

ADE industrial relations information sessions

Questions and Answers

This document provides further information in response to questions raised during the information sessions. We have arranged the questions and answers under the following topic headings:

- (a) the federal industrial relations system and ADEs;
- (b) the SES Modern Award;
- (c) wages and related issues;
- (d) wage assessment;
- (e) classification;
- (f) other terms and conditions;
- (g) enterprise-level agreements and agreement making; and
- (h) other matters.

THE FEDERAL INDUSTRIAL RELATIONS SYSTEM AND ADEs

1. When did the federal industrial relations system commence applying to my ADE?

The transitional arrangements for ADEs vary depending on when the ADE entered the federal industrial relations system.

Section 2.4 of the Workbook (see attached) provides further information on when ADEs became covered by the federal industrial relations system.

In summary:

- ADEs in Victoria, the Australian Capital Territory and the Northern Territory have been in the federal system for some time;
- before March 2006, ADEs in other States were only covered by the federal system if they became a respondent to a federal award, such as the LHMU Award, or made a federal certified agreement;
- in March 2006, all ADEs in New South Wales, Queensland, South Australia, Tasmania and Western Australia that were constitutional corporations (see Question 2 below) became covered by the federal system; and
- from 1 January 2010, all remaining private sector ADEs in New South Wales, Queensland, South Australia and Tasmania became covered by the federal system.

ADEs in Western Australia that are not constitutional corporations continue to be covered by the Western Australian industrial relations system.

2. I understand that the federal industrial relations system applied to all "constitutional corporations" from March 2006 onwards. What makes an organisation a "constitutional corporation"?

The critical issue in determining whether an employer is a "constitutional corporation" is whether or not the employer is a body corporate, such as a company created under the *Corporations Act 2001*, an incorporated association created under State legislation or some other corporate body, as opposed to an individual, a partnership or an unincorporated association.

If an ADE employer is a body corporate it is very likely that the ADE will be a "constitutional corporation" for the purposes of industrial relations legislation. Constitutional corporations are, relevantly, corporate bodies that generate a significant portion of their revenue from trading activities. Most ADEs engage in commercial activity and therefore are "trading".

THE SES MODERN AWARD

3. Does the SES Modern Award cover all ADEs?

The *Supported Employment Services Award 2010 (SES Modern Award)* is intended to cover all employers throughout Australia who operate supported employment services and their employees.

As noted in the information sessions, the SES Modern Award may not currently apply to some ADEs and their employees because an industrial instrument (such as a transitional enterprise-level agreement or an enterprise agreement) covers the ADE.

4. Which employees of an ADE are covered by the SES Modern Award

Employees with disability working in supported employment

The SES Modern Award is intended to cover all employees with disability working for a supported employment service. The classifications set out in Schedule B to the SES Modern Award cover a wide range of industries and are intended to cover all work performed by supported employees.

If your ADE employs supported employees to perform other work (for example, retail), you should consider seeking a variation to the classifications contained in Schedule B to the SES Modern Award to reflect this work type (see Question 6 below). In the meantime, you should consider contacting the Fair Work Infoline (13 13 94) to seek guidance in relation to award coverage of these employees.

Other employees

The SES Modern Award also covers other (non-supported) employees of ADEs working in the classifications listed in Schedule B to the SES Modern Award, except employees who are covered by one of the following modern awards:

- *Aged Care Award 2010;*
- *Health Professionals and Support Services Award 2010;* or
- *Social, Community, Home Care and Disability Services Industry Award 2010.*

ADEs should consider contacting the Fair Work Infoline (13 13 94) to seek guidance in relation to award coverage of these employees.

5. When is the SES Modern Award going to be reviewed?

It is anticipated that Fair Work Australia will review each modern award during 2012 to determine whether the modern award is achieving the modern awards objective (see the presentation from the Department of Education, Employment and Workplace Relations) and operating free from anomalies and technical issues.

In addition, the *Fair Work Act 2009* provides for four-yearly substantive reviews of modern awards (with the first review to occur in 2014).

6. Can an organisation ask for the SES Modern Award to be varied and, if so, what is the process?

An employer, employee or organisation covered by a modern award can apply to Fair Work Australia to have the modern award varied.

Fair Work Australia may vary a modern award to:

- resolve uncertainty or ambiguity;
- achieve the modern awards objective; or
- remove a discriminatory requirement (on application from the Australian Human Rights Commission).

An applicant must complete and lodge Form F46 with Fair Work Australia (available from www.fwa.gov.au). Fair Work Australia may require the applicant to provide copies of the application to other interested parties.

Fair Work Australia may decide whether to vary the modern award based on written and/or oral submissions made by the interested parties.

WAGES AND RELATED ISSUES

7. The minimum rates of pay under the SES Modern Award commence from the first full pay period after 1 July 2010. How do I determine the minimum rate of pay that applies to supported employees?

Attachment A to this document sets out detailed instructions on calculating minimum wages for supported employees from 1 July 2010 onwards.

8. The SES Modern Award does not contain a term that expressly permits salary packaging. Can an ADE still provide salary packaging arrangements to its employees?

The absence of a salary packaging term in the SES Modern Award prevents an employer from directly providing non-cash benefits to an employee as part of a salary sacrifice arrangement.

However, it is lawful for employers covered by the SES Modern Award to enter into salary packaging arrangements under which the employee authorises the employer to deduct money from the employee's pay and pay that amount to a salary packaging provider or third party supplier who provides the employee with a non-cash benefit. This is the case notwithstanding the omission of a salary packaging term in the SES Modern Award.

Under section 324 of the *Fair Work Act 2009*, the authorisation by the employee must be in writing, be principally for the benefit of the employee and must specify the amount of the deduction. The employee may withdraw the authorisation at any time.

WAGE ASSESSMENT

9. What happens if a supported employee no longer qualifies to be a supported employee?

The SES Modern Award defines "employee with a disability" as an employee who qualifies for the Disability Support Pension (**DSP**). A person can *qualify* for DSP but not be eligible to receive DSP payments (due to the application of the income test, etc).

An ADE can only apply a pro-rata wage assessment to an employee who is an "employee with a disability" for the purpose of the SES Modern Award. Accordingly, ADEs should ensure that all supported employees have been assessed by Centrelink as qualifying for DSP.

10. How should an ADE determine the wage of an employee with disability before the pro-rata wage tool is administered?

The rate of pay for a new employee during the period before a wage assessment is conducted must be determined in accordance with the industrial instrument that applies to the ADE and/or the wage assessment tool being used by the ADE.

The SES Modern Award requires employees to be paid at the rate of pay assessed under one of the approved wage assessment tools, and does not contain any provision in relation to payment before the wage assessment is conducted.

Some wage assessment tools provide for a trial period, and a standard wage rate, or a percentage of the wage, to apply during that period. In those circumstances, we consider that it is justifiable for the ADE to pay the rate of pay determined by the tool.

Some tools (for example, BSWAT) do not make any reference to payment during the period before the wage assessment is conducted or finalised. In those cases, the ADE does not appear to have any legal basis for paying an employee at a rate below the full award rate. As noted in the information sessions, ADEs that use wage assessment tools that do not address payment during a trial period may consider applying to Fair Work Australia to vary the SES Modern Award to address this issue (see Question 6 above).

11. Can a wage assessment tool be administered to employees with disability who are working above outlet capacity?

Yes. If an ADE wishes to pay an employee a pro-rata wage, the employee must:

- be an "employee with a disability" for the purpose of the SES Modern Award – that is, be qualified for DSP (see Question 9 above); and
- have their capacity assessed in accordance with an approved wage assessment tool.

Otherwise, the ADE should pay the employee at the full minimum rate of pay specified in the SES Modern Award.

12. Can an ADE change from one wage assessment tool to another?

There are some difficulties in changing from one tool to another if the subsequent wage is reduced, but this difficulty is not one to do with industrial relations law. It has more to do with each individual and what they may do with it – for example, report to the Australian Human Rights Commission, or use a complaints mechanism.

13. Can an organisation use a wage assessment tool that is not in the SES Modern Award?

Where the SES Modern Award applies to an ADE and its employees, the ADE may only use one of the approved wage assessment tools specified in the SES Modern Award.

An ADE can, however, use another wage assessment tool or a modified wage assessment tool if:

- the tool is contained in an existing enterprise-level agreement or state enterprise award that applies to the ADE and its supported employees;
- the ADE continues to be covered by a Division 2B State Award (only unincorporated ADEs that became covered by the federal system on 1 January 2010) and a slow worker permit (or equivalent) applies to the employee; or
- the tool is contained in a new Fair Work Act enterprise agreement that applies to the ADE and its supported employees.

An ADE cannot use a modified wage assessment tool unless that tool is contained in one of the above instruments. An ADE that previously made "informal" modifications to an approved wage assessment tool cannot use the modified tool once the SES Modern Award starts to apply to the ADE.

14. Can we use a different tool to the wage tool listed in our enterprise-level agreement?

No. An ADE can seek to make a new Fair Work Act enterprise agreement that permits the ADE to use another tool. If the tool in the proposed enterprise agreement is one listed in the SES Modern Award then, all things being equal, the enterprise agreement would pass the Better Off Overall Test. If the tool chosen in the enterprise agreement provides a lower wage outcome than the previous agreement, that may give rise to the same issues referred to in Question 12 above.

There cannot be any modifications to the tool itself or its processes without going through the above process.

15. Can an ADE use an award other than the SES Modern Award and just pick a wage assessment tool to administer? Disability Services Standard 9 says that you can use a tool that meets the criteria of the Guide to Good Practice Wage Determination.

All ADEs should be covered by the SES Modern Award or a transitional instrument.

If you are covered by the SES Modern Award, you must use one of the 30 tools listed in the award (and they should be administered without change to the tool or its processes). The SES Modern Award refers to the version of the tools published by the Department in *Analysis of Wage Assessment Tools used by Business Services* (12 April 2006 and 18 October 2007).

If you are covered by a transitional instrument (such as an enterprise-level agreement), the agreement will list a tool (and the tool should be administered without change to the tool or its processes).

If for some reason an ADE was covered by another modern award, the ADE would have to use the SWS wage assessment tool or pay full award wages. This is because the SWS wage assessment tool is the only tool specified in the other modern awards.

KPI 9.1 states that an employee with disability must receive wages according to an award, order or industrial agreement. Use of a tool not referred to in an award, order or industrial agreement that actually applies to an ADE would, amongst other things, not comply with KPI 9.1.

16. Can a wage assessment tool owner vary a wage assessment tool?

As noted in Question 15 above, the SES Modern Award refers to the version of the tools published by the Department in *Analysis of Wage Assessment Tools used by Business Services* (12 April 2006 and 18 October 2007). Accordingly, if the SES Modern Award applies to an ADE, it must use that version of the tool.

A tool owner would need to consult with the Department and apply to Fair Work Australia to vary the SES Modern Award before it could vary its wage assessment tool.

17. Does the SES Modern Award specify a minimum percentage of the full adult wage that can be applied following a wage assessment?

No. However, the wage assessment tool may specify a minimum percentage of the full adult wage that must be paid to the employee (regardless of the employee's actual capacity).

18. Can an individual's wages be regressed under the SES Modern Award?

An employee's wage can be regressed in accordance with clause 14.4(f) of the SES Modern Award.

19. What are the rules for wage assessment for apprenticeship/trainees?

The national training wages for apprentices and trainees are set out at Schedule C to the SES Modern Award. The SES Modern Award does not permit an employer to apply a pro-rata wage assessment to an employee who is paid a national training wage. This is to prevent "double-discounting" the minimum wage paid to an apprentice or trainee with disability.

We recognise that this gives rise to a situation where an apprentice/trainee is entitled to receive a higher rate of pay than an employee with disability who is paid a pro-rata wage derived from the full adult rate. ADEs who engage apprentices/trainees may consider seeking a variation to the SES Modern Award to pay an apprentice/trainee with disability the lesser of the national training wage and a pro-rata wage derived from the full adult rate (see Question 6 above). However, as it currently stands, an ADE must pay the national training wage rate to all apprentices/trainees, including persons with disabilities.

CLASSIFICATION

- 20. Should we classify all new employees at Grade 1 for the initial training period? In particular, if a new employee is performing duties at a higher grade, should the employee be paid at Grade 1 (Training) or the higher grade for the initial assessment period (for example, the first 13 weeks)?**

An ADE may pay the employee at the Grade 1 level during the initial period. This is because an employee needs to complete at least 3 months' structured training to be classified at Grade 2 to 4. Further, an employee is not entitled to a higher rate of pay under clause 14.5 of the SES Modern Award (which relates to higher duties) while undertaking training.

Grade 5 and above are trade-qualified. Employees at Grade 5 and above must commence at the relevant wage for their level.

- 21. Will some employees always stay under Grade 1 (and not advance to a higher classification grade)?**

A Full Bench of Fair Work Australia has stated that Grade 1 should be an induction and training classification. The Full Bench's view is that:

In the normal course under the modern award, after induction and training, an employee would be classified either at Grade 2 or a higher grade relevant to their duties...

While Grade 1 employees receive an initial assessment for payment purposes during their period under training that assessment is, necessarily, of an interim nature pending their classification at the relevant grade...

Grade 1 is not normally the classification level at which assessment is made for ongoing purposes...

Grade 1 should not be the default level at which permanent assessment takes place.

(See paragraphs 13 to 19 of Decision to vary Supported Employment Services Award 2010 [2010] FWAFB 1980).

However, the Full Bench has recognised that there will be some employees who, after receiving training, will still not be able to carry out the Grade 2 duties. In those circumstances, it is permissible for the employee to continue to be classified at Grade 1.

OTHER TERMS AND CONDITIONS

- 22. Can you have an individual flexibility arrangement under the SES Modern Award?**

Clause 7 of the SES Modern Award allows an employer and an individual employee to make an individual flexibility arrangement (IFA) to vary the application of certain terms of the award to meet the genuine needs of the individual employee.

An IFA must satisfy a number of requirements stipulated in clause 7. In particular, an IFA must result in the employee being better off overall than the employee would have been if no IFA had been agreed to.

An IFA can only vary the application of terms of the award concerning:

- arrangements for when work is performed;
- overtime rates;
- penalty rates;

- allowances; and
- leave loading.

An IFA may supplement other entitlements provided under the SES Modern Award (for example, by providing for a higher base rate of pay), but it may only reduce the benefit to the employee of an award term if that term relates to one of the above areas.

The Fair Work Ombudsman has published a Best Practice Guide in relation to the use of IFAs, which is available from <http://www.fwo.gov.au/Best-Practice-Guides/Documents/03-Use-of-individual-flexibility-arrangements.pdf>.

23. Can an individual flexibility arrangement made under the SES Modern Award exclude the superannuation clause?

We refer to Question 22 above. An IFA can only vary the application of a term of the SES Modern Award concerning arrangements for when work is performed, overtime rates, penalty rates, allowances or leave loading. An IFA cannot vary the application of clause 19 of the SES Modern Award (which relates to superannuation).

24. What practical issues may arise in implementing the superannuation obligations under the SES Modern Award?

Clause 19.5 of the SES Modern Award requires an ADE to make a minimum superannuation contribution in respect of an employee with disability of 3 percent of ordinary time earnings or \$6.00 per week, whichever is higher. The requirement to make a minimum contribution of at least \$6.00 per week will apply:

- regardless of the number of hours worked by the employee. In particular, the minimum contribution of \$6.00 is not pro-rated for part-time employees; and
- to all employees, even employees who are engaged for a short period.

The SES Modern Award requires ADEs to make contributions to either:

- a fund chosen by the employee in accordance with the superannuation choice provisions of the superannuation legislation; or
- AustralianSuper or an eligible superannuation fund to which the employer was making contributions before 12 September 2008.

A large proportion of employees have not previously received superannuation contributions. Accordingly, when the SES Modern Award starts to apply to an employee, ADEs should ensure that employees understand that:

- they may choose a fund for the contributions to be made to; and
- if they do not choose a fund, the contributions will be made to Australian Super or the employer's nominated fund (as applicable).

25. Can an employee cash out annual leave under the SES Modern Award?

The National Employment Standards provide that paid annual leave can only be cashed out in accordance with a term of a modern award or enterprise agreement (see sections 92 and 93(1) and (2) of the *Fair Work Act 2009*).

The SES Modern Award does not permit cashing out of annual leave.

Accordingly, an employee covered by the SES Modern Award could only cash out paid annual leave if this was permitted by a term of an enterprise agreement (or transitional enterprise-level agreement). A cashing out term in an enterprise agreement or transitional enterprise-level agreement can only provide for cashing out in a manner that is consistent with section 93(1) and (2) of the Fair Work Act.

26. Can a supported employee be required to take paid annual leave

The National Employment Standards provide that a modern award or enterprise agreement may include terms that allow an employer to require an employee to take paid annual leave in particular circumstances, but only if the requirement is reasonable (see section 93(3) of the *Fair Work Act 2009*).

Clause 22.3 of the SES Modern Award permits an employer to require an employee to take paid annual leave by giving at least 4 weeks' notice where the employer shuts down its operations (for example, over Christmas/New Year) or where an employee has more than eight weeks' accumulated annual leave.

This differs from several other modern awards that may apply to ADEs (namely, the *Social, Community, Home Care and Disability Services Industry Award 2010* and *Aged Care Award 2010*), which do not contain any terms which allow an employer to require an employee to take paid annual leave.

27. I currently allow employees with high support needs to only work 2 hour shifts. Does the SES Modern Award require me to pay the employee for 3 hours even where they work a shorter shift?

Yes. Part-time employees must be rostered and paid for a minimum of 3 hours per shift. Similarly, casual employees are entitled to be paid for a minimum of 3 hours for each shift.

28. What are the rules for overtime for part-time employees under SES Modern Award?

Under the SES Modern Award, all time worked by a part-time employee in excess of the employee's agreed hours attracts overtime rates, except where an employee agrees to work up to two hours beyond their normal finishing time at ordinary rates. Even where such an agreement is in place, an employee must be paid overtime rates in respect of any hours worked in excess of 10 hours in a day or 38 hours in between Monday and Friday in that week.

Where an employee works overtime between Monday and Friday, the employee may request time off in lieu of overtime on an hour for hour basis. A time off in lieu arrangement must be formalised in a written agreement between the employer and employee. Time off in lieu is not available in respect of overtime worked on Saturday, Sunday or a public holiday.

The overtime rates are:

- time and half for all hours worked Monday to Friday and before 12 noon on a Saturday; and
- double time for Saturdays after 12 noon and Sundays (including ordinary hours worked during those times).

ENTERPRISE-LEVEL AGREEMENTS AND AGREEMENT MAKING

29. Do you have to renew a certified/collective/enterprise agreement when it passes its nominal expiry date?

No, an enterprise-level agreement will continue to apply until it is terminated or replaced. Section 3.5 of the Workbook provides further details on the termination or replacement of an enterprise-level agreement.

30. Can I vary an existing certified agreement, collective agreement or preserved state agreement (as an alternative to making a Fair Work Act enterprise agreement)?

There are very limited circumstances in which an employer, employee or organisation covered by a transitional enterprise-level agreement can apply to Fair Work Australia to vary the agreement. They are:

- to resolve an uncertainty or difficulty relating to the interaction between the agreement and the National Employment Standards or to make the agreement operate effectively with the National Employment Standards; and
- to resolve an ambiguity or uncertainty (since 1 January 2010, this is only available in respect of Division 2B State agreements).

It is unlikely that this mechanism could be used to vary a transitional enterprise-level instrument as an alternative to making a Fair Work Act enterprise agreement.

31. If there is an inconsistency between the terms of an enterprise-level agreement that applies to the ADE and the Disability Services Standards, what options does the ADE have for addressing this inconsistency?

The fact that an enterprise-level agreement may be inconsistent with the Disability Services Standards does not affect the legal validity of the enterprise-level agreement.

An ADE that wishes to rectify an inconsistency between an enterprise-level agreement and the Disability Services Standards could:

- apply to Fair Work Australia to have the agreement terminated; or
- seek to replace the agreement with an enterprise agreement.

Having regard to Question 28 above, it is unlikely that an ADE could apply to Fair Work Australia to make substantive variations to the agreement to ensure consistency with the Disability Services Standards.

32. What happens if an ADE has a certified agreement that is very specific to a certain business type and a wage assessment tool that is very specific in its application, and the ADE starts operating another business stream that is not covered by the certified agreement or the wage assessment tool?

It is likely, in those circumstances, that the new business stream of the ADE is covered by the SES Modern Award and a tool in that award can be used for that part of the business.

33. What is the process for making an enterprise agreement?

To make an enterprise agreement, an ADE must:

- commence a bargaining process by issuing the employees with a notice of representational rights. This notice explains the arrangements for bargaining under the Fair Work Act and each employee's right to nominate a bargaining representative to represent them in bargaining with the employer;
- bargain with the bargaining representatives, in good faith, for the proposed enterprise agreement;
- once bargaining is complete and a draft enterprise agreement agreed, provide the employees who will be covered by the agreement with an opportunity to vote for (or against) the agreement. Before conducting a vote, the ADE must ensure that:
 - it has provided the employees with a copy of the agreement and any other material incorporated in the agreement at least 7 days before the vote will take place;
 - it has taken reasonable steps to ensure that it has explained the terms of the enterprise agreement, and the effect of those terms, to all employees; and
 - at least 21 days have passed since the ADE issued the notice of representational rights;
- where a majority of employees who cast a valid vote approve the proposed enterprise agreement, lodge the agreement with Fair Work Australia for approval.

The Fair Work Ombudsman has published a Best Practice Guide in relation to the enterprise bargaining process, which is available from <http://www.fwo.gov.au/Best-Practice-Guides/Documents/11-Improving-workplace-productivity-in-bargaining.pdf>.

34. Does Fair Work Australia have to approve a proposed enterprise agreement?

Yes. All proposed enterprise agreements require approval from Fair Work Australia. Fair Work Australia will only approve a proposed enterprise agreement where it is satisfied that the proposed enterprise agreement:

- passes the better off overall test (**BOOT**);
- is genuinely agreed to by employees;
- does not contravene the National Employment Standards;
- does not contain unlawful terms (for example, terms which are unlawfully discriminatory);
- contains mandatory terms relating to dispute resolution, consultation and individual flexibility arrangements;
- has a nominal expiry date not more than four years after the date of approval by Fair Work Australia; and
- covers a group of employees that has been fairly chosen.

A new enterprise agreement will commence operation 7 days after it is approved by Fair Work Australia (or on a later date specified in the agreement)

Applying the BOOT

When determining whether a proposed enterprise agreement passes the BOOT, Fair Work Australia will consider whether each employee who would be covered by the proposed agreement would be better off overall if the agreement applied to the employee than if the SES Modern Award¹ applied to the employee.

As discussed in the information sessions, it is likely that Fair Work Australia will undertake a detailed "line by line" comparison between the proposed enterprise agreement and the award to determine whether employees will be better off. ADEs should ensure that any less favourable terms and conditions in the proposed agreement are offset by benefits to employees.

Applying the "genuine agreement" test

Fair Work Australia will generally only be satisfied that an enterprise agreement has been genuinely agreed to by employees if the employer has followed the process outlined above. There are a number of recent cases where Fair Work Australia refused to approve an enterprise agreement because, for example, the employer had not properly issued the notice of representational rights or waited a sufficient period of time before asking employees to vote on the proposed agreement.

In addition, the *Re Coffs Harbour Challenge* decision represents an additional hurdle for ADEs who are seeking to make an enterprise agreement that covers employees with intellectual disabilities. That case involved the approval of a certified agreement under the *Workplace Relations Act 1996* (which required the Australian Industrial Relations Commission to be satisfied that a proposed certified agreement had been "genuinely made") to cover employees with intellectual disabilities. The Commission refused to certify the proposed agreement on the basis that the employees who would be covered by the proposed agreement did not understand the effect of the proposed agreement on their terms and conditions and were not capable of achieving such an understanding. Given the similarity between the old and new tests, this may be a significant barrier to ADEs who employ persons with intellectual disabilities making enterprise agreements to cover those employees.

35. Where an ADE that has a transitional enterprise-level agreement (such as a collective or certified agreement) lodges an enterprise agreement with Fair Work Australia for approval but Fair Work Australia refuses to approve the enterprise agreement, does the transitional agreement cease to apply?

If an application to approve an enterprise agreement under the *Fair Work Act 2009* is unsuccessful, the previous agreement remains in place because it has not in fact been replaced. Accordingly, unless the previous agreement has been the subject of a successful application to Fair Work Australia to terminate the agreement (see page 9 of the Workbook), it will remain in place.

OTHER MATTERS

36. What happens to industrial arrangements when one organisation merges or takes over another organisation with a different industrial arrangement?

In these circumstances, ADEs should seek legal advice to determine whether the transfer of business provisions of the *Fair Work Act 2009* will be triggered. This is a complex matter, and needs to be considered on a case by case basis.

¹ Where a Division 2B State award covers the employees who will be covered by the enterprise agreement, the BOOT is applied against the Division 2B State Award and not the SES Modern Award.

37. What happens to organisations that do not pay the appropriate wages under SES Modern Award? Who is responsible to find out and take action if organisation is not complying under SES Modern Award?

The Fair Work Ombudsman may investigate an employer in relation to suspected breaches of a workplace law or industrial instrument (such as the SES Modern Award):

- on its own initiative; or
- after receiving a complaint from an employee, or a union on the employee's behalf.

Fair Work Inspectors have broad-ranging powers to investigate suspected breaches, including entering employers' premises and accessing employer records.

If the Fair Work Ombudsman finds a breach of a modern award (or workplace law), the Fair Work Ombudsman will usually issue the employer with a contravention letter or compliance notice setting out the breach and how the employer can fix it. This mechanism provides the employer with an opportunity to voluntarily fix the breach.

If the employer does not remedy the breach within the required timeframe (usually 14 days), the Fair Work Ombudsman may take further action, including:

- telling the employee the next steps they can take, such as taking small claims action;
- issuing an infringement notice (i.e. a fine); or
- commencing legal proceedings against the employer.

38. Where can I go to get further information?

Fair Work Australia and the Fair Work Ombudsman publish a range of fact sheets and best practice guides on various industrial relations matters. Those publications are available from www.fairwork.gov.au. ADEs can contact the Fair Work Infoline (13 13 94) to seek guidance in relation to various matters, including award coverage.

If you have any issues or concerns not addressed in that material, you should seek your own legal or specialist industrial relations advice.

BLAKE DAWSON

24 June 2010

ATTACHMENT A – CALCULATING MINIMUM WAGES

This Attachment A provides guidance to ADEs on calculating minimum wages for supported employees from 1 July 2010 onwards. This information supplements the information contained in the Workbook distributed at information sessions.

ADEs (other than unincorporated employers in New South Wales, Queensland, South Australia and Tasmania)

Principles

- *ADEs are generally required to provide employees with any annual minimum wage increases determined by Fair Work Australia. The first increase (of \$26 per week) takes effect from 1 July 2010. If an ADE has been paying employees at above award rates, the ADE may absorb any annual minimum wage increases into the existing above-award rate.*
- *ADEs may phase in differences between the minimum rates of pay provided under the SES Modern Award (as at 1 January 2010) and the minimum rates of pay that applied before 1 January 2010 over 5 years.*
- *The minimum pay rates apply to all supported employees, including new employees who commence employment after 1 January 2010.*

The minimum rates of pay in the SES Modern Award apply from the first full pay period after 1 July 2010. Before the first full pay period in 1 July 2010, ADEs should continue to pay the amount specified in the transitional instrument which applies to the ADE or which applied to the ADE until 31 December 2009.

From the first full pay period after 1 July 2010, ADEs must pay at least the transitional minimum rate of pay under the SES Modern Award. If a transitional enterprise-level agreement that applies to the ADE and its supported employees provides for a higher rate of pay, the ADE must pay that higher rate.

Steps 1 to 3 below set out the process for calculating the minimum transitional rate of pay under the SES Modern Award.

Step 1: Determine the 'transitional amount' (if any)

- (i) For each classification grade, identify the minimum rate of pay that applied before 1 January 2010. This minimum rate of pay would generally be contained in an applicable Australian Pay and Classification Scale or award. The minimum rate of pay may be less than the amount the ADE was actually paying under an enterprise-level agreement or as an above award payment.
- (j) For each classification grade, calculate the difference between the minimum rate of pay that applied before 1 January 2010 (see Step 1(a) above) and the modern award rate as at 1 January 2010 set out below.

SES Modern Award rate (as at 1 January 2010)

Classification	Weekly rate
Grade 1	\$543.80
Grade 2	\$560.50
Grade 3	\$583.00
Grade 4	\$603.90
Grade 5	\$637.60

Classification	Weekly rate
Grade 6	\$698.20
Grade 7	\$727.50

- (k) The difference between those rates is the 'transitional amount' that may be phased in accordance with Step 3 below.

Step 2: Identify the modern award rate that applies from July 2010

For each classification grade, identify the modern award rate which applies from the first full pay period after 1 July 2010 set out below. These rates reflect the minimum wage increase determined by Fair Work Australia on 3 June 2010.

SES Modern Award rate (as at 1 July 2010)^b

Classification	Weekly rate
Grade 1	\$569.90
Grade 2	\$586.50
Grade 3	\$609.00
Grade 4	\$629.90
Grade 5	\$663.60
Grade 6	\$724.20
Grade 7	\$753.50

Step 3: Calculate the minimum wage rate that applies to employees from the first full pay period after 1 July 2010

ADEs that must pay the full SES Modern Award rate immediately

The following ADEs should pay the SES Modern Award rate set out at Step 2 above in full from the first full pay period after 1 July 2010 if either:

- (i) the transitional amount calculated at Step 1 was zero. This will be the case for all ADEs covered by the LHMU Pay Scale² or the Special Pay Scale³; or
- (ii) the minimum rate of pay that applied before 1 January 2010 was higher than the modern award rate as at 1 January 2010, but the difference was \$26 or less. This is because the difference between the two rates has been absorbed by the minimum wage increase that applies from 1 July 2010.

ADEs that can phase in decreases towards the SES Modern Award rate

If the minimum rate of pay that applied before 1 January 2010 was more than \$26 higher than the modern award rate as at 1 January 2010, the ADE can phase in the difference in accordance with the following process. This may include ADEs who were applying a rate other than the rates contained in the LHMU Pay Scale or Special Pay Scale.

² This Australian Pay and Classification Scale was derived from the pay scales in the *Liquor Hospitality and Miscellaneous Union (Supported Employment Services) Award 2005* and applied to all ADEs covered by that award.

³ This Australian Pay and Classification Scale was introduced in October 2006 and applied to all federal system ADEs in respect of employees with disabilities in supported employment services who were not otherwise covered by a Pay Scale.

For the first full pay period after 1 July 2010, the minimum pay rate will be the SES Modern Award rate set out at Step 2 above *plus* 80 percent of the transitional amount identified at Step 1 above.

For the first full pay period after 1 July 2011, the minimum pay rate will be the SES Modern Award rate (adjusted to reflect any minimum wage increase) *plus* 60 percent of the transitional amount identified at Step 1 above. The phase in process continues until July 2014 when the ADE will only be required to pay the SES Modern Award rate.

For example, ADE Pty Ltd employs Sally at Classification Grade 3.

Step 1: We have assumed that the minimum weekly rate of pay for Classification Grade 3 that applied before 1 January 2010 was \$603.00. The modern award weekly rate as at 1 January 2010 was \$583.00. Therefore, the transitional amount is \$20.00.

Step 2: The SES Modern Award rate that applies from the first full pay period after 1 July 2010 is \$609.00.

Step 3: From the first full pay period after 1 July 2010, ADE Pty Ltd will be required to pay Sally at the rate of \$625.00, comprising \$609.00 (being the SES Modern Award rate) plus \$16 (being 80 percent of the transitional amount). This represents an increase of \$22.00 per week compared to the previous rate.

ADE Pty Ltd will pay Sally a proportion of the weekly rate based on an approved wage assessment and the number of hours Sally works.

Hypothetically, in the annual wage review conducted in June 2011, Fair Work Australia decides to increase the minimum wage by \$10 per week.

Step 2: The SES Modern Award rate that applies from the first full pay period after 1 July 2011 will be \$619.00.

Step 3: From the first full pay period after 1 July 2011, ADE Pty Ltd will be required to pay Sally at the rate of \$631.00, comprising \$619.00 (being the modern award rate) plus \$12 (being 60 percent of the transitional amount). This represents an increase of \$6.00 per week compared to the previous rate.

This process will continue until the first full pay period after 1 July 2014 at which time Sally will be paid the rate specified in the SES Modern Award.

ADEs that can phase in increases towards the SES Modern Award rate

If the minimum rate of pay that applied before 1 January 2010 was lower than the modern award rate as at 1 January 2010, the ADE can phase in the difference in five equal increments as set out above. However, because the LHMU Pay Scale or Special Pay Scale (which applied to most incorporated ADEs) contained a minimum rate of pay equal to the modern award rate as at 1 January 2010, we expect that very few (if any) ADEs will fall within this category.

ADEs which are unincorporated employers in New South Wales, Queensland, South Australia and Tasmania

Principles

- *These ADEs continue to be covered by Division 2B State awards (derived from the state award previously applied by the ADE) until 31 December 2010. The SES Modern Award will apply from 1 January 2011.*
- *The annual minimum wage increase determined by Fair Work Australia in June 2010 does not apply to these ADEs.*
- *Fair Work Australia will make a decision later in 2010 in relation to the transition arrangements for ADEs moving from a Division 2B State award to the SES Modern Award.*

Unincorporated ADEs should continue to calculate employees' wages based on the minimum rate provided under the Division 2B State award until 31 December 2010. If a Division 2B State agreement (i.e. an enterprise-level agreement) applies to the ADE and its supported employees, the ADE should apply the rate provided under that agreement.

ADEs should seek advice in late 2010 in relation to the transitional arrangements that will apply from 1 January 2011.

Need further information?

Guidance Note No. 7 Transitional arrangements in modern awards published by the Fair Work Ombudsman provides further details in relation to transitional arrangements for minimum wages and other entitlements. The Guidance Note is available from <http://www.fwo.gov.au/Legal-info-and-action/Guidance-notes/Pages/default.aspx>.