

## Equal Remuneration and the Gender Gap – Does Anyone Really Understand What This Means?

The [Joint Submission](#) to Fair Work Australia of the Australian Government and the Australian Services Union (ASU) has elicited a barrage of submissions in response both supporting and attacking the basis on which the claim for equal remuneration has been made. The Victorian and New South Wales Governments, the Australian Industry Group, Australian Chamber of Commerce and Industry, Australian Business Industrial, Australian Federation of Employers & Industries, and other employer organisations have challenged virtually every element of the Applicant's submission on the proposed remedy.

Readers will recall from the [November edition](#) that the joint submission presented an argument to quantify the 'gender bias' that apparently exists in the Australian social welfare sector, by drawing on research suggesting that there is an 'unexplained' gender pay gap in all Australian workplaces and that a measure of gender undervaluation that can be isolated in order to assess the undervaluation of work in the sector is the degree to which the work performed is 'caring work'.<sup>1</sup>

The Government and the ASU proposed the adoption of the scale of wages applied in Queensland phased in over six year's .as the appropriate rates to remedy the 'gender bias'. These increases would be in addition to the minimum modern award wage adjustments on 1 July each year. A further 1% each year for four years would also be paid to compensate for the sector's alleged lack of capacity to undertake enterprise bargaining.

The submission has been challenged on several grounds. Firstly, the validity of the research method used to identify the gender gap by proxy with caring work. The parties arguing against the Joint Submission say the research sample was not large enough or representative of the work that is

performed. Also, the awards selected to compare wages were not 'like with like' and the gap in wages attributed to gender was grossly overstated.

It was contended that the use of averaging and median rates to calculate the gender gap will lead to under and over compensation. Further, the failure to differentiate job classifications in the modern award that perform few or no 'caring' duties is likely to lead to major distortions in market rates for employees that perform support functions and specialist roles such as IT, accounting and human resource management.

They are also critical of the failure to address the contribution of bargaining to the gap in the rates of pay of other industries and the absence of any reference to comparator rates in local government. State health systems are dominated by female employees who have obtained vastly superior rates of pay through enterprise bargaining. The Joint Submission does not explain how this occurred in one sector but is not evident in the Social and Community Services Sector.

Finally, the Victorian Government has pointed out the potential for over-compensation of some job classifications exposes the jurisdictional limitations to orders that would result in rates of pay in excess of the comparator rates i.e. Fair Work Australia does not have power to make orders that would result in award wages in excess of the public service rates of pay.

The only point that the parties agree is in the phasing of any adjustment over six years.

Anyone interested in understanding how complex this case has become should read the submissions and transcript of proceeding held on [7-8 December](#) at Fair Work Australia.

It is far from clear as to how this case will be unfold. Fair Work Australia has an unenviable task to quantify justifiable rates of pay to compensate for the apparent gender gaps in the wages it decided existed in its first [decision](#) on this matter in May this year. The only parties that agree on a methodology to quantify the 'gender gap' are the Australian Government and the Applicant, the ASU. That agreement may be sufficient to ensure the success of the application.

[Maguire Consulting](#) will keep you up with the latest as soon as it occurs.

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<sup>1</sup> Junor Anne, and Briar Celia, [Community Sector Work: Proportion of Client Based Care by Modern Award Level October 2011](#) Industrial Relations Research Centre, Australian School of Business, UNSW

## Application to vary the Social Community Home Care and Disability Services Award 2010

The Australian Services Union has applied to Fair Work Australia to vary the Transitional Provisions of the Social Community Home Care and Disability Services Award. The application aims to move the date on which transitional rates were due to commence from 1 February 2012 to 1 July 2012.

The application has been made due to delays in the Equal Remuneration Case. It is argued that it is in the interests of employers and employees that the status quo continues until a decision is made in that case.

The Full Bench of FWA will decide the application in conjunction with the Equal Remuneration Case. Therefore employers may have further time to translate employee job classifications and wages from the pre-modern award rates.

Please contact [Maguire Consulting](#) if you need advice on how to translate the job classification or are unsure of the financial implications of the transitional rates.

## Christmas and New Year Public holidays

Public holidays including the Christmas, Boxing Day and New Year holidays are regulated by a mix of the National Employment Standards (NES) modern awards, enterprise agreements and State government regulations. Consequently, employers may be confused as to the application and cost associated with employing staff over the 2011 Christmas and 2012 New Year public holidays.

The NES allows

- (a). substitution of the public holidays, and
- (b). additional public holidays

If a law of a State or Territory government substitutes another day on which a public holiday to be observed, then that day will be public holiday.

In addition a modern award or enterprise agreement may include terms providing for an employer and employee to agree to observe a public holiday listed above on another day.

This year, Victoria has substituted Christmas Day to Tuesday the 27<sup>th</sup> December, whilst the Boxing Day holiday falls on Monday 26<sup>th</sup> December and doesn't require substitution. Sunday the 1<sup>st</sup> of January is the official New Years Day holiday and the 2<sup>nd</sup> January 2012 is an additional public holiday.

NSW is transferring the Christmas Day holiday to Monday 26<sup>th</sup> December and has declared Sunday 25<sup>th</sup> December as an additional public holiday. Boxing Day holiday occurs on Tuesday 27<sup>th</sup> December 2011. Sunday the 1<sup>st</sup> of January is the official New Years Day holiday and the 2<sup>nd</sup> January 2012 is an additional public holiday.

Queensland celebrates the Christmas Day public holiday on the 25<sup>th</sup> December and has declared an additional holiday on Tuesday the 27<sup>th</sup> December, whilst the Boxing Day holiday falls on Monday 26<sup>th</sup> December and doesn't require substitution. Sunday the 1<sup>st</sup> of January is the official New Years Day holiday and the 2<sup>nd</sup> January 2012 is an additional public holiday

Tasmania will observe Christmas Day on Sunday the 25<sup>th</sup> and Tuesday the 27<sup>th</sup> December. Boxing Day holiday occurs on 26<sup>th</sup> December. New Years Day has been substituted to Monday 2<sup>nd</sup> January 2012.

In South Australia Boxing Day is observed on the Tuesday 27<sup>th</sup> December. Christmas Day is observed on Monday 26<sup>th</sup> December. New Years Day is substituted to Monday 2<sup>nd</sup> January 2012.

In West Australia the Christmas, Boxing and New Years Day is observed on the actual date unless the relevant award or enterprise agreement substitutes it to the following Monday or Tuesday.

[Contact us](#) if you are unsure of the holidays that apply to your business.

## Modern Award Review 2012

Fair Work Australia must conduct a review of all modern awards, other than modern enterprise awards and State reference public sector modern awards, as soon as practicable after the second anniversary of the Fair Work (Safety Net Provisions) commencement day. Consequently the review must commence as soon as practicable after 1 January 2012.

Applications to vary a modern award as part of the review must be filed by Thursday, 8 March 2012. A more detailed timetable for the review of modern awards will be issued after 8 March 2012.

This should be an interesting exercise as the modern awards remain a contentious political issue and many employer groups are urging the Australian Government to refer the review to the Productivity Commission. Nevertheless, any employer that wishes to make a submission should [contact us](#) to discuss the issues of interest so that we may consider the feasibility of making an application to vary the modern award.

## Superannuation Guarantee increases to 12 percent

The Australian Government has introduced a Bill into Parliament to increase the level of Superannuation Guarantee (SG) contributions from 9% to 12%.

The Superannuation Guarantee (Administration) Amendment Bill 2011 also proposes to raise the SG age limit from age 70 to age 75 so that employer contributions can be made for older employees. The Minister Bill Shorten has also announced that the Government intends to introduce further legislative amendments to remove the age limit on Superannuation Guarantee contributions altogether. Both measures will commence on 1 July 2013.

Although the Explanatory Memorandum indicates that the implementation of the change is subject to the passing of the Mining and Minerals Resources Rent Tax there is no mention as to how this increase is to be funded. This is clearly pretence as it will be the employer's responsibility to make the contributions or otherwise pay the levy.

The following table shows the schedule of increases each year, starting with a 0.25% increase on 1 July 2013 and reaching the 12% level by 1 July 2019:

Year	Superannuation Charge
1 July 2013	9.25%
1 July 2014	9.5%
1 July 2015	10%
1 July 2016	10.5%
1 July 2017	11%
1 July 2018	11.5%
1 July 2019	12%

The Bill will be debated next year.

## TIP OF THE MONTH: A few statistics from Fair Work Australia to contemplate in 2012

Fair Work Australia publishes quarterly results on a range of its activities and responsibilities under the Fair Work Act. It also publishes an annual report that provides some interesting statistics. The following is a summary. I have included some statistics on Labour Mobility to add some context.

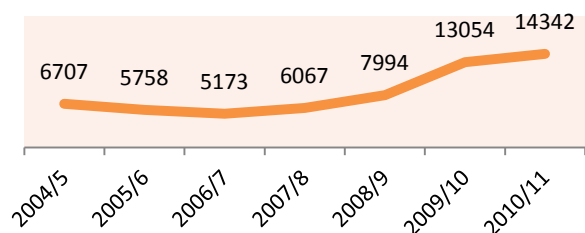
## Termination of employment disputes

During 2010–11 14,897 termination of employment applications were made to Fair Work Australia and 14,342 applications were finalised.

11893 (83 per cent) of the applications finalised in 2010-2011 were finalised at, or before, conciliation. A further 1922 (13 per cent) of the applications were finalised without requiring a decision of the tribunal, and 527 (four per cent) were finalised by a decision.

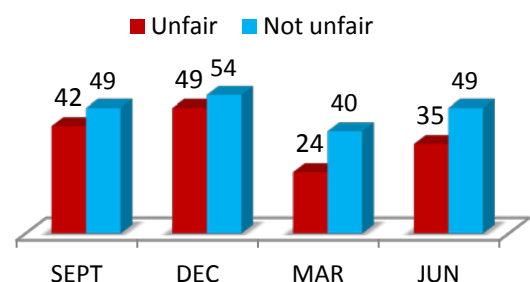
The following chart shows the growth in unfair and unlawful dismissal applications over the past seven years.

Termination of employment applications



Prior to 26 March 2006 employees were able to access State unfair dismissal jurisdictions as well as the federal system. After 26 March 2006 85% of the workforce (employed by constitutional corporations) moved into the federal system. However, employers with less than 100 employees were exempt until 1 July 2009.

Unfair dismissal decisions 2010-2011



These results represent the applications that were decided on the basis of whether the employee was 'unfairly dismissed.' The figures do not include the cases where certificates were issued in respect of *unlawful dismissal* applications, general protection orders or decisions on jurisdiction such as whether the dismissal was a 'genuine redundancy'.

## Labour Mobility<sup>2</sup>

2.2 million Australians ceased a job during the year ending February 2010 and 58% of those persons voluntarily left their job. Of the 917,300 people who involuntarily lost their job during this period, 47% had less than 12 months service with employer.

The most common reason for involuntary job loss (49.5%) was: *'Retrenched' by their employer' or 'Went out of business.'* This figure includes genuine redundancy as well as dismissal for unsatisfactory work performance and misconduct.

The high percentage of involuntary job losses due to retrenchment or business ending in that period can be attributed largely to the impact of the Global Financial Crisis. In 2008 the aggregate numbers and proportion attributable to this reason were significantly less (202,600 and 33 percent for the year ending Feb 2008).

However, the interesting statistic that emerges in the trend of applications claiming unfair or unlawful dismissal is that we can surmise from the labour mobility figures that over the period 2009-2010 approximately 2.9 percent of Australians that involuntarily left employment due to retrenchment or their employer going out of business pursued an application for compensation against their former employer for termination of employment. This is not significantly larger than the case prior to the Fair Work Act.

363,700 Australians involuntarily terminated employment due to the temporary or seasonal nature of their employment. 99,500 Australians did so due to illness or injury.

## Enterprise agreements

7783 enterprise agreements were finalised (approved) over 2010-2011. 91 percent of agreements filed with Fair Work Australia for approval were single enterprise agreements. The median number of days to approve a single enterprise agreement was 22 days.

There were 926 applications seeking orders for 'Protected industrial action ballots' and 96 'Good faith bargaining order' applications in 2010-2011.

## General Protections

General protections applications which involve dismissal, increased from 1188 in 2009-10 to 1871 in the reporting period, an increase of almost 60 percent. General protections applications under s.372 of the Fair Work Act, which do not involve dismissal, increased from 254 in 2009-10 to 504 in

2010-11. Clearly a growth area in employee relations.

## Dispute notifications

The number of general dispute notifications to Fair Work Australia has risen dramatically (650%) over the past two years under the Fair Work Act (3193 notifications since 1 July 2009) but the number of Full Bench appeals and other matters has remained relatively stable at 192 matters. However next year's review of modern awards will increase that figure.

## Conclusions

The activities and functions of Fair Work Australia over the three years of its existence have the look and feel of the old Australian Industrial Relations Commission. Naturally, this is primarily due to the tightly regulated national system of workplace relations prescribed under the Fair Work Act. However, there is no doubt that the tribunal has acted with old fashioned conservatism and overly paternalistic caution in the exercise of its statutory obligations, especially with regard to enterprise bargaining and termination of employment.

Consequently, there is a serious question as to how effectively it is meeting the objectives prescribed under the Fair Work Act that aspire to higher productivity, flexibility for business and economic growth for Australia. Let's see what occurs in 2012.

## Christmas Closedown

The office of Maguire Consulting will close for business at noon on Friday 23<sup>rd</sup> December 2011 and re-opens 9am on Tuesday 10<sup>th</sup> January 2012.

If any urgent business arises during this period please contact Paul Maguire on his mobile phone 0417 523 901.



## Merry Christmas

Thank you to every one of you who have contributed to our success in 2011. We have enjoyed working with you and trust that we have contributed in some small manner to the success of your business.

I wish you and your staff every success in 2012.

<sup>2</sup> (ABS 6209.0 - Labour Mobility, Australia, Feb 2010)