

AWARD MODERNISATION TRANSITIONAL PROVISIONS

SUBMISSIONS AND DRAFT AWARD PROVISIONS



29 May 2009

ARRANGEMENT

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Chapter 1 – Overview

1. Ai Group has been extensively involved in each Stage of award modernisation and has expressed comprehensive views regarding awards in a broad variety of industries and occupations in which it has an interest. Accordingly, we believe that we are very well placed to provide submissions regarding the principles and drafting which should be adopted in reference to transitional provisions which will apply within modern awards.

2. The following summarises various key propositions which Ai Group submits should underpin the development of transitional provisions. Within subsequent Chapters each of these matters will be explored and developed in greater detail:
 - (a) Transitional provisions should be targeted only at ‘significant remuneration-related entitlements’.

 - (b) The primary purpose of transitional provisions should be to cushion the impact of increased employer costs resulting from the creation of modern awards;

 - (c) The primary mechanism for addressing negative impacts upon employees of award modernisation changes should be the “Take-

home Pay Orders” in the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*.

- (d) Model transitional provisions should be developed, however there should also be flexibility for the provisions to be modified to suit the needs of particular industries and occupations.
- (e) The model provisions should apply fixed percentage movements. While the quantum of the percentage movements may vary from one modern award to another, once set within a particular modern award, the percentage movements would apply to all employers and employees covered by the modern award irrespective of the award or NAPSA which previously applied.
- (f) The transitional provisions should include an offsetting / absorption clause and a review clause.
- (g) The Commission should make available special transitional provisions in industries which have identified the potential for substantial economic hardship as a result of the introduction of a modern award, which have the effect of suspending the application of particular provisions of a modern award until after the two year review has been conducted, eg. Horticulture and Fast Food. The two year delay in implementation would:
 - Take account of official forecasts of the period before the Australian economy returns to a reasonable level of growth; and
 - Allow record-keeping and analysis to better assess the impact of the modern award provisions which the Commission has formulated for these industries.

Chapter 2 – Background

3. An appropriate starting point in developing transitional provisions is to consider what has been said to date about this topic by the Government and the Commission. Also, the transitional provisions already inserted into modern awards need to be considered.

What has been said about transitional provisions by the Government?

4. At the time of writing this submission the Commonwealth had made two submissions to the Commission in relation to the award modernisation process. The first of these submissions was filed on 10 October 2008 as part of the post-exposure draft submissions for the priority industries/occupations, the second submission was advanced as part of Stage 2 of award modernisation and filed on 13 February 2009.
5. Both submissions primarily dealt with matters of general importance and articulated the Government's views on a range of matters including, coverage, dispute resolution, small business redundancy and the supported wage. In addition, brief submissions relating to transitional provisions were contained in the 10 October submissions as follows:

“80. The Commission included savings and transitional arrangements in its modern award exposure drafts.

81. The Government welcomes the inclusion of these arrangements in modern awards. These arrangements will assist the Commission to respond to the Government's statement in the award modernisation request that the creation of modern awards is not intended to disadvantage employees or increase costs for employers (Paragraph 2).

82. *The Government encourages the Commission to make use of these provisions in developing the final modern awards. The Commission may wish to consider, having regard to the terms of the award modernisation request, whether it is appropriate to include such transitional provisions in relation to significant remuneration-related entitlements, such as wages, casual loadings or superannuation¹.*”
6. We contend that although limited, there are a number of important indications provided in this extract which reveal the Government’s views on the scope and objectives which should underpin transitional provisions. We further submit that such matters should be factored into the Commission’s approach.
7. The first of these propositions is that transitional provisions should be targeted only at ‘*significant remuneration-related entitlements*’. We submit that appreciation of this suggestion is highly important, particularly in the context of submissions made by other parties in early stages of the award modernisation process which have sought preservation of all differences created by virtue of the modern awards² or transitional protection of conditions that were non-monetary in nature.³
8. Ai Group has previously made submissions⁴ in opposition to these proposals and continues to maintain that non-monetary or minor deviations in conditions created as a result of a modern award should not be dealt with through transitional provisions. We are fortified in our approach by the notions reflected in the Government’s submissions.
9. In addition to this notion, however, the Government’s submissions provide insight into the objectives which should underpin the utilisation of transitional provisions with their specific reference to propositions contained within the ‘*award modernisation request*.’

¹ Australian Government – Submissions to the Australian Industrial Relations Commission; Exposure Drafts of Priority Awards 10 October 2008; at [80] – [82]

² New South Wales Government Submissions to the Australian Industrial Relations Commission Exposure Draft Modern Awards October 2008; at [22]

³ ACTU Submissions to the Australian Industrial Relations Commission Award Modernisation Exposure Draft Submission 10 October 2008; at [140] and [148] and ACTU Submissions to the Australian Industrial Relations Commission Award Modernisation Stage 2 Exposure Draft Awards AM2008/13-24 13 February 2009; at [161]

⁴ Transcript AM2008/2-12; 20 October 2008; at PN155 – PN157

10. In the Consolidated Award Modernisation Request the enabling provision for the insertion of transitional provisions within modern awards is found at paragraph 12 of the Request which states:

“12. The Commission may include transitional arrangements in modern awards to ensure the Commission complies with the objects and principles of award modernization set out in this award modernization request.”

11. Given the use of the word ‘*may*’, in describing the Commission’s ability to insert transitional provisions, it is clear that such arrangements are not mandatory for every modern award. It logically follows that the breadth of subject matter dealt with by transitional provisions across various modern awards may also not be identical.

12. The Request provides guidance regarding the criteria to be considered for utilisation of transitional provisions. The relevant criteria is intertwined with the objectives of award modernisation and allows utilisation of transitional provisions where necessary to ensure the achievement of those objectives reflected in the Modernisation Request.

13. In this regard, the dominant focus to date from the Commission and other parties, Ai Group included, has been in respect of the two objectives which have been most fundamentally challenged by the award modernisation process, namely the prevention of ‘employee disadvantage’ and the protection from ‘increased employer costs’.

14. Ai Group submits that it should not be assumed that transitional provisions are required to guard against any affront to these objectives. To the contrary, we submit that the language of paragraph 12 of the Modernisation Request is intended to preclude the utilisation of transitional provisions where the injured

objectives of the Modernisation Request are capable of restitution by other means.

15. We submit that where a matter such as 'employee disadvantage' is more appropriately corrected through mechanisms other than transitional arrangements it is not appropriate for such arrangements to be included within modern awards. This proposition is particularly relevant in the context of the ability for 'employee disadvantage' to be remedied through the issuing of 'Take Home Pay Orders'⁵ by Fair Work Australia.

What has been said about transitional provisions by the Commission?

16. In Statements made by the Commission on 12 September 2008⁶ and 23 January 2009⁷ a request was made for interested parties to advance their views in relation to the approach to be adopted in the formulation of transitional provisions for modern awards. The dominant response from the majority of parties who responded to these requests was that consideration of transitional provisions should appropriately be left to a point where the terms of the modern awards were actually known in lieu of determination at the time the award was being created.
17. In its 19 December 2009 decision concerning the priority awards, the Commission endorsed this view and made the following observations in connection with its decision to defer consideration of transitional provisions.

⁵ *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*, Schedule 5, Part 3, Section 9.

⁶ [2008] AIRCFB 717; at [31]

⁷ [2009] AIRCFB 50; at [11]

“[106] In general, however, we are convinced that, as many contended, transitional provisions are best dealt with after the terms of the priority awards have been published, if it is practical to do so. There are a number of reasons. The first and obvious reason is that it is difficult to know what the effect of the award will be until those affected have had an opportunity to consider the impact in detail. The second reason is that in many cases the effect of the award upon employees and employers is not uniform and depends upon the terms of the NAPSA or pre-reform award which applied previously. More debate will be needed as to how the differing situations of employers and employees are to be viewed and dealt with. In some cases an aggregate or overall approach may be the appropriate one. Finally, it follows that the representatives of employers and employees will be in a better position to assess the overall effect of the awards, taking potential gains and losses into account and will be in a position to give practical assistance to the Commission..⁸”

18. Ai Group submits that undeniably the development of transitional provisions cannot occur in a vacuum and that acknowledgement of the conditions that are being transitioned from and to is necessary. Importantly however we do not support the development of transitional provisions which seek to deal with the conditions in a NAPSA or award on an individual basis as such an approach will likely create overly complex transitional arrangements. This is particularly the case where a large number of NAPSAs and awards have been rationalised into a single modern award.
19. Instead, Ai Group contends that model transitional provisions should be developed with flexibility for the provisions to be modified to suit the needs of particular industries and occupations.
20. It is also submitted that the model provisions should apply fixed percentage movements as the mechanism for transition. In this regard, whilst the quantum of the percentage movements may vary from one modern award to another after consideration of the existing award conditions and the terms of the relevant modern award, once set, the percentage movements would apply to

⁸ [2008] AIRCFB 1000; at [106]

all employers and employees covered by the modern award irrespective of the award or NAPSA which previously applied.

21. Such an approach is analogous to the transitional arrangements which the Full Bench provisionally inserted into a number of exposure drafts⁹ during the priority stage for the purpose of eliciting views.
22. We submit that this should be the preferred approach in lieu of what is perhaps the obvious alternate method which would see a calculation of the difference between the relevant term/s of the NAPSA or award against the relevant term/s of the modern award and then sub-division of this difference over the transition period.
23. An approach which requires calculation and/or sub-division to arrive at the quantum of movement for a transitional provision from year to year could lead to calculation errors and uncertainty about award obligations and entitlements. Furthermore, it would not assist either the employer or employee in understanding their legal entitlements and accordingly would not support the award modernisation objectives of being simple to understand and easy to apply¹⁰.
24. Whilst, as Ai Group has already observed, the development of transitional provisions cannot occur without regard to the existing conditions of employment for employees, transitional provisions must be consistent with the legislative schema in which modern awards will operate.
25. Indeed, the necessity to consider the legislative framework in which modern awards will operate was specifically identified by the Commission when it determined that deliberations regarding transitional provisions should be

⁹ Retail Industry Award 2010; Clause 35.2 and Clerks – Private Sector Award 2010; Clause 29.2

¹⁰ Consolidated Award Modernisation Request; at para. 1(a)

deferred until the second half of this year. The following extract from the Full Bench's decision of 19 December 2009 makes this clear:

"[107] There is an additional consideration. It is desirable that transitional provisions, including supersession provisions, take account of the legislative scheme in which they will operate. For that reason it is our intention not to deal with transitional provisions until the legislation, including the foreshadowed transitional legislation, has been passed by the Parliament. At that time we shall be in a position to assess the overall economic impact and to give consideration to how transitional provisions are to be finalised for the remaining stages of the modernisation process. On current indications we would expect to address these matters towards the middle of 2009.¹¹"

26. As Ai Group has already submitted, we believe that such a proposition is distinctly relevant when one considers the need for transitional arrangements for 'employee disadvantage' given the fact that the Government's Transitional Bill contemplates the ability for Fair Work Australia to remedy employee disadvantage through the issuing of 'Take Home Pay Orders'¹². These orders are specifically targeted at circumstances where an employee has suffered a reduction in take-home pay as a result of award modernisation or, in other terms, has been 'disadvantaged' through the creation of a modern award.

Transitional provisions already developed by the AIRC

27. Although consideration of general transitional provisions was deferred by the Full Bench in its 19 December 2008 decision, a range of limited transitional arrangements, drafted with recognition of the terms of section 576T of the *Workplace Relations Act 1996* ("the WR Act"), have been included within the modern awards created as part of Stages 1 and 2 of award modernisation.
28. These transitional provisions have primarily related to district allowances, accident pay and redundancy provisions. In limited circumstances additional

¹¹ [2008] AIRCFB 1000; at [107]

¹² *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*; Schedule 5, Part 3, Section 9.

transitional arrangements have been included in some modern awards¹³ to provide for differential training arrangements which may exist in particular States and Territories.

29. In relation to each of the abovementioned transitional provisions, the Commission has sought to rely on model provisions to reflect the transitional entitlement. This approach is supported by Ai Group and appropriate for transitional provisions more generally.
30. Ai Group also notes that each of the Commission's transitional provisions seek to utilise five years as the transitional period for operation of the clause. This duration is consistent with the period of time provided under s.576T(2) of the WR Act relating to the retention of differences based upon State or Territory boundaries. We submit that such an approach is sensible especially when one considers that the majority of circumstances in which transitional provisions will be required will be to cushion the effect of transition from NAPSA's which apply in a single State.
31. In turning to consider the subject matter of these transitional provisions, the provisions which have generally been inserted into all modern awards relate to district allowances, accident pay and redundancy. In assessing the function of these provisions it is accurate to observe that all preserve an existing employment entitlement and therefore could be construed as provisions designed to mitigate any 'employee disadvantage'.
32. Ai Group notes that at the time that the Full Bench determined that these arrangements were necessary within modern awards, the Government had not revealed any intention to provide for an alternate mechanism to protect against employee disadvantage. Further, subject matters such as accident pay and redundancy are not easily addressed through take home pay orders.

¹³ *Electrical, Electronic and Communications Contracting Award 2010*, Clause 13

Chapter 3 – Legislative Provisions

33. Although not expressly articulated within the terms of the Modernisation Request, Ai Group submits that the development of any principles for transitional provisions within modern awards must occur with regard to, and appreciation of, the legislative provisions from which these modern awards have spawned and the legislative provisions in which the modern awards will exist.
34. Indeed, we submit that the Commission in some respects has already engaged in such an analysis when determining matters of principle that are to apply to a range of other key modern award provisions. The most notable examples of this approach are reflected in the Full Bench’s drafting and justification for the model dispute resolution procedure to be contained in all modern awards¹⁴ or the decision to abstain from the naming of registered organisations as parties to any modern award¹⁵.
35. Given the process of fundamental legislative change which surrounds the creation of modern awards there is not a single legislative instrument from which exclusive considerations can be drawn. Instead there are three, namely the *Workplace Relations Act 1996* (“the WR Act”), the *Fair Work Act 2009* (“the Fair Work Act”) and the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* (“the Transitional Bill”).
36. In turning first to consider the legislative instrument from which the modern awards were created, we submit that any transitional provisions within modern awards cannot operate inconsistently with the WR Act. Such a submission may seem trite, however we contend that the requirements of the WR Act, in particular those which pertain to allowable award matters¹⁶, are particularly

¹⁴ [2008] AIRCFB 1000; at [43]

¹⁵ [2008] AIRCFB 1000; at [15]-[22]

¹⁶ *Workplace Relations Act 1996*; s576J

relevant when one considers the expansive list of matters which some parties to date have contended should be subject to transitional provisions¹⁷.

37. In addition to those matters within the WR Act which restrict the subject matter of any transitional provisions, the terms of section 576T, which has already been referred to in the foregoing Chapter, is also of clear relevance in relation to the operation of transitional provisions. As already expressed, this is due to the fact that the majority of circumstances in which transitional provisions will be relevant are where the conditions in NAPSAs need to be transitioned from, and these instruments only apply in one State.
38. We submit that given the legislative flexibility provided by section 576T(2) to maintain interstate differences for a period of five years, transitional provisions should be drafted with the presumption that the full effect of the relevant modern award provision will not apply until the five year anniversary of the commencement of the modern award. This submission is made with particular consideration of the potential for award modernisation to increase employer costs at a time when a very large number of employers are being confronted with financial difficulties associated with the global financial crisis.
39. Whilst the legislative provisions which facilitate creation of modern awards undoubtedly have relevance in the framing of transitional provisions within those awards, Ai Group submits that consideration of the interaction between modern awards and the legislative framework in which they will operate is also of critical importance. An analysis of the provisions of the Transitional Bill, particularly in respect of the provisions regarding 'Take Home Pay Orders' will be undertaken in the following Chapter.

¹⁷ See the submissions of the New South Wales Government in relation to employee disadvantage created through the absence of payroll deduction of union dues provisions within Modern Awards. (*New South Wales Government Submissions to the Australian Industrial Relations Commission Exposure Draft Modern Awards October 2008*, at [18]-[22])

40. In addition to these provisions however, Ai Group submits that the terms of the Transitional Bill which provide for a two year review of modern awards are relevant to the determination of appropriate transitional provisions in two key respects.

41. The Transitional Bill at Schedule 5, Part 2, Item 6 identifies that it is intended that all modern awards (other than enterprise awards) undergo a review following the two year anniversary of their creation. Specifically, Item 6 states:

“6 Review of all modern awards (other than modern enterprise awards) after first 2 years

(1) *As soon as practicable after the second anniversary of the FW (safety net provisions) commencement day, FWA must conduct a review of all modern awards, other than modern enterprise awards.*

Note: The review required by this item is in addition to the annual wage reviews and 4 yearly reviews of modern awards that FWA is required to conduct under the FW Act.

(2) *In the review, FWA must consider whether the modern awards:*

(a) *achieve the modern awards objective; and*

(b) *are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.*

(2A) *The review must be such that each modern award is reviewed in its own right. However, this does not prevent FWA from reviewing 2 or more modern awards at the same time.*

(3) *FWA may make a determination varying any of the modern awards in any way that FWA considers appropriate to remedy any issues identified in the review.*

Note: Any variation of a modern award must comply with the requirements of the FW Act relating to the content of modern awards (see Subdivision A of Division 3 of Part 2-3 of the FW Act).

(4) *The modern awards objective applies to FWA making a variation under this item, and the minimum wages objective also applies if the variation relates to modern award minimum wages.*

(5) *FWA may advise persons or bodies about the review in any way FWA considers appropriate.*

(6) *Section 625 of the FW Act (which deals with delegation by the President of functions and powers of FWA) has effect as if subsection (2) of that section included a reference to FWA's powers under subitem (5).*

42. This review is in addition to the four yearly review which is required for all modern awards pursuant to section 156 of the Fair Work Act and we submit is intended to be an important interim step in ensuring that modern awards are operating effectively and achieving the modern award objective. Support for this view can be found from the terms of the Explanatory Memorandum which state in relation to this provision:

“188. This review will be required to examine whether modern awards:

- are achieving the modern awards objective set out in this Bill; and*
- are operating effectively, without anomalies or technical problems arising from the award modernisation process.*

189. In considering whether modern awards are achieving the modern awards objective, FWA would consider a range of issues, including, for example, the need to encourage collective bargaining and the principle of equal remuneration for work of equal or comparable value.

190. The interim review will enable FWA to examine individual flexibility clauses in modern awards to ensure they are being used for the purpose intended and not to alter industry standards on hours and shift patterns.

191. FWA would have the power to vary a modern award in a way that it considers appropriate to remedy any issues identified, although the limits in Part 2-3 of the FW Bill as to the matters that may (or may not) be included in awards will apply.”
(Emphasis added)

43. In the Supplementary Explanatory Memorandum for the Bill, relating to 110 amendments which the Government has introduced into Parliament, the following commentary relates to paragraph (2A) of Item 6 (as set out above):

“Amendment No.19 - Schedule 5, item 6, page 56 (after line 3)

29. Item 6 of Schedule 5 requires FWA to conduct a review of modern awards after 2 years. Amendment No.19 amends item 6 to make express the requirement that in conducting the 2 year review, FWA must review each modern award. This does not mean that FWA may not review 2 or more modern awards at the same time. The new provision reflects the requirements governing the conduct of the regular 4 yearly reviews by FWA (see subsection 156(5) of the FW Act).”

44. Ai Group submits that the Commission should make available special transitional provisions, particularly in industries which have identified the potential for substantial economic hardship as a result of the introduction of a modern award, which have the effect of suspending the application of particular provisions of a modern award until after the two year review has been conducted.
45. Such transitional provisions would be particularly relevant in the Horticulture Industry and Fast Food Industry, both of which will be discussed in greater detail later in this submission.
46. The two year delay in implementation would:
 - Take account of official forecasts of the period before the Australian economy returns to a reasonable level of growth; and
 - Allow record-keeping and analysis to better assess the impact of the modern award provisions which the Commission has formulated for these industries.
47. We submit that it is not without precedent for this Commission to endorse the deferral of certain safety net entitlements where compelling circumstances exist. In this regard we note the Full Bench’s decision in the *Wages and*

*Allowances Review 2007*¹⁸ to defer any increase in minimum rates within Transitional Awards applying to rural employers. In arriving at this decision, the following extract is relevant:

“[10] As we have indicated above, in its July 2007 decision the AFPC decided that rural employers receiving a specific type of government financial assistance should be relieved of the obligation to pay the increases in the pay scales for a maximum of 12 months. The assistance is known as an Exceptional Circumstances Interest Rate Subsidy (ECIRS). So far as relevant to this Commission, the AFPC decision is limited to the Australian Pay and Classification scales derived from the following federal Awards:

- Pastoral Industry Award 1998 (AP792378CRV)*
- Horticultural Industry (AWU) Award 2000 (AP784867CRV)*
- Woolclassers’ Award 1999 (AP802323). [7]*

[11] Rural employers in receipt of an ECIRS are exempt from the requirement to afford the increases otherwise applying to pay scales as a result of the July 2007 decision until the interest rate subsidy ceases or until 1 October 2008, whichever is the earlier. NFF submitted that we should adopt similar provisions in the three transitional federal awards concerned, one of which is currently before us. The ACTU opposed that course, submitting that the AFPC decision was unjustified and motivated by factors other than those stated by the AFPC.

[12] In announcing its decision to defer increases for rural employers in receipt of an interest rate subsidy pursuant to the ECIRS scheme, the AFPC set out official estimates of farm income in 2006/7 and then said:

“In the Commission’s consideration, the financial viability of farm enterprises is critical to sustaining jobs in the rural sector into the future. While there is considerable variability in agricultural employment from state to state (for example, estimated changes in employment over 2006-2007 range from a 12 per cent increase in Queensland to a 10 per cent decrease in Western Australia), combined with projections of minimal growth over the next five years, the Commission believes there is scope to provide further assistance to maintain jobs during this difficult period.

The Commission recognises that even minor cost increases for farm business in Exceptional Circumstances areas currently in receipt of drought assistance may increase financial strain on these businesses resulting in job losses.” [8]

¹⁸ [2007] AIRCFB 684

[13] We have considered the submissions of the parties, the relevant reasons given by the AFPC and had regard to the matters in cl.8 of Schedule 6. There is no sound basis to depart from the AFPC's decision. We shall adopt the same approach in the transitional awards concerned." (Emphasis Added)

48. We submit that should the Commission endorse the proposal to defer the application of specific provisions within a modern award in particular industries, those industries should for that provisional transitional period (ie. until after the two year review) be entitled to apply those conditions which applied in respect of those entitlements immediately prior to the creation of the modern award. The drafting of such a provision could adopt a similar structure to that which has already been approved by the Full Bench in relation to accident pay, district allowances and redundancy. This proposed drafting approach is further discussed in Chapter 7.
49. In addition to the creation of these special transitional provisions for particular industries, Ai Group submits that to ensure that all transitional provisions within modern awards are operating effectively it is imperative that all transitional provisions contain specific provisions which allow for their review and modification.
50. This proposal we contend is necessary to give effect to the terms of section 7 of the Transition Bill which provides:

"7 Review of transitional arrangements included in modern awards

(1) *If:*

- (a) *a modern award includes terms (**review terms**) under which FWA may review transitional arrangements included in the award; and*
- (b) *the review terms, and the transitional arrangements, were included in the award in the Part 10A award modernisation process;*

FWA may:

- (c) *review the award in accordance with the review terms; and*

- (d) *make a determination varying the award in any way it considers necessary, having regard to that review.*

Note: Any variation of the modern award must comply with the requirements of the FW Act relating to the content of modern awards (see Subdivision A of Division 3 of Part 2-3 of the FW Act).

- (2) *The review terms are taken to be terms that are permitted to be included in the modern award by Subdivision B of Division 3 of Part 2-3 of the FW Act.”*

51. In considering the operation of this provision, the Explanatory Memorandum to the Transitional Bill states:

“Item 7 – Review of transitional arrangements included in modern awards

194. *This item allows FWA to review transitional arrangements that have been included in modern awards as part of award modernisation, but only if the power to do so is included in a modern award.*

195. *If such a term is included in a modern award, subitem (1) authorises FWA to review the modern award in accordance with the review terms and to vary the modern award to give effect to the review.” (Emphasis Added)*

52. Accordingly, it is clear that in the absence of any expressed review provision within transitional arrangements, Fair Work Australia would be precluded from reviewing them other than during the two year and four year reviews. Such a scenario we contend is not appropriate, particularly when one considers that the sole purpose of transitional provisions is to cushion any adverse impacts created by award modernisation. We submit that should a transitional provision not be achieving this outcome it is of little use and should be reviewed and amended. Inserting a model review provision within all modern awards which facilitates this should be endorsed by the Commission.

Chapter 4 – Approach to Dealing with Employee Disadvantage

53. It is inherent in the nature of the award modernisation process that existing employment entitlements will change, and hence that there will be some cost implications for employers and some areas of disadvantage for employees.
54. The issue to which transitional arrangements should be directed is ensuring that excessive variations to significant remuneration-related entitlements are minimised. Of course, this must also be achieved through arrangements which are simple to understand and easy to apply, and meet the other objectives of the award modernisation process.
55. In Ai Group’s view, the primary mechanism for addressing negative impacts upon employees of award modernisation changes should be the “Take-home Pay Orders” in the Transitional Bill.
56. The Transitional Bill states that the award modernisation process “is not intended to result in a “reduction in take-home pay of employees or outworkers” (Schedule 5, clause 8(1)). Ai Group submits that this clause should be taken as elaborating on the practical meaning of the statement in the Award Modernisation Request that the award modernisation process is not intended to “disadvantage employees” – in a sense, by making clear what forms of employee disadvantage were not intended to result from the process and in respect of which there should be a remedy.
- In this Chapter, we summarise the way in which “Take-home Pay Orders” appear to operate.

Operation of “Take-home Pay Orders”

57. The orders provided for in the Transitional Bill are available in confined circumstances, and are directed at actual loss of pay attributable to a modern award having come into effect.

58. The first way in which the provisions in the Bill are confined is in regards to the types of entitlements to which they relate. Not all employee entitlements are seen as being relevant to “take-home pay”. This is clear from clause 8(2) which defines the concept in the following way:

(2) *An employee’s or outworker’s **take-home pay** is the pay an employee or outworker actually receives:*

- (a) *including wages and incentive-based payments, and additional amounts such as allowances and overtime; but*
- (b) *disregarding the effect of any deductions.*

59. The concept of take-home pay is clearly concerned with monetary entitlements only, and with those which were actually being received by the employee. This would exclude, for example:

- non-monetary entitlements or entitlements with no direct monetary value, but which may incidentally affect the pay an employee receives (eg. hours of work provisions and meal breaks);
- monetary entitlements which are contingent, such as redundancy pay;
- any payments which were not in fact received by the employee because they were never actually entitled to them, even if they existed under the award that applied previously.

60. The second way in which this mechanism is confined is through the way in which the reduction in take-home pay must be “modernisation related”. The reduction must be assessed by comparing “like with like”. The employee’s position and the hours of work (or quantity of work) must be the same. This is made clear in the Explanatory Memorandum accompanying the Bill, which states (at paragraphs 201 and 203) that:

“.. the provision is designed purely to ensure a fair transition from the old award to the new – it is not intended that this provision apply where employees change jobs, or where working arrangements change;

...

It is not intended that the take-home pay orders should prevent an employer from taking action (eg reorganising roster arrangements) that would otherwise be lawful.

61. The effect is that employee entitlements are not frozen in a way that would constrain an employer’s ability to make legitimate changes to work arrangements or where the employee’s circumstances change. Any other approach would be unfair and unworkable given frequent changes in work patterns by employees (eg. reductions in overtime due to the current economic environment, changes in shift rosters, etc).

62. The fact that any reduction must be “modernisation related” is also important in placing some practical limitation on the time over which applications for such orders can be brought. The Explanatory Memorandum (at paragraph 206) states that:

“It is not intended that there be a time limit on the making of an application, however, it is expected that the ability to draw a connection between a reduction in take-home pay and the award modernisation process will diminish over time.”

63. This statement makes clear the Government’s intention that the ability to apply for such orders would in reality have a limited lifespan, implying that over time

the effect of modern awards will become less immediate as employee entitlements are shaped by other matters.

64. The third qualification in the provisions in the Bill is that Take-home Pay Orders are to be confined to the “circumstances in which they are needed”, to use the wording in clause 10. From clause 10(1) of the Bill, such orders are not considered necessary where:

- the reduction is minor or insignificant; or
- the employee has been adequately compensated in other ways.

65. Fourthly, Take-Home Pay Orders are intended to work their way out of the system over time so that they do not preserve entitlements indefinitely. Clause 10(2) of the Bill provides that:

“FWA must ensure that a take-home pay order is expressed so that:

.....

(b) if the take-home pay payable to the employee or outworker under the modern award increases after the order is made, there is a corresponding reduction in any amount payable to the employee or outworker under the order.”

66. The Explanatory Memorandum makes clear that this provision is intended to ensure that “future wage increases from annual wage reviews are absorbed into any amounts payable under a take-home pay order” (Paragraph 212).

Transitional provisions to address employee disadvantage

67. In most circumstances it is appropriate that “Take-home Pay Orders be the mechanism for dealing with any “employee disadvantage” arising from award modernisation and that transitional provisions deal with employer cost increases.

68. Earlier in this submission we discussed various transitional provisions which the Commission has inserted into modern awards to address employee disadvantage, and expressed the view that redundancy pay and accident pay are not subject matters which could be readily addressed through Take-home Pay Orders.

69. Conceivably, the Commission could develop transitional provisions to phase-in entitlement reductions as well as phase-in cost increases. However, in most circumstances, in Ai Group's view, Take-home Pay Orders would be a more appropriate means of addressing any employee disadvantage arising from award modernisation.

70. If the Commission decides to introduce transitional arrangements to address employee disadvantage, it is extremely important that the provisions have a limited life and take the form of:

- Provisions which preserve entitlements for a limited period (eg. the provisions included in modern awards to deal with accident pay and redundancy); or
- Provisions which phase-in new entitlements over a period (eg. the phasing-in of a 25% casual loading from a 33% loading).

71. Ai Group strongly opposes any general savings clauses being included in modern awards such as the following clause which was included in the exposure draft of the Retail Industry Award 2010:

"The making of this award will not result in the rate of pay of any existing employee being reduced below the level of pay in an award or NAPSA that applies to the employee immediately before this award comes into effect."

72. Such savings clauses are antithetical to the objectives of the award modernisation process because:

- Unlike Take-home Pay Orders and phasing-in arrangements, such clauses would not work their way out of the system over a reasonable period;
- Such clauses result in ongoing complexity and potential disharmony in workplaces, through the indefinite preservation of differences in conditions between employees who were employed before the modern award came into operation and those employed later.

Chapter 5 – Approach to Dealing with Employer Cost Increases

73. The global economic crisis is deepening by the day and Australia is experiencing negative economic growth. Companies are struggling to cope with falling demand for their products and services, reduced or negative profitability, and restricted access to finance. Unemployment levels are rising rapidly.
74. Some industry sectors have suffered an overnight massive reduction in demand.
75. The economic situation is not forecast to significantly improve for a considerable period of time. It is evident that modern awards will come into operation during a very difficult economic environment. Therefore, the Commission needs to take great care to avoid imposing additional costs upon employers.
76. In the current environment higher costs will be at the expense of jobs. Jobs need to be the priority.
77. Ai Group submits that simplicity should not be pursued at all costs. For example, as the Commission is aware, Ai Group argued against the standardisation of casual loadings at 25%. For a very large number of employers this represents a huge increase in labour costs.
78. The primary purpose of any transitional provisions should be to cushion the impact of increased employer costs resulting from the creation of modern awards. (As set out in the last Chapter, the primary remedy for resolving employee disadvantage should be the utilisation of “Take Home Pay Orders”).

Structure of modern awards and transitional provisions

79. It is important that transitional provisions do not unduly reduce the simplicity of modern awards. With this fact in mind Ai Group contends that the structural approach to transitional provisions generally within modern awards should be the inclusion of such provisions within a specific schedule to the award in lieu of inserting the provisions in each relevant clause of the award. This will avoid confusion and unnecessary repetition, particularly in circumstances where a specific transitional provision through its terms applies to a range of modern award clauses.
80. To ensure that employers and employees are made aware of the potential relevance of transitional arrangements to terms of a modern award, Ai Group submits that a specific reference to the applicability of a transitional provision should also be included within the award. This could be achieved through one of two options.
81. Ai Group's primary position to resolve this issue is through the inclusion of the following phrase within each relevant clause of the modern award:
- “X.x This clause operates subject to the transitional provision contained within clause X of Schedule X of this Award.”*
82. Should the Commission determine that such a provision may in practice become overly repetitious or impractical, Ai Group suggests that as an alternative each modern award contain a discreet clause, which in much the same way as many facilitative provision clauses, identifies those clauses within the award which are subject to a transitional arrangement. An employer or employee would thereby be able to identify at the outset which particular provisions of the modern award may have limited or no application as a result of a transitional arrangement.

83. With regard to the content of transitional provisions, as stated in Chapter 2, Ai Group contends that:

- The Commission should develop model transitional provisions which will generally apply, where necessary, within all modern awards;
- In expressing the manner in which any transitional movements in conditions should apply, preference should be given to a fixed percentage movement in lieu of provisions which require an employer to calculate the difference between existing conditions and the modern award conditions and then apply a fraction of that difference throughout each year of the transition; and
- The subject matter to which transitional provisions have application should be limited to '*significant remuneration related entitlements*¹⁹', as submitted by the Commonwealth.

84. In accordance with these general propositions, the following Chapter identifies the terms and scope of model transitional provisions which Ai Group submits are appropriate as transitional provisions.

¹⁹ Australian Government – Submissions to the Australian Industrial Relations Commission; Exposure Drafts of Priority Awards 10 October 2008; at [82]

Chapter 6 – Model Transitional Provisions for General Application

85. Ai Group submits that the model transitional provisions should cover the following subject matters:

- Absorption or ‘setting-off’ over-award payments;
- Minimum rates of pay;
- Casual loadings;
- Saturday, Sunday and public holiday rates;
- Shift Allowances/ spread of hours; and
- Review of transitional arrangements

86. Whilst Ai Group believes that the above list represents those matters which generally will have application to most modern awards, we do not contend, with the exception of provisions relating to absorption and review of transitional arrangements, that all of the above must be included within each modern award. Instead, the appropriateness of a particular transitional provision should be considered with regard to the objects of award modernisation and the terms of the Modernisation Request. This includes the quantum of any percentages included within the provision.

87. The following represents the model terms which Ai Group advocates in relation to general transitional provisions. For ease of calculation with respect to the illustrative examples particular percentages have been included within the proposals. These percentages however do not represent model or minimum percentages which should apply generally for each entitlement.

1. Off-Setting of conditions

1.1 *An employer:*

- (a) who immediately prior to 1 January 2010, was covered 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 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 XX – 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) 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*
- (b) 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	<i>(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.)</i>	

3. Casual loadings

3.1 *Subject to clause XX – Off-setting of Conditions, an employer:*

(a) *who immediately prior to 1 January 2010 was covered 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 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 XX – Off-setting of Conditions, an employer:*

(a) *who immediately prior to 1 February 2010 was covered 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 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 or 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 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 or Public Holiday rates by the lesser of 5% or the percentage required to be paid to reach the award rate.*

4.3 *Sub-clause 2.1 and 2.2 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 XX – Off-setting of Conditions, an employer:*

(a) *who immediately prior to 1 February 2010 was covered 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 rates 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 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:

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

6. Review of Transitional Provisions

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

Key Aspects of Ai Group’s model transitional provisions**Off-setting of over-award payments**

88. As identified by the Commission, when developing transitional provisions “in some cases an aggregate or overall approach may be the appropriate one²⁰”.

²⁰ [2008] AIRCFB 1000; at [106]

89. Consistent with the concept of an aggregate / overall approach being taken, Ai Group submits that it is vital that an offsetting provision be included within the transitional provisions to avoid unnecessary cost increases upon employers. If an employer is required to increase the level of, say, a particular allowance or penalty as a result of award modernisation, it is essential that the employer be entitled to absorb such an increase into any over-award payment. This approach:

- Is consistent with the object of not increasing employers' costs;
- Is consistent with the approach taken within Schedule 5, Part 3 – Avoiding Reductions in Take Home Pay, of the Transitional Bill; and
- Is consistent with the approach taken in the Victorian Common Rule Test Case.

90. Ai Group's proposed offsetting provision is set out above (Clause 1 – Offsetting of Conditions).

1 February operative date for transitional increases

91. Section 287 of the *Fair Work Act* provides for minimum wage orders to come into operation on 1 July.

92. Ai Group proposes that increases arising from transitional provisions apply from 1 February for the following reasons:

- The impact upon employers will be reduced if minimum wage increases and the transitional increases are payable at different times of the year; and
- An increase of 1 January would be burdensome upon employers because it would complicate the Christmas / New Year annual leave calculations and increase the payroll workload at a time when payroll staff are typically on annual leave.

Chapter 7- Special Transitional Provisions

Horticulture Industry

93. The modern *Horticulture Award 2010* will have a significant cost impact upon employers in this industry. The Horticulture Industry in Australia is vulnerable to international competition. Increases in labour costs imposed through the modern award will make the industry less competitive against overseas farmers and growers.
94. Ai Group submits that the Commission should delay the operation of the hours of work, weekend penalty rates, piecework and casual loading provisions of the *Horticulture Award 2010* until after the two year review provided for in Item 6, Schedule 5 of the Transitional Bill. This will enable the employers to gather accurate data about the cost impact of the new provisions whilst not having to incur the costs in the short term.
95. The two year delay in implementation would also take account of official forecasts of the period before the Australian economy returns to a reasonable level of growth.
96. During the two year period, under the proposed transitional provision, the existing federal award or NAPSA provisions relating to hours of work, weekend penalty rates, piecework and casual loading, would apply as the legal minimum.
97. In support of this submission, Ai Group submits statutory declarations from horticulture businesses that will be affected by the modern award, as follows:
- Damien Garlick, Grape Exchange Farming Pty Ltd (**Annexure A**);

- Richard Roberts, AgriExchange Pty Ltd (**Annexure B**);
- Amapole Phoonie, BerrExchange Pty Ltd (**Annexure C**); and
- Don Trewin, Mushroom Exchange Pty Ltd (**Annexure D**).

98. The issues of most concern are:

- Piece work loading has increased to 15% (currently 12.5% for many employers).
- Casual loading has increased to 25% (currently 15% for many employers).
- Employees are now guaranteed a minimum piece work loading (no matter how experienced or efficient). This means employers will no longer be able to employ certain groups of employees (see discussion below). It is also impractical because it is very difficult to monitor the total time actually worked (taking into account breaks taken) by employees picking fruit and vegetables on orchards or plantations. The current system allows the setting of the piece rate in advance rather than monitoring each employee's performance against actual time worked each day.
- All Sunday work is increased to double time. In the horticulture sector, this is not in keeping with the current commercial environment in which the industry operates. With seven day a week food and beverage manufacturing and supermarket/shop trading hours, horticulture businesses are required to provide fresh produce seven days a week. Due to the perishable nature of many horticulture products, the changing volume levels dependent on customer demands, and the seasonal nature of fruit and vegetables, the industry cannot limit its operations to Monday to Saturday.
- Packing house operations can only be worked between 6.00am to 6.00pm, Monday to Friday with no afternoon shift

arrangements available. This results in a penalty rate of double time after three hours, outside these hours. This accentuates the problem outlined in the point above. The packing house hours of work should be consistent with the hours of work for all other employees under the award.

- There are no exemptions to these arrangements during seasonal periods where for example the picking of fruit and vegetable crops occurs over a seven day period. During peak picking season, weather conditions and the timing of the ripening process may mean that the restrictions on ordinary time under the Modern Horticulture Award will have a significant cost impact on the business.

99. Initial data gathered by employers in the sector indicate that these changes will increase labour costs by approximately 30%. However, as employers have not kept detailed hours of work records for casual piece rate workers under current awards and NAPSAs, the full impact of the changes is not known.

100. Also, given that the minimum hourly rate is guaranteed under the modern award, employers will no longer be able to employ certain groups of employees that are currently being paid according to the volume of fruit and vegetables they pick. These groups are usually inexperienced and are happy to take their time in picking. They are:

- ‘Grey nomads’ – retirees that travel around regional Australia and choose a lifestyle that allows them to pick at their own pace and take as many breaks as they need.
- Back packers – overseas travellers who work at a rate that may or may not be a pace that would allow them to reach the equivalent of the guaranteed minimum wage under the Modern Horticulture Award.

- Itinerant or previously unemployed workers living in regional areas – the reliability of these workers fluctuates and often they do not work at a pace that would allow them to reach the equivalent of the guaranteed minimum wage under the Modern Horticulture Award.

101. As a result of the rigidities of the Modern Horticulture Award, employers will no longer be able to employ a substantial proportion of these groups of workers (representing about 30% of the workforce). This will have a negative impact on regional Australia. These groups of employees support businesses in country towns around the country. It will also increase unemployment rates in regional areas if workers are not able to meet the minimum required targets.
102. In addition, all workers will be under pressure to maintain a minimum picking rate in order to keep their jobs. This could increase workplace accidents as workers exert themselves to meet the targets.
103. For all of the above reasons, Ai Group submits that the Commission should implement transitional provisions that delay the operation of the hours of work, weekend penalty rates, piecework and casual loading provisions of the *Horticulture Award 2010* until after the two year review.

Fast Food Industry

104. As with the *Horticulture Award 2010*, the application of the *Fast Food Industry Award 2010* (“the Modern Fast Food Award”) will have a significant cost impact on employers in the sector.
105. Ai Group has considerable involvement in the fast food industry. Ai Group is representing the industry in the award modernisation proceedings, including representing McDonald’s Australia Ltd, Hungry Jacks Pty Ltd, Yum Restaurants Australia Pty Ltd (which incorporates KFC and Pizza Hut),

Australian Fast Foods Pty Ltd (which includes Red Rooster and Chicken Treat), Collins Food Group (which operates KFC outlets and Sizzler Restaurants) and Eagle Boys Dial-A-Pizza Australia Pty Ltd.

106. The fast food industry employs over 250,000 people, a high proportion of which are young people who are particularly vulnerable to periods of unemployment in the current recession. A high proportion of the workers in the industry are award-dependent and therefore any increases in minimum wages and conditions would have a direct and substantial negative impact upon employers and employees in the industry.
107. As Ai Group has submitted previously, this industry operates on low margins, in a highly competitive environment and is labour intensive. It is an industry which needs to operate 7 days a week with long operating hours, often from 6am to midnight, but many operate 24 hour operations. The industry is made up of a large proportion of small business operators.
108. Industry studies indicate that labour costs represent the second highest cost to a business in this industry. In this environment, increases to labour costs will have a very negative impact on businesses and will make the industry less viable.
109. Ai Group submits that the Commission should delay the operation of the following provisions of the Modern Fast Food Award until after the two year review provided for in the Transitional Bill:
 - Penalty provisions in paragraphs 26.2 (a), (b) and (c);
 - Special clothing allowance in sub-clause 19.2
 - Public holiday penalty rate in clause 30.
 - Casual loading in subclause 13.2.

110. The delay in implementation would provide the employers with the opportunity to gather accurate data about the cost impact of the new provisions whilst not having to incur the costs in the short term.
111. The two year delay in implementation would also take account of official forecasts of the period before the Australian economy returns to a reasonable level of growth.
112. During the two year period, under the proposed transitional provision, the existing federal award or NAPSA provisions applicable at the enterprise (evening work, Saturday work and Sunday work, special clothing allowance, public holiday penalty rate and casual loading) would apply as the legal minimum.
113. After the 2 year review is conducted, we submit that there should be a further transitional period of 3 years with any increases being phased-in over this period.
114. The issues of most concern regarding the Modern Fast Food Award are:

- **The penalty provisions in paragraphs 26.2 (a), (b) and (c):**

- ***Evening work***

The 10% loading for evening work in the Modern Fast Food Award commences at 6pm and casuals receive 50% of the permanent employee's rate as a penalty. Most NAPSA and certain states in the National Fast Food Award ("NFFA") have penalties which are less. In some instances no penalties apply. Additionally in all of the NAPSAs and in the NFFA, the penalty paid to casuals working those hours is substantially lower.

- **Saturday and Sunday work**

The Modern Fast Food Award has Saturday work attracting a 25% loading with casuals receiving the penalty on top of their casual rate. Sunday work attracts a 75% loading. Again this is a substantial increase to some of the NAPSA's and the NSW provisions of the NFFA. The increase is very substantial when comparing the payments to be made to casuals for working these times. In particular we note that this provision is going to create substantial cost increases in QLD where such penalties do not apply to casuals. As this is an industry whose main operating hours include weekends, we submit that employers in this industry would not be able to readily absorb such costs, without the transitioning process we propose.

- **Special clothing allowance in sub-clause 19.2:**

The Modern Fast Food Award stipulates a special clothing allowance of *\$4.53 per garment per week*. This amount is far in excess of the similar allowance payable in current NAPSA's operating in the industry. NAPSA rates are capped, with the lowest at 40c per day and 2.25 per week, and 60c per day to 2.95 per week. Further the NFFA, as it operates for NSW employers, provides for an allowance that is lower than the Modern Fast Food Award.

- **Public holiday penalty rate at clause 30:**

Some NAPSA provisions provide for double time and most provide for casuals to receive the penalty, but not the casual loaded rate

115. The cost impost on many of the operators, as outlined above, will be substantial as, the majority would not be operating in accordance with NFFA

but under a NAPSA. This would be particularly the case for those operating in QLD. We will provide the Commission with statements from operators outlining these additional costs to illustrate our arguments.

116. For all of the above reasons, Ai Group asks the Commission to implement transitional provisions that delay the operation of the penalty, special clothing allowance, public holiday and casual loading provisions of the Modern Fast Food Award until after the two year review.

Chapter 8 - Transitional Provisions for Each Modern Award

117. Ai Group is continuing to review those modern awards in which it has an interest with a view to providing the Commission with award-specific transitional provisions for key awards. We anticipate that such provisions in relation to key Stage 1 and Stage 2 modern awards will be available by no later than the filing date for additional submissions and material in reply regarding transitional provisions of 26 June 2009.
118. A meeting between Ai Group and the Metal Trades Federation of Unions (AMWU, AWU, CEPU, CFMEU, LHMU and NUW) has been scheduled for 19 June, and transitional provisions are on the agenda.