

AWARD MODERNISATION TRANSITIONAL PROVISIONS

ADDITIONAL AND REPLY SUBMISSIONS



26 June 2009

ARRANGEMENT

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AWARD MODERNISATION TRANSITIONAL PROVISIONS ADDITIONAL AND REPLY SUBMISSIONS

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1. Overview

1. In our submission dated 29 May 2009, Ai Group set out its views in some detail on transitional award provisions for Stage 1 and Stage 2 modern awards.
2. Ai Group has considered the submissions of other parties and none have raised issues which, we believe, detract from the merit of the approach outlined in our 29 May submission.
3. That said, we have made some relatively minor amendments to our proposed model transitional provisions to clarify the intent, and included revised model provisions within this submission.
4. Ai Group submits that the model provisions should be incorporated into all modern awards (varied as necessary to suit the needs of the particular industry) unless there are compelling reasons why the transitional provisions should not be included.
5. In this submission we have also commented upon the proposals of various union parties.

2. Revised model transitional provisions

6. In Chapter 6 of Ai Group's submission of 29 May, we put forward a set of model transitional provisions. Some relatively minor amendments / corrections have been made to the transitional provisions in the revised version below to clarify the intent.
7. These amendments do not serve to alter the central propositions which underpinned Ai Group's earlier proposal and submissions and we continue to rely on those submission in support of these redrafted provisions.
8. For ease of reference and in keeping with the format which Ai Group has adopted for the revision of award provisions to date, the modifications made to our original provisions are marked with **highlighting** or a ~~strikethrough~~ as appropriate.
9. There should be flexibility for the provisions to be modified to suit the needs of particular industries and occupations. For example, different percentage increases may be appropriate in particular industries during the phasing-in period. Also, examples of relevance to the particular industry could be included in lieu of the examples set out below.

SCHEDULE X

1. Off-Setting of conditions

1.1 An employer:

- (a) *who immediately prior to 1 January 2010, was covered by and applying conditions derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and*

- (b) *is required by the terms of this modern award to increase any of the conditions or entitlements identified in clauses 2, 3, 4 or 5 of this Schedule when compared to those conditions or entitlements which applied pursuant to (a); and*
- (c) *is providing an over-award payment to an employee who is within an existing classification or category of employee as specified in (a);*

shall, subject to 1.2 below, be entitled to off-set the additional costs associated with such entitlements and absorb the increases into the over-award payment.

1.2 *The employer shall be required to consult with the affected employee prior to the implementation of this transitional provision.*

1.3 *Sub-clause 1.1 and 1.2 cease to operate after 31 December 2014.*

2. Minimum rates of pay

2.1 *Subject to Clause 1 – Off-setting of Conditions, an employer:*

- (a) *who immediately prior to 1 January 2010 was covered by the pay scale derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and*
- (b) *who was applying minimum rates of pay less than that which are prescribed by this modern award;*

shall not, subject to 2.2, be required to apply the minimum rates of pay provided for in this award in respect of any of those classifications or categories of employment.

2.2 *An employer to whom 2.1 applies shall, in respect of those classifications or categories of employee:*

- (a) *continue to apply the minimum rate of pay derived from the terms of the NAPSA or award specified in 2.1(a); and*
- (b) *be required from the first full pay period to commence on or after 1 February 2010 and each year thereafter to increase those minimum rates of pay by the lesser of 2% or the percentage required to be paid to reach the award rate; and*
- (c) *be required to apply the annual wage review adjustment in any given year.*

Example

The Clerks – Private Sector Award 2010 provides that the minimum rate for an employee engaged at the highest classification under the award is \$740.00 per week (Level 5). The Clerical Employees (Victoria) Award provides for a minimum rate of \$698.44 for its Level 5 classification. Assuming that the annual wage review decision awarded an increase of \$10 per annum, employers utilising this transitional provision would increase rates as follows:

<u>Transitional Rate</u>		<u>Award Rate</u>	
1 February 2010	= \$712.41	1 February 2010	= \$740.00
1 July 2010	= \$722.41 (AWR)	1 July 2010	= \$750.00
1 February 2011	= \$736.86	1 February 2011	= \$750.00
1 July 2011	= \$746.86 (AWR)	1 July 2011	= \$760.00
1 February 2012	= \$760.00	(Only a 1.73% increase is required to the 1 July 2011 figure to reach the minimum award wage. Thereafter only the annual wage review adjustment will affect the rate of pay.)	

3. Casual loading

3.1 Subject to **Clause 1** – Off-setting of Conditions, an employer:

- (a) who immediately prior to 1 January 2010 was covered by and applying conditions derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and
- (b) who in accordance with those conditions was applying a casual loading less than that which are prescribed by this modern award;

shall not, subject to 3.2, be required to apply the casual loading provided for in this award in respect of any of those existing classifications or categories of employment.

3.2 An employer to whom 3.1 applies shall, in respect of those classifications or categories of employee:

(a) continue to apply the casual loading derived from the terms of the NAPSA or award specified in 3.1(a); and

(b) be required from the first full pay period to commence on or after 1 February 2010 and each year thereafter to increase the casual loading by the lesser of 1% or the percentage required to be paid to reach a casual loading of 25%.

3.3 Sub-clause 3.1 and 3.2 cease to operate after 31 December 2014.

Example

The casual loading under the Metal Industry (NT) Award and the Metal Trades (ACT) Award is 20%. Employers bound by these awards are entitled to apply the following casual loading:

1 February 2010	21%
1 February 2011	22%
1 February 2012	23%
1 February 2013	24%
1 February 2014	25% (ie. the level provided for in the modern award)

4. Saturday, Sunday and public holiday rates

4.1 Subject to Clause 1 – Off-setting of Conditions, an employer:

(a) who immediately prior to 1 January 2010 was covered by and applying conditions derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and

(b) who in accordance with those conditions was applying Saturday, Sunday and/or Public Holiday rates less than that which are prescribed by this modern award;

shall not, subject to 4.2, be required to apply the Saturday, Sunday and Public Holiday rates provided for in this award in respect of any of those classifications or categories of employment.

4.2 An employer to whom 4.1 applies shall, in respect of those classifications or categories of employee:

(a) continue to apply the Saturday, Sunday and Public Holiday rates derived from the terms of the NAPSA or award specified in 4.1(a); and

(b) be required from the first full pay period to commence on or after 1 February 2010 and each year thereafter to increase the Saturday, Sunday and Public Holiday rates by the lesser of 5% or the percentage required to be paid to reach the award rate.

4.3 Sub-clause 4.1 and 4.2 cease to operate after 31 December 2014.

Example

The rate for Sunday work for a day worker under the Rubber, Plastic and Cablemaking Industry – General – Award 1998 is 175% of the ordinary time rate. Employers bound by this award are entitled to apply the following penalty rates:

1 February 2010	180%
1 February 2011	185%
1 February 2012	190%
1 February 2013	195%
1 February 2014	200% (ie. the level provided for in the modern award)

5. Shift allowances / spread of hours

5.1 Subject to **Clause 1** – Off-setting of Conditions, an employer:

(a) who immediately prior to **1 January 2010** was covered by and applying conditions derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and

(b) who in accordance with those conditions was applying shift loadings less than that which are prescribed by this award;

shall not, subject to 5.2, be required to apply the shift loadings provided for in this award in respect of any of those classifications or categories of employment.

5.2 An employer to whom 5.1 applies shall, in respect of those classifications or categories of employee:

(a) continue to apply the shift loadings derived from the terms of the NAPSA or award specified in 5.1(a); and

(b) be required from the first full pay period to commence on or after 1 February 2010 and each year thereafter to increase the shift loading by the lesser of 3% or the percentage required to be paid to reach the award rate.

5.3 Sub-clause 5.1 and 5.2 cease to operate after 31 December 2014.

Example

Under the Rubber, Plastic and Cablemaking Industry – General – Award 1998 a shift finishing at 8pm is day work and no loading is payable. For such a shift, employers bound by this award are entitled to apply the following penalty rates:

1 February 2010	3%
1 February 2011	6%
1 February 2012	9%
1 February 2013	12%
1 February 2014	15% (ie. the level provided for in the modern award)

6. Review of Transitional Provisions

Fair Work Australia may review and amend the transitional provisions within this award.

3. ACTU principles for transitional provisions

10. Ai Group has reviewed the submissions of the ACTU filed on 29 May 2009 regarding the approach that it endorses for transitional provisions within modern awards. In lieu of advancing any provisions which are appropriate for inclusion within modern awards, the ACTU has instead merely sought to assert a range of 'principles' which it contends "*should guide the Commission's approach to the formulation of specific transitional arrangements*¹".
11. We submit that such an approach is of little assistance and indeed contend that the 'principles' proposed by the ACTU are highly confusing and in some cases contradictory. Accordingly, whilst we have attempted to consider that which the ACTU has proposed critically, in a number of areas the operation of its 'principles' were capable of a number of meanings. In such circumstances we were forced to make assumptions in relation to the intention which underpinned the proposal so that consideration of the concepts could be undertaken.

The ACTU's approach to employer cost increases

12. The ACTU advocates for a highly limited approach to resolving increased employer costs which essentially encapsulates the following notions:
 - (a) Only increased costs as a result of elevation of the rates of pay within the modern award should be dealt with through transitional provisions²;
 - (b) These transitional provisions should only be available to existing employees³; and

¹ ACTU submissions to the Australian Industrial Relations Commission Award Modernisation Transitional Provisions – 29 May 2009

² ACTU submissions – 29 May 2009; at [61] and [69]

(c) Employees should transition to the modern award rates of pay as soon as possible, but no greater than three years from the date of creation of the modern award⁴.

13. Ai Group submits that not only is the limitation on creating transitional provisions only for 'rates of pay' far too narrow, but additionally, the requirement that such provisions operate for a maximum of three years ignores entirely the important mechanism which is available under the *Workplace Relations Act 1996* ("the WR Act") for differences of a state based nature to be retained for a period of up to five years⁵.
14. The ACTU proposal for increased employer costs, we contend, gives only the most cursory of considerations to the possibly damaging effects that increased costs may have on employers' businesses. Such an observation is particularly relevant given the economic realities being faced by many employers as a result of the global financial crisis, and the corresponding detrimental effects that increased costs would present.
15. In addition to this fact however, we submit that the ACTU's proposal is unclear in how the duration of the transition period would apply within a transitional provision. Ai Group advances this submission on the basis that whilst the maximum period for transition is specified as three years, the ACTU also advances the view that:

"70. *Where the difference between the existing federal award rate of pay and the modern award rate is small or insignificant, such increase to the modern award rate shall be phased in over a lesser period of time.*"

³ ACTU submissions – 29 May 2009; at [61] and [69]

⁴ ACTU submissions – 29 May 2009; at [61] and [70]

⁵ Section 576T

16. The ACTU in a footnote to this statement identify that in its view any difference that is less than 5% should be phased in with a single increase. We submit that it is entirely unclear how such a provision would be intended to operate in practice. On one reading of this proposal what is being advocated for are individually drafted transitional provisions which apply only in respect of a single award or NAPSAs as this will allow for the variation in duration of the transitional provision depending upon the quantum of the difference as suggested by the ACTU.
17. Ai Group strongly opposes any proposal or principle which would see the creation of individual transitional provisions based upon coverage of individual awards or NAPSAs as part of the transitional provisions for modern awards. We contend that such an approach is unwieldy and will result in some awards containing transitional provisions that span for many tens or even hundreds of pages depending on the number of awards which have been rationalised into the modern award. Such an outcome would not support the objectives of award modernisation.

The ACTU's approach to employee disadvantage

18. In stark contrast to that which is proposed to cushion the impact of increased employer costs, the ACTU proposes expansive and, in some circumstances, perpetual transitional provisions to ensure that employees are not disadvantaged. Ai Group has already advanced within its earlier submissions its primary view that employee disadvantage created as a result of the award modernisation process should primarily be remedied through the utilisation of take-home pay orders in lieu of the use of transitional provisions. We continue to endorse those submissions.
19. Should the Commission not support this position however, we strongly oppose the principles which the ACTU has advanced to prevent employee disadvantage and respectfully submit that they defy any reasonable attempt to

transition to the modern award. Instead the ACTU's proposal reflects a blatant attempt to maintain the influence of existing awards and NAPSAs and preclude the operation of the modern award for a vast number of employees for what effectively may be many years or even decades.

20. It is noteworthy that the ACTU defines "*Transition and transitional provisions*" as a "time-based process"⁶ yet seeks to preserve differences in award conditions indefinitely for many employees.
21. Ai Group has reviewed the principles endorsed by the ACTU to account for employee disadvantage and we submit that in addition to going far beyond what could reasonably be held to be appropriate transitional provisions, a number of propositions which the ACTU advances appear to be in direct contravention of the terms of the WR Act.

Rates of pay and penalties/loadings

22. Whilst the ACTU's position in relation to transitional provisions for employer costs identifies a distinction between the approach to be adopted for significant and insignificant differences⁷, it gives no regard to such a proposition in the manner in which it approaches the principles for dealing with employee disadvantage. We submit that this goes to illustrate the imbalanced approach which has been adopted by the ACTU in developing its principles.
23. Ai Group submits that if the Commission is to consider the inclusion of transitional provisions to reduce employee disadvantage, such provisions should only be targeted at areas of substantial disadvantage and not seek to preserve every difference in condition regardless of how small.

⁶ ACTU submissions – 29 May 2009; at [45]

⁷ ACTU submissions – 29 May 2009; at [61] and [70]

24. This submission is made with particular consideration of the proposal by the ACTU to not only protect any diminution in rates of pay or loadings but also overtime penalties and allowances. Ai Group contends that should the Commission endorse our submission that transitional provisions should only be targeted at disadvantage of a substantial nature, we believe that there will be little if any need for transitional provisions dealing with either overtime penalties or allowances.
25. The basis upon which we advance this submission is due to the fact that the vast majority of modern awards created by the Commission contain both provisions dealing with allowances and also overtime provisions. We submit that on this basis there are primarily three main circumstances in which there will be a difference between these conditions and those within the modern award as follows:
- (a) Where the same allowance is in the modern award as in the pre-existing award or NAPSA but the modern award rate is lower;
 - (b) Where the Commission in making the modern award has decided not to include the allowance from the pre-existing award or NAPSA; and
 - (c) Where the number of overtime hours required to be worked to move from time and a half to a double-time penalty have been increased under the modern award, when compared against the pre-existing award or NAPSA.
26. We submit that in the circumstances presented by examples (a) and (c), any disadvantage created by the modern award would not be of sufficient magnitude to outweigh the importance of not increasing the regulatory burden on employers. Indeed in relation to the issue of overtime penalties we contend that the vast majority of awards either provide for double-time penalty payments to be commenced after two or three hours of overtime on any given

day, therefore if there is any 'disadvantage' in this respect it would be no greater than 0.5 of an hour's pay per day in which the overtime occurred.

27. In relation to the scenario created by option (b), Ai Group submits that where the Commission has considered the appropriateness of including a particular allowance and has decided that it should not be a feature of the modern safety net award, such a determination should weigh heavily against the inclusion of any transitional provision maintaining such a provision. Such a submission is of particular relevance when one considers that the dominant approach which the ACTU advocates for in relation to its transitional provision principles is an enshrining of the transitional provision in perpetuity so long as the employee is engaged in their current position.
28. This matter will be discussed in greater detail subsequently but in relation to its effect on transitional provisions preserving allowances, it would potentially result in a vast array of allowances having continued application to many employees for a substantial period of time. Such a situation, we submit, has a highly damaging effect on the creation of a certain and stable safety net as required by the terms of the WR Act.
29. On this basis, Ai Group submits that not only do the ACTU's principles require correction in relation to the level of disadvantage required to trigger their operation, but additionally there is no basis for the inclusion of transitional provisions which relate to overtime penalties or allowances.

Transitional provisions for new employees

30. Ai Group has already, within previous proceedings, advanced its views in opposition to the contention that the 'employee disadvantage' which is referred to in the Modernisation Request also accounts for disadvantage to those who become engaged with a new employer after 1 January 2010. We continue to rely on those submissions and submit that we are fortified in this view when

one considers the circumstances under which ‘take home pay orders’ are available under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*⁸ (“the FW Transitional Act”).

31. Accordingly, we do not support the creation of transitional provisions to mitigate employee disadvantage for those employees who were not as at 31 December 2009 engaged by the relevant employer.

State based and non State based differentials

32. The ACTU’s transitional principles on their face appear to identify a range of propositions which relate to state based differentials and a second series of principles for those differences not derived from state based conditions.
33. In seeking to explain the justification for such an approach the ACTU state:

“The ACTU submits that the duration of transitional arrangements depends on whether the differentials between existing awards and the modern award are state based differentials or whether they are simply differentials that arise as a result of workers moving from the disparate terms and conditions of employment found in pre-reform awards to the one modern award⁹.”

34. It is apparent therefore, that the motivating factor for seeking to distinguish between these two types of transitional provision is for no other reason than to avoid the legislated five year limitation on the inclusion of conditions within a modern award which do not apply in each State and Territory.
35. Ai Group rejects such a justification, and has identified no defensible basis within the ACTU’s submissions for applying a different range of transitional provisions to non State based differences than that which will apply to State

⁸ See Schedule 5, Part 3 – section 8(3)

⁹ ACTU submissions to the Australian Industrial Relations Commission Award Modernisation Transitional Provisions – 29 May 2009; at [15]

based differences other than a desire to preserve in perpetuity the higher conditions which may be within an award or NAPSA.

36. Indeed, Ai Group questions what matters the ACTU contends fall into the category of non State based differences as we would submit that almost all of the matters which would be subject to transitional provisions, be they derived from NAPSAs or awards, would cut across the restrictions contained within section 576T of the WR Act.
37. We advance this submission on the basis that whilst the terms of NAPSAs clearly do not apply in each State and Territory, the vast majority of awards equally do not have application in all States and Territories. We submit that in such circumstances any transitional provision which sought to preserve conditions from an award which did not apply in all State and Territories would fall foul of section 576T and therefore such provisions could only operate for a maximum of five years.
38. In light of this observation it is evident that any transitional principles which seek to distinguish between State based and non State based differentials are highly fraught as such concepts cannot be reduced to a question of whether the conditions being preserved are derived from a NAPSA or award respectively. Rather, determining that issue requires, in the case of an award condition, detailed consideration of the coverage of the instrument and the application of the relevant provision to ensure that it operates in all States and Territories.
39. Whilst the ACTU proposal on its face seeks to create a distinction between State based and non State based differences, we submit that there is substantial confusion as to the delineation between these two concepts as there appears to be an intent to apply the non-State based differential principles to State based differences from 31 December 2014 onwards. The

following extract from the ACTU's submissions relating to transitional principals for rates of pay emphasise this point:

“Rates of Pay

State based differentials

59. *The following principles apply to differences in rates of pay attributable by reference to state boundaries.*

Existing employees

... ..

62. *An employee who is in receipt of a rate of pay greater than the rate of pay set out in the relevant modern award by virtue of the operation of a NAPSA or federal award shall continue to receive that higher rate of pay (the transitional rate of pay) from 1 January 2010. Alternatively, the employee may be moved, without detriment, to the next highest pay point in the modern award*

63. *An employee in receipt of a transitional rate of pay shall be entitled to receive any increases arising from the annual review of wages conducted by FW Australia based on their transitional rate of pay. Any such increases shall not be absorbed by the transitional rate of pay.*

64. *An employee in receipt of a transitional rate of pay shall receive that pay rate while they occupy the same position as (or a position that is comparable to) the position they occupied on 31 December 2009.*

65. *These provisions shall apply until 31 December 2014 at which time the relevant provisions of paragraphs 71-74 will apply.*

New employees

66. *Where, but for award modernisation, a new employee would have been entitled to a rate of pay under a NAPSA or federal award state differential in excess of the rate of pay under the modern award, the employee shall receive the higher rate of pay (transitional rate of pay) until 31 December 2014 at which time the provisions of paragraphs 71-74 will apply.”*

(Emphasis Added)

40. If one reviews the provisions of paragraphs 71 – 74 it can be seen that they articulate the principles which should apply for non-State based differences and relevantly provide:

“Non state based differentials

Existing employees

71. *An employee who is in receipt of a rate of pay greater than the rate of pay set out in the relevant modern award shall continue to receive that higher rate of pay (transitional rate of pay) from 1 January 2010 or, alternatively, may be moved without detriment to the next highest modern award salary point.*
 72. *An employee on a transitional rate of pay shall have that rate maintained and shall receive any movements arising from the annual review of wages by Fair Work Australia based on the transitional rate of pay. Any such increases in minimum wages shall not be absorbed into the transitional rate of pay.*
 73. *An employee in receipt of a transitional rate of pay shall receive that rate (as adjusted from time to time) for as long as they continue to occupy the same position as (or a position that is comparable to) the position they occupied on 31 December 2009.*
 74. *An employee on a transitional rate of pay who is promoted shall not suffer any loss of pay as a result of that promotion.*
41. We submit that if the principles espoused in paragraphs 71 – 74 are applied to State based differences after 31 December 2014, such differences will be maintained within the award in perpetuity. The only caveat to this proposition being that such provisions cease to be applicable should an employee be engaged in a different position.
42. Ai Group contends that if this is the intention of the application of these principles the ACTU’s proposal is clearly in contravention of section 576T as differences of a State based nature will be maintained well beyond the five year limitation period.
43. The ACTU has advanced similar propositions in relation to penalties and loadings¹⁰. Ai Group submits that these principles are equally offensive to the terms of section 576T of the WR Act and accordingly should not be endorsed by the Commission.

¹⁰ ACTU submissions – 29 May 2009; at [79] - [82]

The maintenance of transitional provisions whilst an employee remains in the same or a comparable position

44. In addition to the preservation of State based differences beyond the 5 year statutory limitation, Ai Group opposes the notion that transitional provisions which protect non State based differentials should be applied to an employee without limitation for as long they remain in the same or a comparable position. We submit that such an approach is highly unworkable and has the potential to result in employers being required to apply a higher safety net to that which the Commission has determined as appropriate to a substantial number of their employees for what may be many years or decades.
45. We contend that not only would such a result increase the regulatory burden on employers but also potentially lead to substantial instability in the safety net. Furthermore, such a proposal places existing employers at a commercial disadvantage to new employers who commence after 1 January 2010 as they will only be required to apply the lower modern award safety net.
46. Ai Group contends that the effect of requiring existing employers to apply a higher safety net virtually in perpetuity should not be disregarded. This observation is particularly relevant in sectors which are highly award reliant such as hospitality and child care, where domestic competition is high. We submit that it would be highly inequitable if existing employers were placed in a position of commercial disadvantage as a result of having to indefinitely maintain a higher safety net than that which applies to new employers by virtue of transitional provisions.
47. Importantly, we also note that the situation foreshadowed is not one that an existing employer would even be capable of bargaining out of given that the ACTU's principles specifically provide that any transitional provisions within

the modern award should be utilised in assessing the better off overall test¹¹. An existing employer would therefore remain at a commercial disadvantage against new entrants so long as they continued to engage employees who were entitled to higher conditions under a NAPSA or award prior to 31 December 2009.

48. As Ai Group has previously submitted, we do not believe that provisions of this nature, which in essence operate with marked similarity to a savings provision are appropriate or support the objectives of Award Modernisation¹². We contend, that should the Commission determine that transitional provisions are required to protect employees from disadvantage such provisions must be capable of working themselves out of the system over a reasonable period.

The ability to reclassify employees to the next highest pay point and absorption of annual wage reviews

49. The ACTU's submissions, in respect of transitional provisions for employees who are being paid a higher rate than the relevant rate in the modern award, identify that in lieu of applying a transitional rate of pay an employer may alternatively move the employee to the next highest pay point in the modern award.
50. Ai Group strongly opposes this proposition and submits that such a submission is ill conceived as it essentially reduces the classification structure in a modern award to nothing more than a series of pay points. Such reductionism is, we submit, antithetical to the notion of skill and competency based classifications which have been developed within the award system since the late eighties and which are a requirement for modern awards.

¹¹ ACTU submissions – 29 May 2009; at [20] – [21]

¹² Ai Group Award Modernisation Transitional Provisions Submissions and Draft Award Provisions – 29 May 2009; at [72]

55. We submit that if this principle were to be endorsed by the Commission substantial operational difficulties would be created for employers as such a principle would require an employer to maintain existing roster arrangements for any employees who refused to provide their consent to move to new roster, regardless of how small the number of employees.
56. We further contend that the dominant approach which has been developed by the Commission when drafting the hours of work provisions within modern awards is to provide a mechanism for employers to vary the arrangement of hours or rostering of employees to meet their operational requirements. It would be inconsistent with this drafting approach to preclude an employer from availing themselves of this important flexibility through the introduction of restrictive transitional provisions.
57. This submission is given further force when one considers that the vast majority of existing awards and NAPSAs provide a mechanism for an employer to vary an employee's hours of work or roster to meet their operational requirements. It defies logic that this ability should be restricted through transitional arrangements.
58. The ACTU has advanced no basis for seeking this highly restrictive principle within the transitional provisions. To the extent that any argument is agitated which asserts that such provisions are necessary to allow for employees' family circumstances to be accommodated we would submit that such protestations are without merit. Whilst a modern award may provide a mechanism for employers to vary an employee's hours of work, such rights can only be exercised subject to the provisions of the *Fair Work Act* and federal and State anti-discrimination legislation. Such legislation incorporates substantial rights and protections relating to an employee's family and caring responsibilities. It is entirely unnecessary and unwarranted, therefore, to insert any additional restrictions on variation to rosters as is proposed by the ACTU.

4. Manufacturing (AM2008/5 and AM2008/19)

Manufacturing and Associated Industries and Occupations Award 2010

59. The Modern Manufacturing Award will replace around 100 federal awards and NAPSAs. These federal awards and NAPSAs have diverse conditions and therefore the transitional provisions in the modern award are particularly important to avoid imposing huge cost increases upon employers.
60. It is common knowledge that the manufacturing industry has been particularly hard hit by the global financial crisis and economic downturn.
61. The transitional provisions proposed for the Modern Manufacturing Award are set out in ***Annexure A***. The provisions are consistent with the model provisions dealt with in Section 2 above.
62. The AMWU has filed a submission which expresses support for the ACTU's position. Ai Group opposes the ACTU's proposals for the reasons set out in Section 3 above.
63. The AMWU's submission also identifies a list of "main changes" which the union alleges should be the subject of transitional provisions.
64. Ai Group acknowledges that the AMWU's list is shorter than the lists put forward (for various modern awards) by other unions such as the ASU and CFMEU, but we submit that employee disadvantage arising from award modernisation is best dealt with via Take Home Pay Orders, as set out in Ai Group's submission of 29 May.

65. The AWU has filed a general submission seeking that the following savings clause be incorporated into all modern awards:

“An employee who is covered by this [modern] award and who, prior to the commencement of this award, was receiving an entitlement, condition or wage that is more generous than is described in this award, will retain that entitlement, condition or wage, until such time as the provision in this award becomes more generous. Where an employee receives a more generous entitlement, in accordance with this clause, that is derived from the terms of a NAPSA the employee ceases to receive this entitlement on 31 December 2014”.

66. The AWU asserts that its draft clause reflects the approach proposed by the ACTU which it describes as follows:

“a) That employees on arrangements that are inferior to the modern award move automatically to the modern award, with the exception of wages which can be phased in over a maximum three year period.

b) That existing employees on arrangements that are superior to the modern award and that are not state-based differences have their wages and conditions grandfathered in perpetuity, with wages being subject to adjustment. New employees commence on the modern award.

c) Existing and new employees on arrangements that are superior to the modern award and that are state-based differences have their wages and conditions grandfathered until 31 December 2014”.

67. Ai Group strongly opposes the AWU's draft clause, which would:

- Result in a very one-sided outcome from award modernisation with many employers suffering increased costs but:
 - No employee covered under any existing federal award suffering any disadvantage at any time;
 - No employee covered under a NAPSA suffering any disadvantage for 5 years;

- Result in an ongoing complex and confusing award system which would be inconsistent with the objects of award modernisation;
- Cause operational difficulties for employers.

5. Private Sector Clerical (AM2008/7)

Clerks – Private Sector Award 2010

68. The transitional provisions which Ai Group proposes for the *Clerks - Private Sector - Award 2010* are set out in **Annexure B**.
69. Ai Group has reviewed the submissions of the ASU, filed in respect of the transitional provisions for number of modern awards, including the *Clerks - Private Sector - Award 2010*.
70. The ASU's submissions deal with a range of issues which, in Ai Group's submission, are beyond the scope of the present proceedings. These include the Commission's decision to include call centre provisions in the *Clerks - Private Sector - Award 2010* and the exemption rate clause.
71. The ASU has filed seven schedules of proposed transitional provisions, amounting to nearly 100 pages (attachments 6A to 7D). These provisions identify a range of often minor or peripheral changes which in many cases could not be said to address real areas of employee disadvantage. This approach would create extremely complex transitional arrangements which would not support the objects of award modernisation. Some of the changes identified by the ASU are capable of being dealt with by the take home pay orders available under the *Fair Work Act*, while others deal with issues about which the Commission has taken a common approach (e.g. right to request additional concurrent parental leave) and yet others are not allowable (e.g. because they deal with long service leave).
72. Ai Group urges the Commission to adopt the far simpler approach set out in **Annexure B**.

6. Retail (AM2008/10)

Fast Food Industry Award 2010

73. The following submissions are made in response to the submissions filed by the SDA in relation to the *Fast Food Industry Award 2010* ("Modern Fast Food Award").
74. These submissions supplement our submissions of 29 May 2009, in particular Chapter 7 – Special Transitional Provisions, of those submissions.

Casuals

75. The SDA has proposed that the 25% casual loading in the Award should apply from 1 January 2010.
76. We submit that this does not allow for an acceptable transitional period to enable businesses to cope with the increased costs. Most relevant NAPSAs and the National Fast Food Award provide for a casual loading of around 20-23%, with a minority at 15% or 25%.
77. It is clear that the increased loading in the Modern Fast Food Award will cause a major cost impost. The cost impost is even more significant because under the Award casuals receive weekend and night penalties calculated on the casual loaded rate. This feature is not common in NAPSAs and is not incorporated within the NSW provisions of the existing National Fast Food Award.
78. The fast food industry has a high level of casual employment. In our submissions filed 10 October 2008 for the Retail Industry (AM2008/10), Ai Group filed witness statements from various operators in the industry, being

attachments 8-26. Those witness statements set out the nature of the industry, the proportion of casual workers and part-time workers and the age of the workers. We also refer the Commission to paragraphs 15-28 of those submissions.

79. Casual employment benefits both employers and employees in the industry. Employees often value the flexibility which casual employment affords.
80. The SDA has proposed a simplistic remedy for dealing with the increased costs which will result from the increase in the casual loading: “the simple expediency of not employing casuals” (para 21 of the SDA’s submissions). The SDA appears to suggest that casual employment is a discretionary matter and can simply and easily be dispensed with in favour of permanent employment.
81. This proposition is entirely misconceived and must be disregarded. The industry has operated and expanded upon the utilisation of casual employment. This has not been to the detriment of the employees. Due to the age and type of employees employed, casual employment is often the employees’ desired form of employment. The statements and reports filed by Ai Group on 10 October 2008 attest to this.
82. We submit that if award modernisation gives rise to a need for employers to restructure the way their industry operates, the award modernisation objectives have not been met.
83. In furtherance of the award modernisation objectives of not increasing employers’ costs and not disadvantaging employees, we urge the Commission to reject the SDA’s arguments.

Evening and weekend penalties and laundry allowance

84. The SDA's proposal of a one year transitional period for these penalties and allowances is not sufficient and not based on any evidence as to the time it would take a business to be able to manage the cost impost.
85. The SDA appears to base its position on a Full Bench decision of 2001 affecting night and weekend penalties of 17,000 Victorian retailers (para 31 of the SDA's submissions). We are only aware of one such decision, being the matter of *SDAEA, \$2 and Under and others* (PR926620). That matter commenced in 1998 with the serving of a log of claims, followed in 2000 by the finding of a dispute. The roping-in of some 17,000 employers did not occur until February 2003. It can be seen that employers in that matter had a lengthy period from the time they received the log of claims to the time when the award was made – much longer than one year.
86. Fast food industry employers will require a longer transitional period, especially in the current economic climate.
87. Annexed to these submissions are statements of operators in the fast food industry (***Annexures D, E and F***). These statements demonstrate the substantial cost increases that are likely to be faced by employers in the industry as a result of award modernisation. As submitted above, the penalty rates will impact on many employers, as most of the NAPSAs either have no penalties payable to casual employees for evening and weekend work or a much lower penalty payable to permanent and casual employees.
88. Employers are in a similar position relating the Laundry Allowance in the Modern Fast Food Award, which exceeds the allowance payable in many of the NAPSAs. Marketing in this industry is particularly focused on the use of colour and design, including uniforms. The Modern Fast Food Award does not have a cap on the allowance. Most organisations in the fast food industry

require an employee to wear 3-5 items of clothing. The cost imposed by the Modern Fast Food Award is in excess of costs required to launder the items and is not based on the number of hours the employee has worked. In a highly casualised industry, this cost is particularly high.

Proposed transitional provisions

89. We urge the Commission to adopt Ai Group's proposed transitional provisions (**Annexure C**), which would see the status quo maintained for two years in respect of the following award provisions to enable a review of the provisions to occur at the end of that time:
- Casual loading in sub-clause 13.2;
 - Special clothing allowance in sub-clause 19.2;
 - Evening and weekend penalties in paragraphs 26.2(a), (b) and (c); and
 - Public holiday penalty rate in clause 30.
90. The reasons why a two year review is important were set out in our 29 May submission.
91. We propose that after the review is complete, the final award provisions which are determined should be phased-in over the following 3 year period (making a total transitional period of 5 years). This will assist employers in the industry to manage the cost impost arising from award modernisation.

7. Textile, Clothing and Footwear (AM2008/12)

Textile, Clothing, Footwear and Associated Industries Award 2010

92. It is vital that transitional provisions be incorporated within the Modern TCF Industries Award to cushion the cost impact for employers.
93. Ai Group proposes that the model provisions set out in Section 2 of this submission be used for this award.
94. The TCFUA has proposed a series of transitional provisions to deal with any employee disadvantage arising from award modernisation. Ai Group opposes the union's proposals which would result in an extremely complex and unworkable award structure.
95. The TCFUA's approach would result in existing employees being entitled to different wages and conditions than new employees, for an indefinite period. Such an approach would create divisions within workplaces and cause operational difficulties.

8. Agriculture (AM2008/14)

Horticulture Award 2010

96. In Chapter 7 of Ai Group's submission of 29 May 2009, we proposed that the implementation of the hours of work, weekend penalty rates, piecework and casual loading provisions of the Modern Horticulture Award be delayed until after the two yearly review provided for in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. A number of statutory declarations from horticultural businesses were filed in support of this position.
97. Ai Group continues to press the need for the two year delay in implementation and associated review.
98. After the review, the final award provisions should be phased-in over the following 3 year period (making a total transitional period of 5 years). This will assist employers in the industry to manage the cost impost arising from award modernisation.
99. The main union in the horticulture industry – the AWU – has filed a general submission seeking that a savings clause be incorporated into all modern awards indefinitely preserving, for current employees, all existing federal award entitlements which are more generous than the entitlements in the relevant modern award.
100. Ai Group strongly opposes the AWU's proposed clause, as set out in Section 4 of this submission.

9. Building, Metal and Civil Construction (AM2008/15)

Building and Construction General On-site Award 2010

Joinery and Building Trades Award 2010

Electrical, Electronic and Communications Contracting Award 2010

Plumbing and Fire Sprinklers Award 2010

Mobile Crane Hiring Award 2010

101. It is vital that transitional provisions be incorporated within modern awards for the Building, Metal and Civil Construction Group to alleviate the cost impacts upon employers. A large number of existing federal awards and NAPSAs are being replaced by the five modern awards which have been made for this sector and there is significant diversity in the terms of the existing instruments.
102. Ai Group proposes that the model provisions set out in Section 2 of this submission be used for these awards.
103. The AWU has filed a general submission seeking that a savings clause be incorporated into all modern awards indefinitely preserving, for current employees, all existing federal award entitlements which are more generous than the entitlements in the relevant modern award. The AWU has submitted that its draft clause is consistent with the position of the ACTU.
104. Ai Group's opposition to the approach proposed by the AWU is set out in Sections 4 of this submission.

105. The CFMEU's position is even more extreme because it would require an employer to provide all existing and new employees with more beneficial conditions contained within any applicable existing award that is replaced by the modern award. Such an approach would result in a more cumbersome and illogical modern award structure than the pre-modernised structure.

10. Graphic Arts (AM2008/17)

Graphic Arts, Printing and Publishing Award 2010

106. The existing federal Graphic Arts Award (and as a consequence - the Modern Graphic Arts Award) contains terms and conditions which are amongst the most generous of all federal awards.
107. The immediate imposition of the penalty rates in the Modern Graphic Arts Award upon employers not currently paying them (e.g. employers covered under various NAPSAs) would be extremely damaging and would have negative employment effects.
108. It is vital that transitional provisions be incorporated within the Modern Graphic Arts Award.
109. Ai Group proposes that the model provisions set out in Section 2 of this submission be used for this award.
110. The AMWU has filed a submission which argues that the 25% casual loading should apply to all employers from 1 January 2010 because, allegedly, most employers are already applying a 25% loading. This is not a valid argument for imposing a substantial increase in labour costs upon employers who are not currently applying a 25% loading (eg. employers in North Queensland). Ai Group's proposed model transitional provision to phase-in the 25 per cent casual loading only applies to those employers who are applying a lower loading.

11. Information and Communications Technology (AM2008/18)

Business Equipment Award 2010

Contract Call Centres Award 2010

Telecommunications Services Award 2010

111. It is vital that transitional provisions be incorporated within the Modern ICT industry awards to cushion the cost impact for employers.
112. Ai Group proposes that the model provisions set out in Section 2 of this submission be used for each award.
113. The ASU has filed lengthy materials identifying often minor and peripheral changes.
114. The ASU's proposed transitional provisions would create extremely complex transitional arrangements which would not support the objects of award modernisation.
115. Ai Group urges the Commission to reject the ASU's proposals and adopt the approach which Ai Group has put forward.

12. Private Transport Industry (Road, Non-Passenger) (AM2008/21)

Road Transport and Distribution Award 2010

Road Transport (Long Distance Operations) Award 2010

116. Ai Group proposes that the model provisions set out in Section 2 of this submission be used for these awards.

13. Other Modern Awards

117. Ai Group submits that the model provisions set out in Section 2 of this submission should be incorporated into all modern awards (varied as necessary to suit the needs of the particular industry) unless there are compelling reasons why the transitional provisions should not be included.

Annexure A

Proposed Transitional Provisions for the *Manufacturing and Associated Industries and Occupations Award 2010*

1. Insert a new clause 6A as follows:

6A Transitional Provisions

*The provisions of this award dealing with the following subject matters operate subject to the transitional provisions set out in **Schedule E**:*

- *Minimum rates of pay;*
- *Casual loading;*
- *Saturday, Sunday and public holiday rates;*
- *Shift allowances and*
- *Spread of hours.*

2. Insert a new Schedule as follows:

Schedule E

1. Off-Setting of conditions

1.1 An employer:

- (a) *who immediately prior to 1 January 2010, was covered by and applying conditions derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and*
- (b) *is required by the terms of this modern award to increase any of the conditions or entitlements identified in clauses 2, 3, 4 or 5 of this Schedule when compared to those conditions or entitlements which applied pursuant to (a); and*

- (c) *is providing an over-award payment to an employee who is within an existing classification or category of employee as specified in (a);*

shall, subject to 1.2 below, be entitled to off-set the additional costs associated with such entitlements and absorb the increases into the over-award payment.

1.2 *The employer shall be required to consult with the affected employee prior to the implementation of this transitional provision.*

1.3 *Sub-clause 1.1 and 1.2 cease to operate after 31 December 2014.*

2. Minimum rates of pay

2.1 *Subject to Clause 1 – Off-setting of Conditions, an employer:*

- (a) *who immediately prior to 1 January 2010 was covered by the pay scale derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and*

- (b) *who was applying minimum rates of pay less than that which are prescribed by this modern award;*

shall not, subject to 2.2, be required to apply the minimum rates of pay provided for in this award in respect of any of those classifications or categories of employment.

2.2 *An employer to whom 2.1 applies shall, in respect of those classifications or categories of employee:*

- (a) *continue to apply the minimum rate of pay derived from the terms of the NAPSA or award specified in 2.1(a); and*

- (b) *be required from the first full pay period to commence on or after 1 February 2010 and each year thereafter to increase those minimum rates of pay by the lesser of 2% or the percentage required to be paid to reach the award rate; and*

- (c) *be required to apply the annual wage review adjustment in any given year.*

2.3 *Sub-clause 2.1 and 2.2 cease to operate after 31 December 2014.*

3. Casual loading

3.1 Subject to Clause 1 – Off-setting of Conditions, an employer:

- (a) who immediately prior to 1 January 2010 was covered by and applying conditions derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and
- (b) who in accordance with those conditions was applying a casual loading less than that which are prescribed by this modern award;

shall not, subject to 3.2, be required to apply the casual loading provided for in this award in respect of any of those existing classifications or categories of employment.

3.2 An employer to whom 3.1 applies shall, in respect of those classifications or categories of employee:

- (a) continue to apply the casual loading derived from the terms of the NAPSA or award specified in 3.1(a); and
- (b) be required from the first full pay period to commence on or after 1 February 2010 and each year thereafter to increase the casual loading by the lesser of 1% or the percentage required to be paid to reach a casual loading of 25%.

3.3 Sub-clause 3.1 and 3.2 cease to operate after 31 December 2014.

Example

The casual loading under the Metal Industry (NT) Award and the Metal Trades (ACT) Award is 20%. Employers bound by these awards are entitled to apply the following casual loading:

1 February 2010	21%
1 February 2011	22%
1 February 2012	23%
1 February 2013	24%
1 February 2014	25% (ie. the level provided for in the modern award)

4. Saturday, Sunday and public holiday rates

4.1 Subject to Clause 1 – Off-setting of Conditions, an employer:

- (a) who immediately prior to 1 January 2010 was covered by and applying conditions derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and
- (b) who in accordance with those conditions was applying Saturday, Sunday and/or Public Holiday rates less than that which are prescribed by this modern award;

shall not, subject to 4.2, be required to apply the Saturday, Sunday and Public Holiday rates provided for in this award in respect of any of those classifications or categories of employment.

4.2 An employer to whom 4.1 applies shall, in respect of those classifications or categories of employee:

- (a) continue to apply the Saturday, Sunday and Public Holiday rates derived from the terms of the NAPSA or award specified in 4.1(a); and
- (b) be required from the first full pay period to commence on or after 1 February 2010 and each year thereafter to increase the Saturday, Sunday and Public Holiday rates by the lesser of 5% or the percentage required to be paid to reach the award rate.

4.3 Sub-clause 4.1 and 4.2 cease to operate after 31 December 2014.

Example

The rate for Sunday work for a day worker under the Rubber, Plastic and Cablemaking Industry – General – Award 1998 is 175% of the ordinary time rate. Employers bound by this award are entitled to apply the following penalty rates:

1 February 2010	180%
1 February 2011	185%
1 February 2012	190%
1 February 2013	195%
1 February 2014	200% (ie. the level provided for in the modern award)

5. Shift allowances / spread of hours

5.1 Subject to Clause 1 – Off-setting of Conditions, an employer:

- (a) who immediately prior to 1 January 2010 was covered by and applying conditions derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and
- (b) who in accordance with those conditions was applying shift loadings less than that which are prescribed by this award;

shall not, subject to 5.2, be required to apply the shift loadings provided for in this award in respect of any of those classifications or categories of employment.

5.2 An employer to whom 5.1 applies shall, in respect of those classifications or categories of employee:

- (a) continue to apply the shift loadings derived from the terms of the NAPSA or award specified in 5.1(a); and
- (b) be required from the first full pay period to commence on or after 1 February 2010 and each year thereafter to increase the shift loading by the lesser of 3% or the percentage required to be paid to reach the award rate.

5.3 Sub-clause 5.1 and 5.2 cease to operate after 31 December 2014.

Example

Under the Rubber, Plastic and Cablemaking Industry – General – Award 1998 a shift finishing at 8pm is day work and no loading is payable. For such a shift, employers bound by this award are entitled to apply the following penalty rates:

1 February 2010	3%
1 February 2011	6%
1 February 2012	9%
1 February 2013	12%
1 February 2014	15% (ie. the level provided for in the modern award)

6. Review of Transitional Provisions

Fair Work Australia may review and amend the transitional provisions within this award.

Annexure B

Proposed Transitional Provisions for the *Clerks – Private Sector Award 2010*

1. Insert a new clause 6A as follows:

6A Transitional Provisions

*The provisions of this award dealing with the following subject matters operate subject to the transitional provisions set out in **Schedule C**:*

- *Minimum rates of pay;*
- *Casual loading;*
- *Saturday, Sunday and public holiday rates;*
- *Shift allowances and*
- *Spread of hours.*

2. Insert a new Schedule as follows:

Schedule C

1. Off-Setting of conditions

1.1 An employer:

- (a) *who immediately prior to 1 January 2010, was covered by and applying conditions derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and*
- (b) *is required by the terms of this modern award to increase any of the conditions or entitlements identified in clauses 2, 3, 4 or 5 of this Schedule when compared to those conditions or entitlements which applied pursuant to (a); and*

- (c) *is providing an over-award payment to an employee who is within an existing classification or category of employee as specified in (a);*

shall, subject to 1.2 below, be entitled to off-set the additional costs associated with such entitlements and absorb the increases into the over-award payment.

1.2 *The employer shall be required to consult with the affected employee prior to the implementation of this transitional provision.*

1.3 *Sub-clause 1.1 and 1.2 cease to operate after 31 December 2014.*

2. *Minimum rates of pay*

2.1 *Subject to Clause 1 – Off-setting of Conditions, an employer:*

- (a) *who immediately prior to 1 January 2010 was covered by the pay scale derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and*
- (b) *who was applying minimum rates of pay less than that which are prescribed by this modern award;*

shall not, subject to 2.2, be required to apply the minimum rates of pay provided for in this award in respect of any of those classifications or categories of employment.

2.2 *An employer to whom 2.1 applies shall, in respect of those classifications or categories of employee:*

- (a) *continue to apply the minimum rate of pay derived from the terms of the NAPSA or award specified in 2.1(a); and*
- (b) *be required from the first full pay period to commence on or after 1 February 2010 and each year thereafter to increase those minimum rates of pay by the lesser of 2% or the percentage required to be paid to reach the award rate; and*
- (c) *be required to apply the annual wage review adjustment in any given year.*

2.3 *Sub-clause 2.1 and 2.2 cease to operate after 31 December 2014.*

Example

The Clerks – Private Sector Award 2010 provides that the minimum rate for an employee engaged at the highest classification under the award is \$740.00 per week (Level 5). The Clerical Employees (Victoria) Award provides for a minimum rate of \$698.44 for its Level 5 classification. Assuming that the annual wage review decision awarded an increase of \$10 per annum, employers utilising this transitional provision would increase rates as follows:

<u>Transitional Rate</u>		<u>Award Rate</u>	
1 February 2010	= \$712.41	1 February 2010	= \$740.00
1 July 2010	= \$722.41 (AWR)	1 July 2010	= \$750.00
1 February 2011	= \$736.86	1 February 2011	= \$750.00
1 July 2011	= \$746.86 (AWR)	1 July 2011	= \$760.00
1 February 2012	= \$760.00	(Only a 1.73% increase is required to the 1 July 2011 figure to reach the minimum award wage. Thereafter only the annual wage review adjustment will affect the rate of pay.)	

3. Casual loading

3.1 Subject to Clause 1 – Off-setting of Conditions, an employer:

- (a) who immediately prior to 1 January 2010 was covered by and applying conditions derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and
- (b) who in accordance with those conditions was applying a casual loading less than that which are prescribed by this modern award;

shall not, subject to 3.2, be required to apply the casual loading provided for in this award in respect of any of those existing classifications or categories of employment.

3.2 An employer to whom 3.1 applies shall, in respect of those classifications or categories of employee:

- (a) *continue to apply the casual loading derived from the terms of the NAPSA or award specified in 3.1(a); and*
- (b) *be required from the first full pay period to commence on or after 1 February 2010 and each year thereafter to increase the casual loading by the lesser of 1% or the percentage required to be paid to reach a casual loading of 25%.*

3.3 *Sub-clause 3.1 and 3.2 cease to operate after 31 December 2014.*

Example

The casual loading under the NAPSA derived from the Queensland Clerical Employees Award – State 2002 is 23%. Employers bound by this awards are entitled to apply the following casual loading:

<i>1 February 2010</i>	<i>24%</i>
<i>1 February 2011</i>	<i>25% (ie. the level provided for in the modern award)</i>

4. Saturday, Sunday and public holiday rates

4.1 *Subject to Clause 1 – Off-setting of Conditions, an employer:*

- (a) *who immediately prior to 1 January 2010 was covered by and applying conditions derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and*
- (b) *who in accordance with those conditions was applying Saturday, Sunday and/or Public Holiday rates less than that which are prescribed by this modern award;*

shall not, subject to 4.2, be required to apply the Saturday, Sunday and Public Holiday rates provided for in this award in respect of any of those classifications or categories of employment.

4.2 *An employer to whom 4.1 applies shall, in respect of those classifications or categories of employee:*

- (a) *continue to apply the Saturday, Sunday and Public Holiday rates derived from the terms of the NAPSA or award specified in 4.1(a); and*

(b) *be required from the first full pay period to commence on or after 1 February 2010 and each year thereafter to increase the Saturday, Sunday and Public Holiday rates by the lesser of 5% or the percentage required to be paid to reach the award rate.*

4.3 *Sub-clause 4.1 and 4.2 cease to operate after 31 December 2014.*

5. Shift allowances / spread of hours

5.1 *Subject to Clause 1 – Off-setting of Conditions, an employer:*

(a) *who immediately prior to 1 January 2010 was covered by and applying conditions derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and*

(b) *who in accordance with those conditions was applying shift loadings less than that which are prescribed by this award;*

shall not, subject to 5.2, be required to apply the shift loadings provided for in this award in respect of any of those classifications or categories of employment.

5.2 *An employer to whom 5.1 applies shall, in respect of those classifications or categories of employee:*

(a) *continue to apply the shift loadings derived from the terms of the NAPSA or award specified in 5.1(a); and*

(b) *be required from the first full pay period to commence on or after 1 February 2010 and each year thereafter to increase the shift loading by the lesser of 3% or the percentage required to be paid to reach the award rate.*

5.3 *Sub-clause 5.1 and 5.2 cease to operate after 31 December 2014.*

6. Review of Transitional Provisions

Fair Work Australia may review and amend the transitional provisions within this award.

Annexure C

Proposed Transitional Provisions for the *Fast Food Industry Award 2010*

1. Insert a new clause 6A as follows:

6A Transitional Provisions

*The provisions of this award dealing with the following subject matters operate subject to the transitional provisions set out in **Schedule B**:*

- *Minimum rates of pay;*
- *Casual loading;*
- *Evening Work, Saturday, Sunday and public holiday penalties;*
- *Special Clothing Allowance*

2. Insert a new Schedule as follows:

Schedule B

1. Off-Setting of conditions

1.1 An employer:

- (a) *who immediately prior to 1 January 2010, was covered by and applying conditions derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and*
- (b) *is required by the terms of this modern award to increase any of the conditions or entitlements identified in clauses 2, 3, 4 or 5 of this Schedule when compared to those conditions or entitlements which applied pursuant to (a); and*
- (c) *is providing an over-award payment to an employee who is within an existing classification or category of employee as specified in (a);*

shall, subject to 1.2 below, be entitled to off-set the additional costs associated with such entitlements and absorb the increases into the over-award payment.

1.2 *The employer shall be required to consult with the affected employee prior to the implementation of this transitional provision.*

1.3 *Sub-clause 1.1 and 1.2 cease to operate after 31 December 2014.*

2. Minimum rates of pay

2.1 *Subject to Clause 1 – Off-setting of Conditions, an employer:*

(a) *who immediately prior to 1 January 2010 was covered by the pay scale derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and*

(b) *who was applying minimum rates of pay less than that which are prescribed by this modern award;*

shall not, subject to 2.2 and 2.3, be required to apply the minimum rates of pay provided for in this award in respect of any of those classifications or categories of employment.

2.2 *An employer to whom 2.1 applies shall, in respect of those classifications or categories of employee:*

(a) *be required from 1 January 2010 and each year thereafter till the first pay period on or after 1 February 2012 to continue applying the pay scale derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and*

(b) *be required to apply the annual wage review adjustment in any given year.*

2.3 *An employer to whom 2.1 applies shall, in respect of those classifications or categories of employee:*

(a) *be required from the first full pay period to commence on or after 1 February 2012 and each year thereafter to increase those minimum rates of pay by the lesser of 2% or the percentage required to be paid to reach the award rate; and*

(b) *be required to apply the annual wage review adjustment in any given year.*

2.4 *Sub-clause 2.1, 2.2 and 2.3 cease to operate after 31 December 2014.*

3. *Casual loading*

3.1 *Subject to Clause 1 – Off-setting of Conditions, an employer:*

(a) *who immediately prior to 1 January 2010 was covered by and applying conditions derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and*

(b) *who in accordance with those conditions was applying a casual loading less than that which are prescribed by this modern award;*

shall not, subject to 3.2, be required to apply the casual loading provided for in this award in respect of any of those existing classifications or categories of employment.

3.2 *An employer to whom 3.1 applies shall, in respect of those classifications or categories of employee, be required from 1 January 2010 and each year thereafter till the first pay period on or after the 1 January 2012 to continue applying the casual loading applicable to the NAPSA or award in respect of any existing classification or category of employee; and*

3.3 *An employer to whom 3.1 applies shall, in respect of those classifications or categories of employee, be required from the first full pay period to commence on or after 1 January 2012 and each year thereafter to increase the casual loading by the lesser of 2% or the percentage required to be paid to reach a casual loading of 25%, whichever is the lesser*

3.4 *Sub-clause 3.1, 3.2 and 3.3 cease to operate after 31 December 2014.*

4. *Evening Work, Saturday, Sunday and public holiday penalties*

4.1 *Subject to Clause 1 – Off-setting of Conditions, an employer:*

(a) *who immediately prior to 1 January 2010 was covered by and applying conditions derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and*

(b) *who in accordance with those conditions was applying Evening, Saturday, Sunday or Public Holiday penalty rates less than that which are prescribed by this modern award;*

shall not, subject to 4.2, be required to apply the Evening, Saturday and Sunday penalty rates as set out in clause 26.2 and the Public Holiday penalty rate as set out in clause 30.3 of this award in respect of any of those classifications or categories of employment.

4.2 An employer to whom 4.1 applies shall, in respect of those classifications or categories of employee be required from 1 January 2010 and each year thereafter to continue to apply the penalty rates for Evening, Saturday, Sunday or Public Holiday (if any) applicable to the NAPSA or award in respect of any existing classification or category of employee; and

4.3 An employer to whom 4.1 applies shall, in respect of those classifications or categories of employee be required from the first full pay period to commence on or after 1 January 2012 and each year thereafter to increase the Evening, Saturday, Sunday and Public Holiday rates by the lesser of 10% or the percentage required to be paid to reach the award rate.

4.4 Sub-clause 4.1, 4.2 and 4.3 cease to operate after 31 December 2014.

5. Special clothing allowances

5.1 Subject to Clause 1 – Off-setting of Conditions, an employer:

(a) who immediately prior to 1 January 2010 was covered by and applying conditions derived from the terms of a NAPSA or an award in respect of any existing classification or category of employee; and

(b) who in accordance with those conditions was applying special clothing or laundry allowance less than that which are prescribed by this award;

shall not, subject to 5.2, be required to apply the special clothing allowance provided for in this award in subclause 19.2 in respect of any of those classifications or categories of employment.

5.2 An employer to whom 5.1 applies shall, in respect of those classifications or categories of employee be required from 1 January 2010 and each year thereafter to continue to apply the special clothing allowance or laundry allowance (if any) applicable to the NAPSA or award in respect of any existing classification or category of employee; and

5.3 *An employer to whom 5.1 applies shall, in respect of those classifications or categories of employee be required from the first full pay period to commence on or after 1 January 2012 and each year thereafter to increase the special clothing allowance by the lesser of 30% or the percentage required to be paid to reach the award rate.*

5.4 *Sub-clause 5.1, 5.2 and 5.3 cease to operate after 31 December 2014.*

6. *Review of Transitional Provisions*

Fair Work Australia may review and amend the transitional provisions within this award.