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FACT SHEET

Award Application

WHAT IS AN AWARD?

An Award is an industrial instrument which contains the minimum terms and conditions of employment for employees who are covered under the Award.

Awards are enforceable documents which apply to employees in particular industries or occupations and together with the National Employment Standards ('NES') provide for a legislated set of minimum terms and conditions for employees and employers

Refer: QHA's National Employment Standards Fact Sheet

Since 1 January 2010 the Fair Work Commission ('FWC'), known as Fair Work Australia from 2010-2012, has had the responsibility for making (ratifying) or varying Awards under the national workplace relations system.

It should be noted that since 1 January 2010, incorporated employers have been subject to Modern Awards. Modern Awards have applied to un-incorporated employers since 1 February 2011. Modern Awards are Awards that were created under the national workplace relations system to replace a number of former State and Federal industry based Awards, therefore all current Awards are referred to as Modern Awards.

The applicable Modern Award in the hospitality industry is the *Hospitality Industry (General) Award 2020* ('HIGA') and like other Modern Awards, it took effect on 1 January 2010 for incorporated employers and 1 February 2011 for un-incorporated employers. 1 January 2010 represented a key date in the history of national industrial relations as employers and employees who fell within the Federal scheme moved from the previous system of thousands of Federal Awards and Notional Agreements Preserving State Awards to a fewer number of new Modern Awards.

AWARD HISTORY

The Award Modernisation process commenced in mid-2008 as part of the Federal Government's workplace relations reforms and was designed to create a system of Awards that operate in the national workplace relations system. Federal Awards existing at the time (e.g. *Hospitality Industry Accommodation, Hotels, Resorts and Gaming Award 1998*) as well as Notional Agreements Preserving State Awards ('NAPSAs') (e.g. *Hotels, Resorts and Certain Other Licensed Premises Award Excluding South East Queensland 2003*) were reviewed with the intention of creating a more streamlined Modern Award system.

As part of the Award Modernisation process the Australian Industrial Relations Commission (Fair Work Commission's predecessor) reviewed more than 1500 State and Federal based Awards and created 122 industry and occupation Modern Awards.

As mentioned above, these Awards commenced on 1 January 2010 for incorporated employers.

MODERN AWARDS

As a result of the Queensland Government referring their industrial relations powers to the Commonwealth, effective 1 January 2010, all private sector employers have been subject to the national workplace relations system and as such most industries and occupations will be covered by a Modern Award. As noted above Modern Awards have applied to un-incorporated employers from 1 February 2011.

MODERN AWARD COVERAGE VS APPLICATION

The *Fair Work Act 2009* ('the Act') introduced the concept of award "coverage" as well as award "application" which presents a change from the previous concept of parties being "bound" to awards.

These two new concepts "cover" and "apply" are key considerations for employers when making an assessment as to whether or not a Modern Award will cover the employer and employee and apply to the workplace. The Act provides the following:

- Modern Awards will **cover** an employer and employee if the Modern Award is expressed to cover the employer and employee (e.g. reference should be made to the coverage clause of the Award);
- Modern Awards will **apply** to the employer and employee only if the Modern Award actually regulates rights and obligations of the employee's employment).

An example of how the distinction operates is that a Modern Award will continue to cover employers/employees where a formal workplace Agreement is in operation at the workplace, but during this time it is the Agreement rather than the Award that will regulate (i.e. apply) the employee's terms and conditions of employment.

Cover:

For the hospitality industry, an employer and an employee will be *covered* by the HIGA if:

1. The employer operates within the hospitality industry, that is, the employer is in the hospitality industry as defined at clause 4 of the HIGA (please see below); and
2. The employee's position falls within the classifications definitions as provided by the HIGA at Schedule A.

For the purposes of point 1 above, the hospitality industry includes:

hotels; motor inns and motels; boarding establishments; condominiums and establishments of a like nature; health or recreational farms; private hotels, guest houses, serviced apartments; caravan parks; ski lodges; holiday flats or units, ranches or farms; hostels, or any other type of residential or tourist accommodation; wine saloons, wine bars or taverns; liquor booths; resorts; caterers; restaurants operated in or in connection with premises owned or operated by employers otherwise covered by this award; casinos; and function areas and convention or like facilities operating in association with the aforementioned.

Please note that clause 4 also provides circumstances where the HIGA will not cover an employer. It is therefore important to consider the clause in its entirety.

Further, the Act provides that Modern Awards will not cover an employee, employer, organisation or outworker entity if under a provision of the Act, the FWC has made an order to exclude the application of the Award. Similarly an Award will not apply in an instance where the court (Federal Circuit Court) makes an order under the provision of the Act that provides, or has the effect, that the Award does not cover the employee, employer or organisation or outworker entity.

Where both points are satisfied, the HIGA will cover an employer and employee. If both are not satisfied, employers should then assess whether any other Modern Award could apply.

Apply:

Using the example that the HIGA covers an employer and employee, is it important to then assess whether the HIGA applies to that employer and employee. The HIGA will apply to an employee (or to an employer, or an employee organisation, in relation to the employee) unless:

1. When there is a formal workplace Agreement in operation at the workplace which excludes the Award from applying; or
2. Where an employee is a high income earner, which means they receive remuneration that is more than \$153,600 per annum* (as at 1 July 2020) and certain conditions are met under the Act. The Award will not apply in this circumstance because a high income employee is considered to be able to negotiate their own conditions of employment without reference to the Award.

NOTE: A formal workplace Agreement is an agreement that has been formally approved by a government authority such as the Fair Work Commission, the Australian Industrial Relations Commission, Workplace Authority or Queensland Industrial Relations Commission. It is not a verbal or informal arrangement between the employer and employee.

* This amount increases on 1 July each year, independently of Award wage increases.

Refer: QHA's Enterprise Agreements Fact Sheet

Summary:

If an Award such as the HIGA covers and applies to the employer and employee the HIGA's terms and conditions of employment represent the minimum legal entitlements for that employee. Paying an employee an above-Award payment will not automatically mean that the Award provisions do not apply, therefore employers must at all times ensure that an employee to whom the HIGA covers and applies receives the Award entitlements.

Failure to do so could result in an underpayment claim, or prosecution by the Fair Work Ombudsman for a technical breach of the Award.

Employers are expected to know or to find out, about their obligations as an employer – ignorance is not an accepted reason for non-compliance with those obligations.

OTHER MODERN AWARDS APPLICABLE TO QHA MEMBERS

Employers should note that there are some positions within the hospitality industry that are not provided for in the HIGA.

Where such a position was covered by a pre-modern Award (e.g an Award that existed before Modern Awards), it is likely that the position will be covered by another Modern Award such as:

- Hair and Beauty Industry Award 2010
- Health Professionals and Support Services Award 2020
- Joinery and Building Trades Award 2010
- Manufacturing and Associated Industries and Occupations Award 2020
- Miscellaneous Award 2020
- Nurses' Award 2010
- Professional Diving Industry (Recreational) Award 2020

- Professional Employees Award 2010
- Live Performance Award 2010
- Restaurant Industry Award 2020 (*Note: this Award may apply in relation to stand-alone restaurants and other venue types as listed in the Award's coverage clause. Restaurants operated in or in connection with premises owned or operated by employers otherwise covered by the HIGA, will still fall within the coverage of the HIGA*).

Please note, this list is not exhaustive and when determining relevant award coverage and application, members should refer to the coverage clause provided in the Award as well as the classification structure of the Award.

Further Assistance

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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