

# THE INCREASING MOVE TOWARDS WORKPLACE FLEXIBILITY

Even a casual observer of the Industrial Law landscape in the post-Work Choices era, will recognise the diversity of employment options that now prevail in modern workplaces.

Part of this has been a consequence of the increasing casualisation of the Australian workforce. We have previously provided commentary regarding casual conversion clauses in Modern Awards. A copy of same can be found on our Facebook page and at:

[https://www.spglawyers.com.au/files/blog/toc\\_november\\_2018\\_new\\_lgal\\_rights\\_for\\_casual\\_employees.pdf](https://www.spglawyers.com.au/files/blog/toc_november_2018_new_lgal_rights_for_casual_employees.pdf) .

This was seen by the Fair Work Commission as a necessary counter-balance to the rights of workers that were gradually being eroded through the trend of casualisation.

However, the modern Industrial Law landscape has nevertheless provided certain benefits for employees, through the Modern Award system, and through the evolution of the National Employment Standards (NES).

Modern Awards contain a generic or template Award Flexibility clause. Whilst the specifics of the Award Flexibility clause may differ incrementally from Award to Award, they generally provide a blue-print for employers and employees to “trade off” certain minimum Award entitlements in favour of more flexibility.

Essentially, an employee who is being paid a higher hourly rate than the minimum standard, may agree with his/her employer to trade off certain other Award benefits. For example, it may suit an employee to be paid several dollars above the Award rate, but in lieu thereof to reduce or even trade away their entitlement to things such as:

- arrangements for when work is performed;
- overtime rates;
- penalty rates;
- allowances;
- annual leave loading.

The process of engaging in Award Flexibility is one that needs to be considered carefully.

From an employer point of view, an attempt to enter into Award Flexibility with an employee that is non-compliant with the legislative architecture, may not only result in a back claim for pay and entitlements, but also potentially a prosecution for breaches of the *Fair Work Act*.

In order for the Award Flexibility agreement to be valid, the following criteria apply:

- the agreement must be in writing, setting out the start date;
- the negotiations between the parties must be genuine, and there must be equality of bargaining power;
- the proposal for Award Flexibility would need to be submitted to the employee for consideration (rather than asking for it to be signed on the spot);
- the employee must be provided with an opportunity to take the proposal away and seek advice from an independent legal or industry advocate;
- the agreement must identify the Award entitlements that are being varied;
- the effect of the Award Flexibility agreement must result in the employee being “better off overall” compared to what might have been payable under the Award at the base rate together with the entitlements traded off;
- the agreement must state how the employee will be better off overall;
- once there is agreement between the employer and the employee, the agreement must be signed with the original kept as a time and wages record with the employer’s records. A copy must be provided to the employee;
- the Award Flexibility agreement may be terminated at any time by written agreement between the parties, or by the employer or employee giving 13 weeks’ notice of the intention to terminate the Award Flexibility agreement.

The allowances that may be traded off are contained in each Award. There is a comprehensive list of allowances depending on the particular sector in which the employee is engaged. Without being exhaustive, these may include:

- meal allowances;
- clothing, equipment and tool allowances;
- uniform and laundry allowances;
- vehicle allowances;
- working away from usual place of work allowances;

- first aid allowances.

Care should be taken at all times in engaging in such flexibility negotiations in good faith, and to ensure that the employee fully understands the effect of any proposed Award Flexibility agreement that is entered into.

Should you require any guidance or assistance in considering Award Flexibility options, please contact **Tony O'Connor** on (07) 5570 9380.

**TONY O'CONNOR**  
– **LITIGATION PARTNER**  
**SHORT PUNCH & GREATORIX LAWYERS**