result, and a commencement date.
- 7.3.5 Once the IFA has been made, it may be terminated by either the employer or employee on 28 days' written notice, or immediately by mutual agreement between the employer and employee in writing.

## **8 Breaches of modern award terms**

If an employer does not comply with a modern award in relation to an employee, that employee can take legal action to recover compensation or obtain an order that the employer comply with the modern award. The legal proceedings may be issued in the Federal Court system, but proceedings may also be issued in some state courts (such as the Industrial Division of the Victorian Magistrates' Court). If there is any shortfall in payments, the employee can recover that money, plus interest. The court may also make an order for a penalty of up to \$33,000 against a company, and up to \$6,600 against an individual who has been involved in a breach.

While the employee may pursue this breach in person, through their union, or through legal representatives, they may instead choose to notify the Fair Work Ombudsman, which may conduct an investigation. If the Fair Work Ombudsman considers that a breach of the modern award has occurred, and the employer disputes that breach, the Fair Work Ombudsman may prosecute the employer in relation to that breach.

## **9 Further information**

Further information about modern awards at the following links:

[About modern awards](#)

[Transitional arrangements](#)