HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2010

Questions & Answers for Chiropractors

Following on from our earlier Article which we were asked to prepare by the Chiropractors Association of Australia (CAA), both the Association and our office have received a number of enquiries, questions and comments in relation to the new modern award which now applies to your business.

The CAA has asked us to provide some further commentary to assist members. We also wish to briefly touch on negative comments towards this office and the CAA.

It is clear that there is a significant level of frustration with the nature and content of the new so-called "modern" Award. Some of this frustration has been directed at this office and the CAA.

The Award is the result of the current Government's Industrial Relations changes and the consequent creation of approximately 120 new modern awards by the Full Bench of the Australian Industrial Relations Commission (now Fair Work Australia) in accordance with a Ministerial Request issued by our now Prime Minister Gillard. The Award itself is not our creation, nor that of the CAA, and we have simply tried to explain its nature and effect to members. Because we express a view on how the Award operates does not mean we agree the clause is fair or appropriate to your business.

Meridian Lawyers is a commercial law firm, separate from Guild Insurance and the CAA. We are more than happy to assist members on a commercial basis, however, from several comments there appears to be an expectation of our office to have approached the Commission to change the Award of our own volition and to provide free advice to members, which would essentially be the same as employees of our office requesting free chiropractic services.

It was a surprise to this office, and no doubt the CAA, to discover that chiropractors had been included in the new draft of the "modern" Health Professional and Support Services Award, particularly when chiropractors had generally been Award free and support staff had largely fallen under relevant State Clerical Awards.

As you are all no doubt aware, as soon as the CAA became aware of the issue it instructed our office to make an application on its behalf to remove chiropractors from the Award. This application was filed in June 2009. The Health Services Union strenuously objected to that application and primarily on that basis, the application was rejected.

Unfortunately, the decision took some time to hand down.

Subsequent to 1 January 2010, the scope to make an application to vary the Award is significantly limited and generally to grounds where the Award contains a material error which requires correction. The majority of issues raised by CAA members are not ones involving material errors in the Award, rather dissatisfaction with the Award's particular terms. This is no longer a basis for making an application to change the Award.

Subsequent to 1 January 2010, there have been some ten or so applications (filed before and after 1 January 2010) to vary the Award dealt with, which has restricted the

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ability of your Association to advise you. The terms of the Award, as at the time of the last decision of 29 June 2010, now appear to be largely settled. We suggest you ensure you obtain the most up to date version of the Award.

We will endeavour to provide our views on the Award's interpretation in an easy to understand question and answer format.

AWARD APPLICATION ISSUES

(Q) Is it possible to pay staff under another Award?

(A) No. The Award covers "employers throughout Australia in the health industry and their employees in the classifications listed…" Schedule C of the Award contains a list of "Common Health Professionals" which clearly includes chiropractors.

(Q) Is it possible to pay staff under an informal agreement?

(A) To the extent that the question contemplates a verbal agreement the answer is no. Whilst it would be permissible to have a verbal agreement to the effect that the employee will be covered by the Award, the Award itself contains a number of mandatory provisions (particularly in respect of part time employees) which require agreement in writing prior to the commencement of the employment (see for example Clause 7 – Award flexibility, Clause 10.3 – pattern of hours, Clause 13 – classifications).

(Q) Is it possible to pay staff under a contract agreement?

(A) Yes. The parties can enter into a common law agreement and we strongly recommend that any employment arrangements should be reduced to writing. This can be done either by way of a complex agreement or a simple letter of appointment. In either case the contract will need to refer to the Award and should also refer to the statutory entitlements under the National Employment Standards contained in the Fair Work Act 2009 and contain a notice of termination provision. It is not possible to contract out of the minimum entitlements contained in the Award.

The question of whether it is permissible to pay an "all up" rate of pay in a common law contract which sets off some or all of the entitlements under the Award (such as penalties, overtime and loadings etc) has been the subject of much debate.

There is some suggestion that this type of common law contractual agreement may be effective, but the extent of this is not clear and, at this stage, we recommend caution be used as we cannot say with any degree of certainty that common law contracts alone may be utilised to facilitate "all up" rates of pay, percentage of revenue based rates of pay which include overtime, penalties or the like, without further clarification or decision from Fair Work Australia.

Under previous industrial regimes, common law contracts with specific legal wording were able to be effectively used for this purpose. However, it was always the case that firstly the contract must be in writing and contain very specific legal wording. Secondly, any agreement could not be inconsistent to award terms and finally, the monetary amount had to be more beneficial.

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We now have specific award provisions providing specifically how these types of arrangements can be made, and how overtime, penalties and the like may be varied (Clause 7 Individual Flexibility Agreement). It is arguably inconsistent with the Award, and the Individual Flexibility Agreement provisions, to endeavour to vary the application of overtime, penalty rates and the like under a common law contract and not under an Individual Flexibility Agreement. Of course, if a contractual clause is inconsistent with the Award it is not enforceable.

This is why we cannot say that common law contracts can be safely utilised to provide "all up" rates of pay, percentage of revenue type pay which includes overtime, penalties and the like or annualised salaries which include overtime etc, without there being a level of risk to the employer that the Agreement may be viewed as invalid by Fair Work Australia, leaving the Employer exposed.

If an employer wishes to take the risk and utilise a straight common law employment contract for this purpose, we strongly encourage them to seek legal advice and at least ensure the contractual wording is effective to provide them with the best chance of defeating any challenge.

ORDINARY HOURS OF WORK

(Q) "Why do Meridian Lawyers make the interpretation from the Award that the chiropractic profession pays staff under Section 24.1 and cannot pay under Section 24.2 the same as medical, dental and pathology practices who also provide services for the convenience of people in their communities?"

(A) We confirm the ordinary hours for a day worker at a chiropractic practice are set out in Clause 24.1 as being 6am to 6pm Monday to Friday.

Chiropractic practices are not "medical practices". There are several decisions on this in an insurance context. It can also be confirmed by the approach of Fair Work Australia in relation to physiotherapy practices, which are not considered medical practices.

We understand the frustration of practitioners and accept that there is genuine argument Clause 24.1 does not provide appropriate ordinary hours of work. However, the Full Bench of the Australian Industrial Relations Commission and Fair Work Australia do not agree. Fair Work Australia are required to review modern awards after two years, which will hopefully provide the CAA with an opportunity to lobby for more appropriate ordinary hours of work.

(Q) Is it possible to vary opening and closing times as long as staff don't exceed 38 hours per week?

(A) Yes it is. The Award does not, at least not overtly, regulate an employer's trading hours. Under Clause 23.1, a full time employee may be required to work 38 hours per week averaged over a fortnightly or 4 week period.

OVERTIME AND SHIFT WORK

(Q) If someone works after 6pm, does the 15% shift worker allowance apply to the whole weekly wage or just for that shift?

(A) Not all work after 6pm is "shift" work. In some cases it will be overtime.

There is a regularly identifiable distinction between shift work, requiring the

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payment of a shift loading, and overtime. In one case, the 15% shift loading is payable for all hours; in the other case only overtime is payable for the time worked after 6pm.

In determining what is shift work, it is important to look at the definition of "shift worker" in Clause 3.1 of the Award, as well as Clause 29. This is because the employee must first fit the definition of "shift worker" and secondly then must also work the hours in the shift specified in Clause 29 to receive the shift loading.

To be a "shift worker" there must be a roster (or contractual requirement) where the set hours of work for the employee are regularly outside of 6am to 6pm Monday to Friday (the ordinary hours of a day worker under Clause 24.1).

The shift work penalty under Clause 29 then does not apply to every shift worked by a "shift worker". It applies only when the normal agreed or rostered hours of the individual "shift worker" employee either:

- Finish after 6pm and before 6am; or
- Commence between 6pm and 6am.

Shift work does not apply to one off or irregular occasions where a person works outside of the ordinary day work hours of 6am to 6pm Monday to Friday. For example, a "shift worker" is someone who is regularly rostered to work:

Example 1:	Example 2:
Monday – 9am to 5pm	Monday – 9am to 5pm
Tuesday – 10am to 6.30pm	Saturday – 8am to 12 noon
Friday – 9am to 5pm	

The person in example 1 would be a "shift worker" as they are regularly rostered to work after 6pm on a Tuesday. It is my view this would be so even if the Tuesday work until 6.30pm was only, say, rostered once per fortnight.

The person in example 2 would be a shift worker as they are regularly rostered to work on a Saturday, which is outside the parameters of Clause 24.1, 6am – 6pm Monday to Friday. However, they do not receive a 15% loading on that day for two reasons, firstly as the hours worked do not finish after 6pm or start before 6am as required by Clause 29. Secondly they are seemingly entitled to overtime under clause 28, and even if the employee did work after 6pm overtime rates are taken to include the shift loading (it is not paid in addition).

There have not been any decisions yet on what "regular" means for this purpose and it is difficult to say in the above example if the person would still be a "shift worker" under the Award if for example that Tuesday shift outside of the 6am to 6pm Monday to Friday parameters was, say, once every four weeks.

It is our view that every scenario will turn on its own facts and it is impossible for us to cover each and every case in this document. We do say that if it is clear there are set or agreed hours which are outside of the 6am to 6pm Monday to Friday day work parameters (Clause 24.1), then it is likely that person would be a "shift worker" for Award purposes.

If, however, times the worker works outside of the 6am to 6pm Monday to Friday parameters are uncertain and intermittent, and generally do not occur often then

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it is more likely the person is not a "shift worker" for the purposes of the Award.

So, for example, if a person's rostered or contracted hours are, say:

Monday	10am to 6pm
Tuesday	10am to 6pm
Friday	10am to 6pm

And for example, there is additional work to complete on a particular day and that person works back until, say, 6.30pm, that would not constitute shift work. This is because the employee does not meet the requirement of being a "shift worker" as defined by the Award. The additional 30 minutes or so would constitute overtime as the ordinary agreed hours of work as set are within the definition of a day worker, being 6am to 6pm Monday to Friday. The extra hours are not ordinary hours, they would be overtime and paid at overtime rates. This would also be the case if the employee in the above example was irregularly asked to work a Saturday to fill in or the like.

(Q) Do "shift workers" receive the 15% loading on all shifts?

(A) No, there is a distinction between being a "shift worker" and receiving the shift loading. "Shift Workers" do not receive a shift loading unless the requirements of Clause 29 are satisfied for that particular shift, being that that particular shift is rostered to finish between 6pm and 6am or commence between 6pm and 6am Monday to Sunday. If those requirements are not satisfied on a particular shift, the shift loading is not payable for that particular shift. If the requirement is satisfied, the loading is payable for that shift only.

So if we use the hours of work in Example 1 above, the loading is only paid for the Tuesday shift.

(Q) Are shift workers paid the 15% loading on all hours worked in the shift, or just the hours outside of the ordinary span?

(A) Shift workers are paid the 15% loading on all hours worked in the shift (except during unpaid meal breaks).

(Q) Do all shift workers receive the additional week off annual leave?

(A) No. A shift worker only receives the additional one week of annual leave where they work at least four ordinary hours on ten or more weekends during the year in which their annual leave accrues (i.e., between the employee's anniversary of commencement of employment). See Clause 31.1 of the Award.

(Q) Can casuals be shift workers?

(A) Seemingly, yes, and it is our view chiropractors should treat this as the case until further notice.

Casuals are specifically stated in some other Awards to receive the shift loading

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and we think it is the better view under this Award, notwithstanding what we view as uncertain language.

We suggest that if it is the case that your casual employee tends to be regularly rostered or consistently finish their hours outside of the 6am to 6pm Monday to Friday time frame, they should be treated as shift workers for shift loading purposes.

The casual loading of 25% is stated to be only in lieu of leave entitlements. It is not stated to be in lieu of other entitlements such as loadings and the like. In our view, the shift loading of 15% is therefore added to the casual loading (i.e., 100% base plus 25% casual loading plus 15% shift loading equals 140%) on particular shifts where the shift loading is payable, i.e., Monday to Sunday where hours are scheduled to finish between 6pm and 6am or commence between 6pm and 6am.

(Q) What loadings are paid to shift workers for Saturday and Sunday work?

(A) For full time and part time shift workers, no shift loading would be payable on weekends. All hours worked by these employees are outside of ordinary hours and are paid at overtime rates. Overtime rates incorporate, and are paid in lieu of, any shift loading. See Clause 28.1.

We comment that Clause 26 of the Award is stated to be in relation to "Saturday and Sunday work". It is poorly worded.

Clause 26.1 is stated to only apply to "day workers" who work "ordinary hours" on a Saturday and Sunday. In a chiropractic practice, there would be no "day workers" who are able to work ordinary hours on a Saturday and Sunday (given the span of hours in Clause 24.1). This clause, as drafted, is inconsistent with many other awards where it is not limited to day workers. In other words, in many other awards "shiftworkers" (those who regularly work weekends) are paid under the Saturday and Sunday penalties regime which tends to provide lower penalties than the overtime regime. Unfortunately, currently language in this award does not facilitate that happening and overtime is seemingly payable for the weekend work of full time and part time shift workers.

For all casual workers including "shift workers" on a Saturday and Sunday, Clause 26.2 seemingly applies. They receive a 75% loading. It is unclear if such casuals also receive the 15% shift loading if they also work "shift work" hours on Saturday or Sunday (i.e., after 6pm and before 6am or they start after 6pm and before 6am). The Award simply does not say whether or not this is the case. There are some Awards which actually spell out that they do receive the shift loading in addition, whereas other Awards specifically spell out that they do not. As a result, we cannot give conclusive advice on the issue.

We do not anticipate that there will be many casuals working in a practice after 6pm on a Saturday or Sunday and practically this drafting issue is unlikely to cause widespread problems.

(Q) For those who are not shift workers, does Clause 26, Saturday and Sunday work apply or does overtime Clause 28 apply?

(A) As stated above, in short, in relation to full time and part time employees they

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cannot work ordinary hours on a Saturday or Sunday and Clause 26 will not apply. As such, the hours worked by full time and part time employees on a Saturday or Sunday would constitute overtime hours and be paid under Clause 28 at time and a half for the first two hours and double time thereafter on Saturday and double time for all hours on a Sunday.

For casual employees, the situation is a little unclear given drafting issues within the Award.

Clause 26.1, which applies to full time and part time staff, applies only to "ordinary hours" on a Saturday and Sunday. Whereas Clause 26.2, which applies to casuals, is not stated to be limited to "ordinary hours" on a Saturday or Sunday. Clause 26.2 applies to casuals and simply says that a casual employee who works on a Saturday or Sunday must be paid a loading of 75% for all time worked on these days instead of the casual rate of 25%. It is our view that until further clarification, casuals should be paid for weekend work under Clause 26.2, being a loading of 75% for all hours worked on a Saturday or Sunday.

(Q) I understand that we need to pay 20% of the loadings and penalties in this Award – Do we pay 20% of the extra week holiday for shift workers?

(A) No. The additional week's holiday for shift workers is not a matter capable of being transitioned and must be provided in its entirety. Transitional arrangements generally only apply to wages, penalty rates, loadings, shift penalties. They do not apply to annual leave (or overtime for that matter).

CASUAL EMPLOYEES

(Q) Is it possible to pay staff at casual rates with rotating shifts and some degree of regularity to their hours?

(A) If an employee has "some degree of regularity to their hours" the employee will most likely be categorised under the Award as a permanent part time employee. Clause 10.3 of the Award provides that:

"A part-time employee is an employee who is engaged to work less than the full-time hours of an average of 38 hours per week and who has reasonably predictable hours of work".

Outside of an Enterprise Agreement, it is not possible to circumvent the definition of part time employment contained in the Award.

We have not seen a ruling as yet on what constitutes "reasonably predictable hours of work" and it is difficult to conclusively say at this stage who is, and who is not, a casual employee in all circumstances. We do not know if the actual span of hours on specific days of work are required to be reasonably predictable, e.g. 8am to 12 noon on a Monday and Wednesday or just that they are given any hours on a reasonably predictable basis. We can say this:

- The Courts have looked at the phrase "regular and systematic" in relation to casuals and determined that this can mean simply where the employee is engaged at regular intervals notwithstanding there may be weeks without work and/or varied hours and days of work.
- The Courts have looked at what is a casual employee and the word "regular"

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under former Awards and essentially determined employment would not be casual unless it was uncertain, intermittent and variable, where there was an absence of agreed hours. Generally, a casual employee is not able to plan their family life around what hours they may work in any particular week as they do not know generally in advance.

- It is our view a person would almost definitely be part time if there was a level of certainty to the number of hours they work in a week and/or days they work and/or times they work. This would generally include rotating shifts.
- It was our experience during the Award modernisation process that employee unions pushed significantly the position that part time employment is to be preferred and casual employment discouraged. It was the Union's position that only those employees who work on an ad hoc and uncertain basis, for example, a short term temporary fill-in for an employee absence or emergency or a sudden increase in work and the like, should be considered casual. We believe that approach was adopted by the Commission in compiling the Award.

(Q) Is it possible to pay staff at casual rates if they choose to have a pay rate at 25% above the permanent pay rate without leave loading and holiday pay?

(A) No, unless they are casual as defined by the Award.

(Q) I have some casual employees who do not want to become Permanent Part Time – what type of agreement do I need to draft to support their choice?

(A) In our opinion, an Enterprise Agreement is the only type of agreement which could be used to retain the casual employment status. What would occur is that a different definition of what constitutes casual employment could be included in the Enterprise Agreement.

It is our view that in the absence of such an Enterprise Agreement, an employee who has been treated as casual but is in fact part time as defined by the Award must be converted to part time employment, whether or not they like it, otherwise there would be an Award breach with potential back pay and penalty issues.

We agree with many of the comments made that this situation is unsatisfactory. This is further compounded when other issues might arise, such as contractual issues if there is a pre-existing agreement at common law that the employee is to be treated as casual.

Unfortunately, we cannot provide a solution to the problem outside of recommending an Enterprise Agreement. An Individual Flexibility Agreement under the Award cannot be used for this purpose.

(Q) There is no provision for Saturday morning hours under 24.1 so would that mean we would have to pay a Casual Double a loading of 75% for all the time worked instead of the casual loading of 25%? The loading of 75% on Saturday is excessive when an employee only works on a casual basis for part of the week?

(A) Casual employees who work on a Saturday or Sunday are paid a loading of 75% for all time worked instead of a casual loading of 25% (refer Clause 26.2 of the Award). Unfortunately, the Award makers and policy makers do not seem to

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agree that his loading is excessive.

(Q) Our C.A's starting hours are always the same depending on am or pm shift but finishing times vary from shift to shift and cannot be predicted. As we cannot predict the actual length of each employee's shift, it would appear our employees are casual as opposed to part time given the Award specifies that you must provide part time employees with start and finish times.

(A) This is not correct. In our view, if there are reasonably predictable starting hours, but not finishing hours, on any consistent basis the employees would be part time. Notwithstanding what your current arrangements are, the Award would now require you to engage these people as part time employees and give them specified finish times in addition to the current specified start times. If the part time employee is required to work past the specified finish time, in most circumstances overtime would be payable. If the employee is not required for all hours up to the specified finish time (ie, there is no work for them to do and they can leave early) you would still be required to pay them until the end of the specified period. Unfortunately, the Award is largely inflexible in this regard. It appears to us that a "social" decision was made that employees are generally entitled to have fixed start and finish times and this overrides an employer's interest in having flexibility depending on work load. Again, we ask practitioners note that we are simply endeavouring to advise you how the Award operates. We ask you not to "shoot the messenger" when parts of the Award appear to be inappropriate.

(Q) Is it possible to negotiate a flexible (casual) arrangement with staff who often (but not always) work similar hours from week to week? Our current staff have been employed on a casual basis, as they like the flexibility, etc. However, they usually work set days and similar times each week on weeks that they work.

(A) Outside of an Enterprise Agreement, the answer is unfortunately "no". The employee could not be engaged as a casual even though we completely understand that both parties may be happy with the arrangement and the arrangement may in fact be beneficial to both parties.

OTHER GENERAL MATTERS

(Q) I have some full time employees who are paid more than $4.00 over the Award rate. Are there specific requirements for an Individual Flexibility Agreement? Can these agreements absorb the added costs of shift loading and Saturday penalties – are there templates available anywhere?

(A) The simple answer is Yes. Individual Flexibility Agreements, provided the specific requirements set out in the Award are met, can be utilised to pay employees above Award and absorb costs such as shift loadings, overtime, Saturday penalties and the like.

As detailed later, we are in the process of developing precedents which will be available for download at a discounted fee from our website. In the interim, you can contact this office for documents.

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(Q) I employ several Remedial Massage Therapists who are employed under a piece rate worker agreement – they receive a percentage of each service and are paid holiday pay of 1-13 of hours worked for every four week period, and super – is this still allowed under the Award?

(A) As a preliminary issue, remedial masseurs are listed in Schedule C of the Award. The Award does not make provision for the payment of "Piece Rate" or output based rates of pay. You cannot have a payment structure which incorporates holiday pay (annual leave). Recent decisions on this issue confirm that annual leave must be paid as and when it is taken and cannot be paid out in advance particularly as part of the usual weekly/fortnightly pay. You could pay a percentage type rate to your employees, however, this should be represented clearly in a contractual agreement and it would be required that the rate of pay they receive is no less than the minimum rates of pay for health professionals as set out in the Award. In addition, such employees would also be entitled to any overtime, penalty loadings and the like as prescribed by the Award.

We would suggest an Enterprise Agreement or Individual Flexibility Agreement which could provide for a "piece rate or percentage type output base rates of pay" in lieu of overtime, penalty rates and the like. Employers may wish to do this in a contract of employment, however they run some risk the document might not be effective. However, neither option is able to incorporate annual leave into the payment.

(Q) If one staff member is sick and another worker works for them, does the person who works extra hours get paid at the overtime rate?. Is there a way to work out a TOIL (time off in lieu) system for such events?

(A) If the replacement employee is a casual employee, generally overtime would not be payable. If the employee is a part time employee who is required to fill in and work hours outside of their agreed hours (as set out in Clause 10.3(b) of the Award), then overtime would be payable.

In relation to a full time employee who works the hours, overtime may not be payable in certain circumstances, such as if the full time employee's shift was changed and the employee worked within the ordinary span of hours (Monday to Friday 6am to 6pm) but did not work more than an average of 38 hours in the week, or more than 10 hours in the day.

In the event overtime is payable to an employee, Clause 28.3 of the Award facilitates time off instead of payment for overtime. It provides that an employee may elect, with the employer's consent, to take time off instead of payment for overtime at a time agreed. Overtime, in this regard, taken as time off during ordinary hours will be taken at the ordinary time rate, that is, an hour off for each hour worked.

We do emphasise that this must be at the employee's election and not the election of the employer.

(Q) What happens if a staff member wants more than the allocated four weeks leave?

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Can they take leave without pay?

(A) Yes. There is no prohibition in the Award on enabling an employee to take unpaid leave provided the employer consents. The employer is not required to consent to the additional unpaid annual leave, however.

(Q) Can we make a contract for a limited or definite time period, and if so, what is the minimum time period?

(A) It is permissible under both the NES and the Award to enter into a fixed term contract which is for a specified period of time and which will terminate at the end of the specified period. Other than the 3 hour minimum engagement for casual employees, there is no "minimum time period" prescribed in the Award or the NES.

(Q) Can we negotiate for staff to take lunch breaks at a convenient time, even if it is after six hours of work?

(A) Meal breaks are dealt with in Clause 27 of the Award. An employee who works in excess of five hours (not five hours or less) is entitled to an unpaid meal break not less than 30 minutes, and not more than 60 minutes. The time of taking the meal break may be varied by agreement between the employer and the employee. Further flexibility in relation to lunch break times is a matter that can properly be dealt with in an Enterprise Agreement.

(Q) In relation to Clause 7.1 of the Award, what is meant by better off overall?

(A) In relation to the better off overall test ("BOOT"), the test under Clause 7.1 is slightly different to the BOOT test in relation to assessing Enterprise Agreements. In relation to assessing Enterprise Agreements, the BOOT test essentially focuses on the employee's remuneration at the end of the day being better off overall than in comparison to what they would have received under the Award receiving base Award rates of pay, allowances, penalties, overtime and the like.

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The BOOT test in relation to Individual Flexibility Agreements under the Award is substantially similar and largely focussed on ensuring that the individual employee receives remuneration which leaves them better off at the end of the day than they would be being paid Award base rates of pay and penalties, etc.

However, there is a subtle difference between the BOOT test for Individual Flexibility Agreements, as it can include consideration of "subjective" factors. The subjective factors could, for instance, be that the particular arrangements suit the individual employee's own personal circumstances better than the Award. It is difficult for us to advise how much weight will actually be given to subjective features and we would suggest that generally little weight will be given and the majority of weight will be given to ensuring better remuneration.

One of our primary concerns with Individual Flexibility Agreements, when compared to Enterprise Agreements, is that with Enterprise Agreements the BOOT test is conducted by Fair Work Australia and the Agreement only operates once approval is given. As such, you can rely on the Agreement safely. With an Individual Flexibility Agreement, the BOOT test is not conducted prior to the Agreement coming into operation. It would only ever be conducted if and when the employee sought to challenge the Agreement. It is not difficult to envisage that an employer or employee may operate under an Individual Flexibility Agreement for many years and, after a dispute, the employee may then seek to challenge the Individual Flexibility Agreement on the basis it did not leave them better off overall. This could leave an employer in the unfortunate position of being faced with a significant back pay claim, together with various penalties.

(Q) Do you have documents or can you assist in producing documents for us?

(A) Yes. You can contact this office and we can prepare documents for you including Employment Contracts, Individual Flexibility Agreements, Enterprise Agreements and the like.

We are currently in the process of finalising pro forma documents and instructions which will be available on our website to be downloaded for a substantially discounted fee.

This article has been prepared for the general assistance of members. It is not a substitute for obtaining your own legal advice related to your own specific circumstances. Care has been taken in relation to the preparation of the article however, Meridian Lawyers is not responsible for any error or omission.

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