

REQUEST UNDER SECTION 576C(1) – AWARD MODERNISATION

CONSOLIDATED VERSION

This is a consolidated version of the Award Modernisation Request, incorporating the Variation of Award Modernisation Request under section 576C(4), issued by Julia Gillard, Minister for Employment and Workplace Relations on 9 November 2009.

I, JULIA GILLARD, MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS, pursuant to section 576C(1) of the Workplace Relations Act 1996 (the Act), request that the President of Australian Industrial Relations Commission (the Commission) undertake award modernisation in accordance with this request.

This award modernisation request is to be read in conjunction with Part 10A of the Act.

Objects

1. The aim of the award modernisation process is to create a comprehensive set of modern awards. As set out in section 576A of the Act, modern awards:
 - (a) must be simple to understand and easy to apply, and must reduce the regulatory burden on business; and
 - (b) together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees; and
 - (c) must be economically sustainable and promote flexible modern work practices and the efficient and productive performance of work; and
 - (d) must be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements;
 - (e) must result in a certain, stable and sustainable modern award system for Australia.
2. The creation of modern awards is not intended to:
 - (a) extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia;
 - (b) result in high-income employees being covered by modern awards;
 - (c) disadvantage employees;

- (d) increase costs for employers;
- (e) result in the modification of enterprise awards or Notional Agreements Preserving State Awards (NAPSAs) that are derived from state enterprise awards. This does not preclude the creation of a modern award for an industry or occupation in which enterprise awards or NAPSAs that are derived from state enterprise awards operate. However a modern award should be expressed so as not to bind an employer who is bound by an enterprise award or a NAPSA derived from a state enterprise award in respect of an employee to whom the enterprise award or NAPSA applies;
- (f) exempt or have the effect of exempting employees who are not high income employees, from modern award coverage or application, unless there is a history of exempting employees from coverage across a wide range of pre-reform awards and NAPSAs in the relevant industry or occupation.

2A In paragraph 2(e) an enterprise award means an award that regulates the terms and conditions of employment in:

- (a) a single enterprise (or part of a single enterprise) only; or
- (b) in one or more enterprises, if the employers all carry on similar business activities under the same franchise and are:
 - i. franchisees of the same franchisor; or
 - ii. related bodies corporate of the same franchisor; or
 - iii. any combination of the above.

2B In paragraph 2(e) a NAPSA derived from a State enterprise award means a NAPSA derived from a State award that regulated the terms and conditions of employment in:

- a. a single enterprise (or part of a single enterprise) only; or
- b. in one or more enterprises, if the employers all carry on similar business activities under the same franchise and are:
 - i. franchisees of the same franchisor; or
 - ii. related bodies corporate of the same franchisor; or
 - iii. any combination of the above.

Performance of functions by the Commission

- 3. In accordance with section 576B of the Act, the Commission must have regard to the following factors when performing its functions under Part 10A of the Act and this award modernisation request:
 - (a) the creation of jobs and the promotion of high levels of productivity, low inflation, high levels of employment and labour force participation, national and international competitiveness, the development of skills and a fair labour market;
 - (b) protecting the position in the labour market of young people, employees to whom training arrangements apply and employees with a disability;
 - (c) the needs of the low paid;

- (d) the desirability of reducing the number of awards operating in the workplace relations system;
- (e) the need to help prevent and eliminate discrimination on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin and to promote the principle of equal remuneration for work of equal or comparable value;
- (f) the need to assist employees to balance their work and family responsibilities effectively and to improve retention and participation of employees in the workforce;
- (g) the safety, health and welfare of employees;
- (h) relevant rates of pay in Australian Pay & Classification Scales and transitional awards;
- (i) minimum wage decisions of the Australian Fair Pay Commission; and
- (j) the representation rights, under the Act or the Registration and Accountability of Organisations Schedule, of organisations and transitionally registered associations.

Award modernisation process

- 4. When modernising awards, the Commission is to create modern awards primarily along industry lines, but may also create modern awards along occupational lines as it considers appropriate.
- 4A. The Commission is to create a modern award 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 (including State awards). The Commission is to identify this award as such. This modern award is not to cover those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have not traditionally been covered by awards. The modern award may deal with the full range of matters able to be dealt with by any modern award however the Commission must ensure that the award deals with minimum wages and meal breaks and any necessary ancillary or incidental provisions about NES entitlements.
- 4B. In creating modern awards, and as indicated at paragraph 3(d) above, the Commission must have regard to the desirability of reducing the number of awards operating in the workplace relations system.
- 4C. In undertaking the award modernisation process, in relation to Victoria, the Commission should take into account transitional awards, transitional Victorian reference awards and common rules that are currently in operation under Schedule 6 to the *Workplace Relations Act 1996* and that would be given effect under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* after 1 July 2009.

- 4D. The Commission must also ensure that modern awards (other than State reference public sector modern awards) are not expressed to cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award, or to cover employers of those employees.
5. Division 3 of Part 10A of the Act deals with the terms of modern awards, including the provisions that may be included and must not be included in modern awards. Subject to paragraphs 28 - 46 below, modern awards may also include provisions relating to the National Employment Standards (NES).
6. As soon as practicable after receiving this award modernisation request, the President will consult with the major employer and employee representative bodies on the best process to be followed by the Commission when creating modern awards. The President will then release a clear program and timetable for completing the award modernisation process.
7. Individual Commission members may be directed by the President in the award modernisation process.
8. The Commission will identify the type of work, industry and/or occupations covered by a modern award and the application of each award.
- 8A. In developing the modern award in accordance with paragraph 4A the Commission must have particular regard to paragraph 1(c) and consider how the modern award will include provisions appropriate for application to employers and employees in a range of industries and/or occupations.
9. The Commission is to have regard to the desirability of avoiding the overlap of awards and minimising the number of awards that may apply to a particular employee or employer. Where there is any overlap or potential overlap in the coverage of modern awards, the Commission will as far as possible include clear rules that identify which award applies.
10. The Commission will prepare a model flexibility term to enable an employer and an individual employee to agree on arrangements to meet the genuine individual needs of the employer and the employee.
11. Each modern award will include the model flexibility term with such adaptation as is required for the modern award in which it is included.
- 11AA The Commission must ensure that the flexibility term:
- identifies the terms of the modern award that may be varied by an individual flexibility arrangement;
 - requires that the employee and the employer genuinely agree to an individual flexibility arrangement;
 - requires the employer to ensure that any individual flexibility arrangement must result in the employee being better off overall;
 - sets out how any flexibility arrangement may be terminated;
 - requires the employer to ensure that any individual flexibility arrangement be in writing and signed:
 - (a) in all cases – by the employee and the employer;

- (b) if the employee is under 18 – by the parent or guardian of the employee;
- requires the employer to ensure that a copy of the individual flexibility arrangement be given to the employee;
- prohibits an individual flexibility arrangement agreed to by an employer and employee from requiring the approval or consent of another person, other than the consent of a parent or guardian where an employee is under 18; and
- where an employee genuinely agrees with an employer to make an individual flexibility arrangement but is either unable to read and/or sign that arrangement, a parent, guardian or representative may sign that agreement on their behalf.

11AB. The Commission can also require any appropriate additional protections for employees or groups of employees of Australian Disability Enterprises.

11A. The Commission should ensure that each modern award includes a clause that sets out a process or process to ensure the settlement of disputes in relation to matters arising under the award. The Commission should ensure the process or processes are suitable for the settling of disputes in relation to matters arising under the NES for employees to whom awards apply. In drafting this clause the Commission may have regard to any method of dispute resolution that it considers appropriate.

12. The Commission may include transitional arrangements in modern awards to ensure the Commission complies with the objects and principles of award modernisation set out in this award modernisation request.

Consultation

13. The President will consult with the Australian Fair Pay Commission and State industrial tribunals as appropriate.

14. The Commission will prepare an exposure draft of each modernised award. The Commission will, as appropriate, hold a conference or conferences with major employer and employee representative bodies for the purpose of informing the preparation of each exposure draft.

15. The Commission is to publish exposure drafts of each modernised award for the purpose of further consultation and to ensure that all stakeholders and interested parties have a reasonable opportunity to comment upon the exposure drafts. In so far as practicable, the exposure drafts will be electronically published for comment.

16. Consultation on exposure drafts of modern awards will be open and transparent.

Creating modern awards

17. Upon completion of the consultation processes in relation to an exposure draft, the Commission will prepare the modern award.

18. The President may establish one or more Full Benches for the purpose of creating modern awards. Each modern award is to be created by a Full Bench.

Timing

19. The Commission is to complete the award modernisation process by 31 December 2009.
20. To that end, the Commission should endeavour by 30 June 2008 to have identified a list of priority industries or occupations for award modernisation, developed a timetable for completing the award modernisation process and developed a proposed model award flexibility clause. In developing its priority list, the Commission will have regard to those industries and occupations with high numbers of Australian Workplace Agreements and NAPSAs.
21. In identifying a list of priority industries or occupations for award modernisation, developing a timetable for completing the award modernisation process and developing a proposed model award flexibility clause, the Commission is to consult with major workplace relations stakeholders and other interested parties. It is acknowledged that the Commission will require the full support and cooperation of major workplace relations stakeholders and other interested parties in order to conduct that consultation.
22. In developing a timeframe for completing the award modernisation process, the Commission should endeavour to have created by the end of December 2008 modern awards for each of the priority industries or occupations it has identified following the consultations with key workplace relations stakeholders.

Reporting on the progress of award modernisation

23. The President is to publish a quarterly report outlining:
 - (a) those industries or occupations undergoing or about to commence award modernisation, including the Commission member responsible, under the auspices of the Full Bench, for those industries and/or occupations;
 - (b) the progress of award modernisation, including any significant developments during the quarter, key issues or developments scheduled for the next quarter and any adjustments made to the timetable determined by the President for the award modernisation process; and
 - (c) any other matters which the President considers appropriate.
24. The first quarterly report should relate to the June quarter 2008.

Minimum wages

25. In accordance with section 576J of the Act, minimum wages are a matter that may be dealt with in modern awards. In dealing with minimum wages the Commission is to have regard to the desire for modern awards to provide a comprehensive range of fair minimum wages for all employees including, where appropriate, junior employees, employees to whom training arrangements apply and employees with a disability in order to assist in the promotion of employment opportunities for those employees.

Allowances

26. Allowances should be clearly and separately identified in modern awards.
27. The Commission is to ensure that all modern awards include an appropriate method or formula for automatically adjusting relevant allowances when minimum wage rates are adjusted.

Restaurant and catering industry

27A. The Commission should create a modern award covering the restaurant and catering industry, separate from those sectors in the hospitality industry providing hotelier, accommodation or gaming services. The development of such a modern award should establish a penalty rate and overtime regime that takes account of the operational requirements of the restaurant and catering industry, including the labour intensive nature of the industry and in the industry's core trading times.

Interaction with the National Employment Standards

28. The NES consist of 10 legislated minimum conditions of employment for all employees covered by the federal system. The NES will establish a simple legislative framework of minimum entitlements with straightforward application or machinery rules that are essential to the operation of each entitlement. The NES will operate in conjunction with a relevant modern award to provide a fair safety net of minimum entitlements for award covered employees.
29. A modern award may cross reference a provision of the NES. A modern award may replicate a provision of the NES only where the Commission considers this essential for the effective operation of the particular modern award provision. Where a modern award replicates a provision of the NES, NES entitlements will be enforceable only as NES entitlements and not as provisions of the modern award.
30. A modern award cannot exclude the NES or any provision of the NES. However, a modern award can provide ancillary or incidental detail in relation to the operation of an entitlement under the NES but only to the extent that the term is not detrimental in any respect, when compared to the NES.
31. Subject to paragraphs 34 and 35 below, a modern award may include industry-specific detail about matters in the NES.
32. Subject to paragraph 34 below, a modern award may supplement the NES where the Commission considers it necessary to do so to ensure the maintenance of a fair minimum safety net for employees covered by the modern award, having regard to the terms of this request and the existing award provisions (including under NAPSAs) for those employees, such as small business redundancy entitlements or the rate of pay at which various types of leave is taken. The Commission may only supplement the NES where the effect of these provisions is not detrimental to an employee in any respect, when compared to the NES.
33. The NES provides that particular types of provisions are able to be included in modern awards even though they might otherwise be inconsistent with the NES. The Commission

may include provisions dealing with these issues in a modern award. The NES allows, but does not require, modern awards to include terms that:

- provide for loadings to be paid to school-based trainees and school-based apprentices in lieu of certain entitlements;
- enable the averaging of hours of work over a specified period;
- provide for the cashing out of paid annual leave by an employee, provided that such terms require:
 - the retention of a minimum balance of 4 weeks' leave after the leave is cashed out;
 - the cashing out of each amount be by separate agreement in writing; and
 - payment of cashed out leave be at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone;
- require employees, or allow employees to be required, to take paid annual leave, but only if the requirement is reasonable;
- otherwise deal with the taking of paid annual leave;
- provide for the cashing out of paid personal/carer's leave, provided that such terms require:
 - the retention of a minimum balance of 15 days' leave after the leave is cashed out;
 - the cashing out of each particular amount be by separate agreement in writing; and
 - the payment of cashed out leave be at least at the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone;
- relate to the kind of evidence required to be provided by an employee when taking paid personal/carer's leave, unpaid carer's leave or compassionate leave;
- provide for the substitution of public holidays by agreement between an employer and employee;
- specify the period of notice an employee may be required to give when terminating their employment; and
- specify further situations in which section 119 (redundancy pay) does not apply to the termination of an employee's employment.

33AAA Where an industry has developed specific arrangements for termination and redundancy to reflect the way the industry operates, the Commission may specify in a modern award that section 119 of the NES does not apply in those circumstances.

33AA Where a modern award covers work performed in remote locations, the Commission should include terms that permit the roster arrangements and working hours presently operating in practice in those locations to continue after the making of the modern award.

33A The NES allows a modern award to include terms requiring an employee, or allowing an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable. Where an award covers remote work, a modern award should provide that an employer may reasonably require employees who work on a roster cycle make up of working days (on-duty period) and non-working days (off-duty period) to do either or both of the following:

- (i) to take any period or periods of annual leave of the same duration as the on-duty period under the employee's work cycle roster;
- (ii) to take annual leave on any day nominated as annual leave as part of the roster cycle.

34. In relation to long service leave, the Australian Government will, in co-operation with state governments, develop a national long service leave entitlement under the NES. In doing so, the Australian Government will also consult with major employer and employee representative bodies. Until then, long service leave entitlements derived from various sources will be protected. So as to not pre-empt the development of a nationally consistent approach, the Commission must not include a provision of any kind in a modern award that deals with long service leave.
35. Other than expressly authorised under this request, the Commission must not include a term in a modern award on the basis that it would be an allowable modern award matter where the substance of the matter is dealt with under the NES.

Termination and Redundancy

36. The NES excludes employees from redundancy entitlements where their award contains an 'industry specific redundancy scheme'. An 'industry specific redundancy scheme' in a modern award will operate in place of the NES entitlement, including the NES redundancy definition, in these circumstances."
37. An 'industry specific redundancy scheme' is one identified as such in a modern award.
38. The Commission may include an 'industry specific redundancy scheme' in a modern award.
39. In determining whether particular redundancy arrangements constitute an 'industry specific redundancy scheme', the Commission may have regard to the following factors:
- when considered in totality, whether the scheme is no less beneficial to employees in that industry than the redundancy provisions of the NES; and
 - whether the scheme is an established feature of the relevant industry.

Shift workers

40. The NES apply to shift workers and provide that a shift worker is entitled to an additional week of annual leave – that is, five weeks of annual leave for each year of completed service.
41. The NES rely on a modern award to define, where required, a shift worker as appropriate for the particular industry covered by the award.
42. In modernising awards, the Commission must have regard to whether it is appropriate to include a definition of shift worker in a modern award that applies to these types of employees for the purposes of the NES annual leave entitlements.

Piece workers

43. The NES apply to a piece worker.
44. The NES rely on modern awards to define a piece worker and set out rules relating to the payment of NES entitlements (based on ordinary hours of work) for a piece worker.
45. In modernising awards, the Commission must have regard to whether it is appropriate to include:
 - (a) a definition of piece worker in a modern award that applies to these types of employees (if an employee is employed on the basis of hours worked, it is not expected that such employees would be defined as piece workers); or
 - (b) a provision that would provide a calculation of payment, a payment rate, or a payment rule in relation to a piece worker employee with respect to paid leave or paid absence under the NES. For example, a method of making payment to a piece worker employee when that employee is absent on annual leave. Any provisions setting out a calculation payment must take into account the various methods by which a piece worker may be remunerated under the modern award, including by incentive payments or bonuses.

Ordinary hours of work

46. Many entitlements in the NES rely on modern awards to set out ordinary hours of work on a weekly or daily basis for an employee covered by the modern award. The Commission is to ensure that it specifies in each modern award the ordinary hours of work for each classification of employee covered by the modern award for the purpose of calculating entitlements in the NES. The Commission is also to ensure that ordinary hours (or the process for determining ordinary hours) are specified for each type of employment permitted by the modern award (for example, part time, casual). In the case of employees to whom training arrangements apply, the Commission should ensure that ordinary hours (or the process for determining ordinary hours) are specified for the purpose of calculating entitlements in the NES.

Maritime Industry

47. When creating a modern award covering the maritime industry, the Commission should ensure that the modern award covers employers on licensed, permit or majority Australian-crewed ships (as defined in item 1 of Schedule 2 to the *Fair Work Amendment Regulations 2009* (No.1)) and their employees.
48. The Commission should give consideration to the circumstances and needs of the employers and employees in the areas described in these regulations.
49. As well as giving consideration to the modern awards objective in s576A of Part 10A of the *Workplace Relations Act 1996*, the other terms of this award modernisation request and the NES, the Commission should consider whether it is appropriate to establish award provisions for employers of the crews of permit ships and their employees relating to accrued entitlements and associated arrangements. In considering this matter, the Commission should have regard to the needs of those employers and employees who may

be in Australia for relatively short periods or who are regularly moving in and out of the Australian jurisdiction.

Horticulture Industry

50. The Commission should enable employers in the horticulture industry to continue to pay piece rates of pay to casual employees who pick produce, as opposed to a minimum rate of pay supplemented by an incentive based payment.
51. Where a modern award covers horticultural work, the Commission should:
 - have regard to the perishable nature of the produce grown by particular sectors of the horticulture industry when setting the hours of work provisions for employees who pick and pack this produce; and
 - provide for roster arrangements and working hours that are sufficiently flexible to accommodate seasonal demands and restrictions caused by weather as to when work can be performed.

Hours of work and penalty provisions – work that involves receiving calls, using call centre technology and entering and retrieving data

52. Where a modern award applies to employees primarily performing the work of receiving calls, using call centre technology and entering and retrieving data, the Commission should establish working hours and penalty rates arrangements that are substantially based upon those that presently apply to those employees within the industry in which they work.

Overtime penalty rates – part-time work

53. The Commission should ensure that the hours of work and associated overtime penalty arrangements in the retail, pharmacy and any similar industries the Commission views as relevant do not operate to discourage employers from:
 - offering additional hours of work to part-time employees; and
 - employing part-time employees rather than casual employees.

Airline Industry

54. Where a modern award covers airline ground staff, the Commission should consider whether separate classification structures and rates of pay should be provided for ground staff employed in regional, domestic and overseas airline operations, having regard to the existing classification structures and rates of pay that apply to this work and the intention of the award modernisation process to not disadvantage employees.
55. Where a modern award covers airline cabin crew, the Commission should ensure that hours of work and rostering provisions appropriately balance the objectives of:
 - recognising the need to assist employees to balance their work and family responsibilities effectively and to improve retention and participation of employees in the workforce;
 - promoting the safety, health and welfare of employees; and
 - promoting flexible modern work practices and the efficient and productive performance of work having regard to the needs of employers in the airline

industry, including the need for employers to be able to re-schedule work efficiently and effectively where changes to flying schedules occur.

56. The Commission should consider whether to include provisions in the modern award applying to aircraft cabin crew to supplement the National Employment Standards in respect of parental leave and related provisions (such as the provision of alternative duties during pregnancy) having regard to:
- the nature of duties performed by aircraft cabin crew;
 - any risks to the health, safety and welfare of employees associated with flying during pregnancy;
 - the nature and scope of coverage of existing award entitlements; and
 - whether such provisions are necessary in order to provide a fair minimum safety net of employment conditions for aircraft cabin crew.