

**SUBMISSION TO FAIR  
WORK AUSTRALIA**



**AM2010/72 and AM2010/68 – Applications by Ai Group  
and the AMWU to vary the Manufacturing Modern Award**



**AUSTRALIAN INDUSTRY GROUP**

**15 June 2010**

# **AM2010/72 and AM2010/68**

## **Applications by Ai Group and the AMWU to vary the Manufacturing Modern Award**

### **1. Introduction**

1. This submission deals with the following matters:

- AM2010/72 – An application by Ai Group to vary the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Modern Award) to clarify that clause 2.2 entitles an employer to absorb all monetary obligations imposed on the employer by the award into over-award payments.
- A request by Ai Group for FWA to act on its own initiative and vary all modern awards which contain the model transitional provisions in similar terms to Ai Group’s proposed variation in AM2010/72. (Refer to paragraph 11 in the grounds set out in Ai Group’s application to vary the award).
- AM2010/68 – An application by the AMWU to vary the Manufacturing Modern Award to clarify that overtime is an “*other penalty*” for the purposes of Clause A.4 of the model phasing schedule.
- A request by the ACTU for FWA to act on its own initiative and vary all modern awards which contain the model transitional provisions in similar terms to the AMWU’s proposed variation in AM2010/68. (Refer to paragraphs 4 and 9 in the ACTU’s submission of 26 May 2010).

2. Ai Group appreciated the promptness with which its application to vary the Manufacturing Modern Award has been listed for hearing before a Full Bench. From 1 July 2010, a very large number of employers will be required to phase-in higher penalties and loadings under modern awards.
3. The Award Modernisation Request states that modern awards are not intended to increase costs for employers, or disadvantage employees.
4. Employees are protected from disadvantage by take home pay orders. However, employers do not enjoy similar protection from increased costs. The absorption clause, which gives employers the ability to absorb monetary obligations into over-award payments, is an essential mechanism to alleviate the cost impacts associated with award modernisation.
5. Ai Group's position is that the intent of the absorption provision in subclause 2.2 is clear. We submit that the absorption clause was inserted to adopt the proposal strongly advocated by Ai Group and a number of other employer representative bodies. That is:
  - Given the extent of the changes involved in the award modernisation exercise it is fair and reasonable to allow employers to absorb changed monetary obligations arising from the implementation of modern awards into over-award payments; and
  - So long as an employer is paying its employees at least the total amount that they are entitled to be paid under the relevant modern award, it would be unfair to require the employer to pay any more as a result of changed employer obligations and employee entitlements arising from the replacement of pre-modern instruments with modern awards.

6. Unfortunately, the Office of the Fair Work Ombudsman (FWO) believes that the intent of the clause is unclear and, given the uncertainty which it believes exists, the FWO has decided to interpret the provision as only allowing absorption where the relevant individual employee agrees.
7. Under the FWO's interpretation, the absorption clause becomes meaningless. An absorption clause is not needed if such clause only applies where the employee agrees to absorb. Under the relevant Court authorities, absorption by agreement is available without an absorption clause.
8. Ai Group submits that it could not possibly have been the Tribunal's intention to insert a meaningless clause, particularly when the absorption issue was strongly pressed by Ai Group and other employer representatives. If the Tribunal had intended to insert a meaningless clause, then surely it would have said so, rather than leading employers to believe that their arguments had been accepted.
9. Given the FWO's view that the absorption clause is ambiguous and/or uncertain, Ai Group submits that subclause 2.2 should be varied, as proposed by Ai Group to clarify the intent.
10. With regard to the AMWU's application (AM2010/68), undoubtedly over the past six months or so there has been considerable uncertainty and debate about whether changes in overtime penalties are subject to phasing. Notwithstanding the uncertainty, we submit that few employers would currently regard overtime as subject to phasing. This means that there are a very large number of employers who have been applying the modern award overtime provisions since 1 January 2010.

11. If a change is made at this late stage, Ai Group is concerned about the cost and disruption that will result for employers, particularly if the change, in effect, would result in changes to the treatment of overtime for the period between 1 January 2010 and 30 June 2010.
12. It is important that the concept of overtime (ie. time worked beyond ordinary hours) not be confused with ordinary time that is worked at times where penalty rates are payable (eg. ordinary time worked on weekends). Clearly, higher and lower penalties for ordinary time are subject to phasing, and no differences of view exist on this issue between the FWO and the major industrial parties.
13. In the event that FWA decides to vary the transitional provisions in the Manufacturing Modern Award to clarify the absorption and/or overtime issues, Ai Group submits that the Tribunal should act on its own initiative and vary all modern awards which include the model transitional provisions in similar terms.

## **2. Discussions between the FWO, Ai Group, ACCI and the ACTU**

14. Following the handing down of the AIRC's Award Modernisation Decision on 2 September 2009, regarding the transitional arrangements in Stage 1 and 2 modern awards, a series of discussions began between the FWO and the major industrial parties (Ai Group, ACCI and the ACTU) to consider the transitional arrangements, and in particular:
- Interpretation issues;
  - Explanatory materials and other resources to assist employers, employees and representative bodies to understand and implement the transitional arrangements.
15. The FWO and the major industrial parties met on 28 September 2009, 28 October 2009, 14 December 2009, 19 February 2010, 12 March 2010, 1 April 2010, 13 April 2010, 3 May 2010 and 7 June 2010. The discussions have been constructive and worthwhile, although at times frustrating due to differences of view over interpretations.
16. At the meetings on 28 September and 28 October some significant differences of view existed between the FWO and the major industrial parties regarding the interpretation of the transitional provisions. Many of the differences which existed at that time were resolved once FWA issued its Award Modernisation Decision of 3 December 2009 which determined the transitional provisions for Stage 3 modern awards and amended the transitional provisions in Stage 1 and 2 awards to clarify some important issues.

17. In recent months the discussions between the FWO and the major industrial parties about interpretation issues have centred around FWO *Guidance Note 7 – Transitional Arrangements in Modern Awards*.
18. The Guidance Note was released as a Public Consultation Draft on 29 April 2010.
19. The final version of FWO Guidance Note 7 was issued on 1 June 2010 (**Attachment A**).
20. In conjunction with the release of the final version of the Guidance Note on 1 June, the FWO released an *Addendum to GN 7 – FWO’s consideration of submissions (Attachment B)*. This document includes the following comments in the section dealing with Absorption / Offsetting:

*“44 In summary, this means that where an employer and an employee have agreed that over-award payments are to be directed towards satisfying particular or all award entitlements, those over-award payments may absorb the relevant increases. However, where this is not the case, an employer would need to seek the employee’s agreement to treat the overaward payments in this way.*

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*59. FWO acknowledges that there are strong opposing views on this important issue and notes that the parties may wish to seek clarification from FWA or a court as to the interaction between the common law on offsetting and clause 2.2.*

*60. FWO would of course consider any decision by a court or FWA on this issue and may revise its approach accordingly.”*

21. The FWO's *Addendum to GN 7 – FWO's consideration of submissions* makes the following comments about the overtime issue which is the subject of the AMWU's application:

*“26. FWO considers that overtime is not subject to phasing arrangements. The draft Guidance Note acknowledged that there is a contrary view, and this was borne out in the submissions. A number of submissions that commented on this issue acknowledged that there was ambiguity on this point.*

*27. FWO notes that the AMWU has indicated it intends to apply to FWA to obtain clarification about the treatment of overtime under the model transitional provisions.*

*28. FWO considers that proceedings before FWA offers the best opportunity to resolve areas of ambiguity in the model transitional provisions. FWO awaits the outcomes of relevant proceedings and will of course adjust its position to reflect FWA's decisions.”*

22. Accordingly, the FWO, in effect, has suggested that the industrial parties apply to FWA to seek clarification on the absorption and overtime issues which are the subject of the Ai Group and AMWU applications.

23. At the meeting between the FWO and the major industrial parties on 7 June, Ai Group's application to vary the absorption clause in the Manufacturing Modern Award (as filed on 4 June) was discussed. During the discussions, Ai Group sought confirmation that, should FWA decide to vary the award as sought by Ai Group, then the FWO would interpret the amended clause as giving an employer the right to absorb monetary obligations imposed by a modern award into over-award payments, as opposed to the agreement of each individual employee being required before absorption could occur.

24. At the meeting, the FWO expressed the view that the amended clause sought by Ai Group would not necessarily overcome the lack of clarity because the proposed additional wording used the word “*may*” rather than more direct wording such as “*the employer is entitled to*”.
25. Accordingly, following the meeting Ai Group redrafted its proposed clause and wrote to FWA (copied to the ACTU and AMWU) seeking to amend its application in AM2010/72 and attaching a Draft Determination with amended proposed wording for subclause 2.2 (***Attachment C***).
26. Given the FWO’s view that the existing transitional provisions are ambiguous and/or uncertain regarding absorption and overtime, it is in the public interest that these issues be clarified by FWA.

### **3. AM2010/72 – Ai Group’s application re. absorption**

#### **3.1 Relevant legislative provisions**

27. In making its application, Ai Group primarily relies upon s.160 of the *Fair Work Act 2009* (FW Act) and subclauses 2.5 and 2.6 of the Manufacturing Modern Award.

28. Subclauses 2.5 and 2.6 provide that FWA may review the transitional arrangements in the award on application by an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award.

29. Ai Group submits that its application also meets the requirements of ss.157 and 158, in that:

- Ai Group is entitled to apply to vary a term in the Manufacturing Modern Award as it is an organisation that is entitled to represent the industrial interests of employers covered by the award;
- The application is necessary to achieve the modern award objective, particular the need for the award to provide a fair (for employees and employers) and relevant minimum safety net, taking into account such aspects as:
  - “the need to promote flexible modern work practices and the efficient and productive performance of work”; (s.134(1)(d))
  - “the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden”; (s.134(1)(f))

- “the need to ensure a simple, easy to understand, stable and sustainable modern award system...”; (s.134(1)(g))
- “the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy” (s.134(1)(h)).

### 3.2 Amendment to application

30. As set out in Section 2 of this submission, on 8 June Ai Group wrote to FWA and sought to amend its application.

31. Consistent with the Draft Determination in **Attachment C**, the wording which we propose for subclause 2.2 is:

*“An employer has the right to absorb any monetary obligation imposed on the employer by this award into any over-award payment/s. Nothing in this award requires an employer to maintain or increase any over-award payment.”*

32. The second sentence is identical to the existing wording in the award. The first sentence has been reworded to:

- Expressly state that the employer has the right to absorb;
- Remove the word “*may*”, which is central to the FWO’s view that the existing provision is ambiguous and uncertain;
- Replace the term “*into overaward payments*” with the term “*into any over-award payment/s*”, to clarify that the employer is entitled to absorb into any over-award payment.

33. Ai Group is confident that if the award is varied, as we have proposed in our amended application, that the FWO will accept the interpretation that we believe is the correct one. However, if the award is not varied as we have proposed, then we are concerned that the uncertainty will continue.

### **3.3 The intent of Ai Group's application**

34. Ai Group's proposed amendment is not intended to alter what we submit is the intent of existing subclause 2.2 in the award.
35. That is, so long as an employer is paying its employees at least the total amount that they are entitled to be paid under the relevant modern award, the employer is not required to pay any more as a result of changed employer obligations and changed employee entitlements arising from the replacement of the relevant pre-modern instrument with the modern award.
36. The intent of Ai Group's application is to simply remove the uncertainty which has arisen as a result of the FWO's interpretation of subclause 2.2.

### **3.4 The FWO's interpretation**

37. The FWO's view on how the existing absorption clause is to be interpreted is summarised in the following extract from its *Addendum to GN 7 – FWO's consideration of submissions (Attachment B)*:

*"44 In summary, this means that where an employer and an employee have agreed that over-award payments are to be directed towards satisfying particular or all award entitlements, those over-award payments may absorb the relevant increases. However, where this is not the case, an employer would need to seek the employee's agreement to treat the overaward payments in this way."*

38. Later in its *Addendum*, the FWO states:

*“55 FWO notes that parties did suggest to the AIRC in the proceedings that it adopt clauses that would have allowed any over-award payment to absorb increases in pay in modern award [footnote refers to Ai Group’s submissions and the use of the term “entitled to offset” in Ai Group’s proposed provisions]. But the final wording of clause 2.2 does not reflect such express intention.”*

39. The FWO’s view that the intent of subclause 2.2 is unclear appears to revolve around the fact that the Tribunal has used the word “*may*” in the phrase “*The monetary obligations imposed on employers by this award may be absorbed into over-award payments*”.

40. Ai Group strongly disagrees with the FWO’s view that the use of the word “*may*” leads to the interpretation that an employer is only able to access the clause with the agreement of each individual employee. There is nothing in the Tribunal’s decision which supports such a proposition.

41. The word “*may*” reflects the fact that an employer may choose to absorb or may choose not to absorb.

42. With respect to the FWO, Ai Group submits that the FWO is placing far too much significance on FWA’s use of the word “*may*” in interpreting the provision. As set out later, the word “*may*” appears in virtually all of the Tribunal’s absorption clauses over the past 15 years, including those inserted pursuant to safety net review decisions.

43. Under the FWO's interpretation, the absorption clause becomes meaningless. An absorption clause is not needed if such clause only applies where the employee agrees to absorb. Under the relevant Court authorities (which are discussed later in this submission) absorption by agreement is available without an absorption clause.
44. Ai Group submits that it could not possibly have been the Tribunal's intention to insert a meaningless clause, particularly when the absorption issue was strongly pressed by Ai Group and other employer representatives. If the Tribunal had intended to insert a meaningless clause, then surely it would have said so, rather than leading employers to believe that their arguments had been accepted.

### **3.5 It is fair and reasonable to permit employers to absorb**

45. The Award Modernisation Request states that modern awards are not intended to increase costs for employers, or disadvantage employees.
46. Employees are protected from disadvantage by take home pay orders, however employers do not enjoy similar protection from increased costs.
47. Given the extent of the changes involved in the award modernisation exercise it is fair and reasonable to allow employers to absorb changed monetary obligations arising from the implementation of modern awards into over-award payments.
48. So long as an employer is paying its employees at least the total amount that they are entitled to be paid under the relevant modern award, it would be unfair to require the employer to pay any more as a result of changed employer obligations and changed employee entitlements arising from the replacement of pre-modern instruments with modern awards.

49. If employers were not permitted to absorb award changes into overaward payments many would face major cost increases which we submit were not intended by FWA or the Australian Government.
50. It is evident that subclause 2.2 is a transitional provision, along with subclauses 2.3 to 2.6 and Schedule A (the Phasing Schedule). The FWO appears to have misunderstood this aspect because in its *Addendum to GN 7*, the following statement is made:

*“56. FWO also notes that unlike other transitional provisions, clause 2.2 is not limited to the phasing period or any time period at all – it operates at large. If it were interpreted in the manner suggested, it would have the effect of permanently setting aside the laws of offsetting rather than doing so to deal with this transition.”*

### **3.6 It is not fair, reasonable or workable to expect an employer to reach agreement with individual employees before being entitled to absorb**

51. Many lawyers advise employers to include offsetting clauses in written common law contracts and many employers have done so for staff employed under these contracts (typically salaried, “white-collar” staff).
52. However, employers in the manufacturing, transport, construction and other industries which employ predominantly “blue-collar” workers do not typically have written common law contracts in place containing offsetting arrangements, nor are they likely to succeed if they seek to implement such arrangements.

53. For factories, construction sites etc with 50, 500 or 5,000 workers, employees are highly unlikely to formally agree to absorb any new monetary entitlements arising under modern awards into over-award payments.
54. The suggestion that these employers are likely to be able to enter into a written agreement with their employees on an offsetting arrangement reflects a lack of understanding of these workplaces, including the communication challenges and the role of unions in seeking to maximise wages and working conditions.
55. Employees are not disadvantaged by absorption. They will continue to receive the same take home pay. It is the take home pay of employees that is intended to be protected in the award modernisation process – not specific “line items” in awards.

### **3.7 The decision of the Tribunal to insert the absorption clause in modern awards**

56. The absorption clause in the model transitional provision states:

*“The monetary obligations imposed on employers by this award may be absorbed into over-award payments. Nothing in this award requires an employer to maintain or increase any over-award payment.”*

57. In its Award Modernisation Decision of 2 September 2009, the Full Bench said:

*“[19] We deal first with the issue of absorption. There was a range of views on the issue. Most employer representatives took the view that any increases resulting from a modern award should be capable of absorption into existing overaward payments. The Australian Council of Trade Unions (ACTU) and most unions took a contrary view. They argued that overaward payments should be maintained in all circumstances. Modern awards are concerned with minimum wages and conditions and not with overaward payments. It would not be appropriate, even on a transitional basis, to require an employer to maintain overaward payments. We have decided to provide for absorption. Of course the payments specifically regulated in the transitional provisions are not to be regarded as overaward payments. Those payments are referable to pre-modernisation obligations in award- or agreement-based transitional instruments. The model provisions will include the following:*

*“The monetary obligations imposed on employers by this award may be absorbed into overaward payments. Nothing in this award requires an employer to maintain or increase any overaward payment.”*

58. When considered in the context of the submissions made in the case, Ai Group submits that the above comments by the Full Bench are very clear. It is equally clear what the meaning of the absorption clause is. That is:

- During the transitional period an employer is entitled to absorb any monetary obligation in the relevant modern award into over-award payments;
- An employer may choose to absorb or may choose not to absorb;

- There is no requirement for the employer to reach agreement with an employee before absorbing; and
  - There is no requirement for the employer to have entered into an offsetting arrangement with an employee before absorbing.
59. The above interpretation has been widely communicated to employers by Ai Group, other employer bodies, and a myriad of lawyers and consultants.
60. Ai Group submits that the above interpretation is consistent with the context in which the Tribunal made its decision. The absorption clause was inserted to adopt the proposal strongly advocated by Ai Group and a number of other employer representative bodies.

### **3.8 Ai Group's submissions in the proceedings which led to the model absorption clause**

61. Ai Group argued in support of the inclusion of a general absorption clause in all modern awards in the following submissions:
- **29 May 2009** - Submission on the model transitional provisions to be inserted in Stage 1 and 2 modern awards;
  - **26 June 2009** – Additional and Reply Submission on the model transitional provisions to be inserted in Stage 1 and 2 modern awards;
  - **23 October 2009** - the model transitional provisions to be inserted in Stage 3 modern awards.

62. In our 29 May 2009, submission (at paragraphs 85 to 87) we said:

*“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.”

(Emphasis added)

63. “Clauses 2, 3, 4 and 5”, as referred to in paragraph 1.1(b) above, included Ai Group’s proposed transitional provisions for:

- Clause 2 – Minimum rates of pay;

- Clause 3 – Casual loadings;
- Clause 4 – Saturday, Sunday and public holiday rates; and
- Clause 5 – Shift allowances.

In each case, Ai Group proposed that the modern award provisions be phased-in over five increments during the period up to 2014.

64. The above submissions of Ai Group, which were made during the proceedings which led to the absorption clause, support the conclusion that the Tribunal intended to give employers the right to absorb monetary entitlements imposed on employers under modern awards into over-award payments.

### **3.9 The submissions of other employer groups**

65. During the proceedings relating to the development of the model transitional provisions, some employer groups expressly supported Ai Group’s proposals.

66. Other employer groups separately argued for an absorption clause to be inserted into modern awards.

67. For example, in its submission of 28 May 2009, Master Builders Australia (MBA) said:

*“5.5 To solve the problem, Master Builders recommends that the following provision or a similar provision with the same substantive effects should be included in each modern award:*

*Where the introduction of this modern award requires an employer to increase any element of an existing employee’s terms and conditions of employment, the employer may vary any over award payment to offset the additional cost provided that*

*prior to making any such variations, the employer must consult with the employee regarding the changes.*

*Where the introduction of this modern award requires an employer to increase the overall terms and conditions provided to its employees, the employer may phase in any increases in wages, allowances, casual loading or shift penalties by providing equal incremental increases in relation to those provisions over a period of up to 5 years, with the first increase to take effect on 1 January 2010.”*

68. During the Public Consultations relating to the Stage 1 and 2 transitional provisions (held on 13, 14, 15 and 16 July 2009), the following exchange took place between Mr Calver of the MBA and Justice Giudice:

*“PN887*

*MR CALVER: Thank you, your Honour. This morning there are a number of matters that I'd like to deal with. The first is what we submit is open for the Commission to do in relation to transitional provisions, and we take the Commission to a number of propositions in that regard. Firstly though, Master Builders has placed two submissions before the Commission on transitional arrangements, and because we are unclear as to the time they're lodged on the website we put the month when they're lodged and then number them. Those are our numbered submissions 12 and 13, and they were lodged and made available on the website at various dates. We rely upon those submissions, your Honour.*

*PN888*

*In the 12th submission which we believe was on the website on 28 May we proposed a comparatively simply provision for inclusion in modern awards but particularly the Building and Construction Industry Awards comprising only two paragraphs. Obviously we had sought to have those as paragraphs of general*

*application as that is what appears to us to be expressed in paragraph 12 of the Request. Those two paragraphs are set out at 5.5 of submission 12. We note that the second paragraph of that proposed global clause was endorsed by the CFMEU at paragraph number 55 of transcript for these proceedings on the hearings of 13 July 2009.*

*PN889*

*In essence the proposal that Master Builders has placed before the Commission vests responsibility in the employer to identify where the introduction of a modern award requires an employer to increase the overall terms and conditions provided to its employees. The employer then identifies increased costs. The employer may phase in any increases in wages, allowances, casual loading or shift penalties by providing equal incremental increases in relation to those provisions over a period of up to five years with the first increase to take effect on 1 January 2010. The reason that we limited our conspectus to those matters is that they are readily ascertainable finite financial issues and we endorse the submissions made by Mr Davis from the agricultural sector where they're calculable. That's how you can reference them and that's how it's possible in that sense that phase in could be the responsibility of the employer, because at that point they would be calculable, they would not be more amorphous employer cost related matters of the kind that I will take the Commission to shortly when I speak about redundancy.*

*PN890*

*JUSTICE GIUDICE: Mr Calver, the first paragraph of the proposal suggests that the Commission, or perhaps I should say a modern award, can regulate over award payments. Presumably it's your submission that it can.*

*PN891*

*MR CALVER: Well, could you perhaps take me to - - -*

PN892

*JUSTICE GIUDICE: It's in clause 5.5 or paragraph 5.5 of the - - -*

PN893

*MR CALVER: May vary any over award payment to offset. Yes, I'm coming to that, your Honour.*

PN894

*JUSTICE GIUDICE: Very well.*

PN895

*MR CALVER: We continue to support the inclusion of that provision. I took the second paragraph first because the second we've endorsed it, but we continue to support the inclusion of that provision in modern awards together with the first paragraph about absorption in over award payments. Part of the reason that we say that there's a requirement for that paragraph to exist is because of the issue with the case of Poletti v Ecob. It's quite clear that in many circumstances a payment of the kind where employers would be required to offset or deduct from over award payments that increase it would come up against the proposition in Poletti v Ecob where the contract between the parties prevents the employer afterwards claiming the payments made pursuant to the contractual obligation can be relied on in satisfaction of award entitlements arising outside the agreed purpose of those payments.*

PN896

*The Commission will recall that in Poletti v Ecob there was consideration of the basis upon which offset could occur that arose from Sheldon Js dissenting judgment in the Radano case, and these principles are often known as the Radano principles. The reason that we have that paragraph about over award payments is not, your Honour, that we seek the Commission to regulate them. It is to distinguish those payments which can be made at law pursuant to transitional arrangements by way of assimilating them into over award*

*payments as a means by which the Radano principle is not brought to bear to prevent that.*

*PN897*

*JUSTICE GIUDICE: But what if the contract in a particular case was for an over award payment which was to apply in addition to the award no matter what the circumstances?*

*PN898*

*MR CALVER: Then, your Honour, that would be a situation where the consultations with the employee may well - which are called for in paragraph 1, enliven that and certainly the Radano principle would operate in those circumstances where there was clear provision which did not permit the contract to be altered. Certainly that's an example where the wording that we've adopted in paragraph 5.5 could not be invoked.*

*PN899*

*JUSTICE GIUDICE: Yes. Well, I think I understand the purpose of the provision and a number of employer interests have advanced a similar sort of provision.*

*PN900*

*MR CALVER: Yes.*

*PN901*

*JUSTICE GIUDICE: But my question was actually directed at the power issue, can a modern award regulate over award payments.*

*PN902*

*MR CALVER: Well, I think that what the clause is trying to do is vest in the employer the legal capacity to implement transitional arrangements and in that context I would argue that yes, that you do under paragraph 12 of the Request and in order to legally do that the proposition, first proposition of the Radano*

*principles that were set out in Poletti v Ecob in our submission need to be taken into account. Now, your Honour, if I've done that inadequately and obviously I have in the particular circumstance where there's a specific provision which would mean that employers could not do that, certainly the clause does not take that into account.*

PN903

*I don't think that that part of the law could be overridden, but without a provision which allows the employer specifically to use over award payments to offset additional costs without that being specifically set out as the CFMEU would have the Commission do by only adopting the second paragraph with which I started my submissions, we think that that would be an every day problem and therefore we believe that it was important to bring it to the attention of the Commission. We do think that the wording that we've used is simple, straight forward and gives that permission. We do think that the Commission is empowered to incorporate such a provision.”*

69. It can be seen from the above exchange, that the Full Bench considered relevant Court authorities during the proceedings which led to the inclusion of an absorption clause within the model transitional provisions.

70. In its 28 May 2009 submission, the Australian Mines and Metals Association stated (at paras 26 and 27):

*“26. AMMA contends that the assessment whether a modern award has the effect of increasing costs should be determined using a global rather than a line by line basis. Increases in costs which arise in one award provision should be able to be offset by reductions in costs from another (for example a new industry allowance may replace a number of separate allowances for particular working conditions).*

27. *Where there is an increase in costs employers should be permitted to offset any increased entitlement from existing employee remuneration, including non-cash benefits that are capable of having a value placed upon them.*"
71. In its submission of 29 May 2009, the Australian Chamber of Commerce and Industry said (at para 88):
- "88. Thirdly, both cost and non-cost related matters must be considered and dealt with through transitional provisions that allow off-setting, absorption and phasing-in."*
72. In its submission of 29 May 2009, the Chamber of Commerce and Industry of WA said (at para 17):
- "Setting off clauses*
- 18. Setting off provisions should also be included in modern awards allowing for the variation of existing contracts of employment to absorb additional costs."*
73. The above submissions of other employer groups and the transcript of the proceedings strongly support the conclusion that the Tribunal intended to give employers the right to absorb monetary entitlements imposed on employers under modern awards into over-award payments.

### **3.10 Union submissions**

74. Ai Group submits that there was no serious opposition from the unions to the employers' absorption proposal during the proceedings which led to absorption clause.

75. During the proceedings the unions primarily focussed upon their own proposals, in particular their proposals relating to the protection of take home pay and savings provisions of various types.
76. The main concern expressed by the unions about the employers' absorption proposal related to an idea pressed by some employer groups (but not by Ai Group) that employers in receipt of over-award payments should not receive minimum wage increases during the transition period.
77. This is highlighted in the following relevant section of the ACTU's Reply Submission of 26 June 2009:

*Absorption and offsetting*

- "73. Employer groups, including Ai Group and AMMA, have argued that employers should be able to absorb and/or offset any increased costs incurred by employers as a result of award modernisation.*
- 74. The ACTU has made submissions with respect to 'absorption' and continues to rely on that submission.*
- 75. The ACTU rejects the proposition that any over award payments currently received by employees or that arise as a result of the implementation of a modern award should be subject to absorption provisions.*
- 76. The ACTU is particularly concerned about the proposition that employees in receipt of 'over award payments' because of the operation of the modern award (i.e. their previous salary was more than that under the modern award) should effectively not receive annual wage increases. To require that such wage increases be absorbed into the 'over award' payment would, in our submission, create significant disadvantage to those employees.*

77. *Further, where an employee is in receipt of over award payments because their pay and/or conditions are linked to the award rate, they should not be disadvantaged by absorption of over award rates caused by the operation of the modern award.*

78. *Existing over award payments as at 31 December 2009 should not be offset against improved benefits flowing from transition to the modern award.”*

(Emphasis added)

78. Ai Group submits that the opposition now being mounted by the unions against the absorption clause is opportunistic and has only arisen since they discovered that the FWO had formed the view that the clause was unclear in its meaning.

### **3.11 The power of the Tribunal to insert an award provision permitting absorption**

79. Ai Group submits that the Tribunal clearly has the power to insert an award clause allowing employers to offset employee entitlements against new award provisions.

80. As set out in the next section of this submission, the Tribunal included absorption provisions in the wages clauses of awards for more than a decade.

81. Also, in the *Victorian Common Rule Award Case*, the AIRC decided<sup>1</sup> to insert the following clause in all Victorian common rule declarations:

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<sup>1</sup> Decision in the *Victorian Common Rule Case*, 17 August 2004, PR950653.

“9. *In the event of a dispute about the entitlement of an employer to set-off entitlements and benefits provided under a contract of employment made prior to the date of this declaration against entitlements and benefits required to be provided under the XX Common Rule Award 2005, the matter may be referred to a Board of Reference consisting of a member of the Commission which shall determine whether or not such a set-off should be permitted having regard to what is fair and equitable in all the circumstances of the case, without regard to technicalities and legal forms.*

*An appeal lies from a decision of a Board of Reference to a Full Bench of the Commission.*

*This clause shall apply for a period of twelve months from the commencement date of the XX Common Rule Award 2005.*

*Any registered organisation bound by the terms of the XX Common Rule Award 2005 shall be notified of the time and date of hearing in relation to any application made pursuant to this provision”.*

82. The above clause was negotiated and agreed upon between Ai Group, other employer groups and the Victorian Trades Hall Council (VTHC) and was subsequently endorsed by the Full Bench.
83. Despite being wordier and more cumbersome (given that it was the outcome of a negotiation process between employer and union representatives) than the absorption clause in modern awards, the clause in the common rule declarations permitted absorption to occur at the time when common rule awards were implemented. Ai Group is unaware of even one dispute which arose or even one matter which was notified to the AIRC under the agreed absorption clause, despite the fact that widespread absorption occurred.

84. Similar to the clause in the Victorian common rule declarations, the clause which the Tribunal has inserted into modern awards will have a limited life, and will presumably be removed, along with the other transitional provisions, after 2014.
85. During the *Victorian Common Rule Award Case*, the Court authorities relating to offsetting were focussed upon in Ai Group's submissions, plus in the submissions of other parties. The above clause was held by the Full Bench to be within the AIRC's powers.
86. There is significant similarity between the situation which existed when Victorian common rule awards were implemented in 2004 and the implementation of modern awards. In both circumstances, a one-off event occurred which resulted in a major change to the safety net.

### **3.12 The absorption clause inserted into awards as a result of Safety Net Review Decisions between 1994 and 2005**

87. As explained above, the FWO's view that the intent of subclause 2.2 is unclear revolves heavily around the fact that the Tribunal has used the word "*may*" in the phrase "*The monetary obligations imposed on employers by this award may be absorbed into over-award payments*".
88. Ai Group strongly disagrees with the FWO's view that the use of the word "*may*" creates doubt about whether an employer is entitled to absorb and can be read as requiring that the employer must reach agreement with each individual employee before absorption can occur. The Tribunal's award modernisation decisions do not support such a proposition.

89. There is nothing unusual about the use of the word “*may*” in an award absorption clause which entitles an employer to absorb. The word “*may*” reflects the fact that an employer may choose to absorb or may choose not to absorb.
90. The word “*may*” has been used in the Tribunal’s absorption clauses for more than 15 years and such clauses have been consistently interpreted as permitting employers to absorb the relevant award entitlements into over-award payments.
91. From the time that the *Industrial Relations Reform Act 1993* came into operation in March 1994, the award system has operated as a safety net. Consistent with the safety net role of awards, between 1994 and 2005 the AIRC inserted an absorption provision in the wages clause of each award. It is universally recognised that such clauses entitled employers to absorb safety net adjustments into over-award payments.
92. In the *Safety Net Adjustments and Review Decision September 1994 [Print L5300]*, the AIRC Full Bench inserted the following absorption clause into awards in conjunction with the first \$8 safety net adjustment:

*"The rates of pay in this award include the first \$8 per week arbitrated safety net adjustment payable under the September 1994 decision. [Print L5300] This first \$8 per week arbitrated safety net adjustment may be offset to the extent of any wage increase as a result of agreements reached at enterprise level since 1 November 1991. Increases made under previous National Wage Case principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments."*

(Emphasis added)

93. It can be seen that the word “*may*” was used in the clause.
94. Ai Group (then the Metal Trades Industry Association of Australia) filed a notice of motion in the High Court of Australia seeking orders that the Full Bench of the AIRC show cause why writs of prohibition, certiorari and mandamus should not issue against it in respect of its 1994 decision. We took this step due to our concern at the time that the above provision might be interpreted as only enabling employers to absorb the safety net increase into formal enterprise agreements.
95. The High Court remitted the matter to the Industrial Relations Court of Australia which delivered its judgment on 5 May 1995 (*Re Australian Industrial Relations Commission; Ex parte Metal Trades Industry Association of Australia and Another* [(1995) 130 ALR 63]).
96. The majority judgment (Wilcox CJ and Beazley J) of the Industrial Relations Court said:

*"The first point concerns absorption of the first \$8 per week arbitrated safety net adjustment by pre-November 1991 overaward payments. The prosecutors argue that the Full Bench decision of 31 October prohibits absorption and that such a prohibition is beyond the Commission's power. It seems to us, with respect, that this argument misreads the 31 October decision. Far from announcing an order proscribing absorption, the Full Bench said that the form of order it proposed to adopt, in relation to the first arbitrated safety net adjustment, 'does not . . . preclude an employer from absorbing the \$8 safety net adjustment into overaward payments . . . In circumstances where an employee is in receipt of an overaward payment in excess of \$8 the order does not, in its terms, increase actual wage rates'. Examination of the form of the order shows that these statements were correct. The form of first safety net adjustment order proposed in the September decision, and which the 31*

*October Full Bench was proposing to make in the subject proceedings, does not exclude absorption of the adjustment into pre-November 1991 overaward payments.” [(1995) 130 ALR at p.76]*

97. Accordingly, the Full Federal Court interpreted the AIRC’s 1994 absorption clause as not precluding *“an employer from absorbing the \$8 safety net adjustment into overaward payments”*.
98. In the *Safety Net Review – Wages April 1997 Decision [P1997]*, the AIRC put the issue beyond any doubt by deciding that the \$10 safety net adjustment would *“be fully absorbable against all above award payments”*, as set out in the following extract:

*“8.2.5 Absorption*

*We have decided that (1) the \$10 per week arbitrated safety net adjustment and (2) the increase in wages to give effect to the federal minimum wage are to be fully absorbable against all above award payments.”*

99. To implement the above decision the Full Bench inserted the following clause into awards:

*“The rates of pay in this award include the \$10 per week arbitrated safety net adjustment payable under the Safety Net Review - Wages April 1997 decision. This arbitrated safety net adjustment may be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to certified agreements, currently operating enterprise flexibility agreements, Australian workplace agreements, award variations to give effect to enterprise agreements and overaward arrangements. Absorption which is contrary to the terms of an agreement is not required.*

*Increases made under previous National Wage Case principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments."*

(Emphasis added)

100. Accordingly, the Full Bench of the AIRC said that it had decided that the \$10 safety net adjustment would *"be fully absorbable against all above award payments"*, and then used the following terminology in the clause which the AIRC inserted into awards to implement the decision: *"This arbitrated safety net adjustment may be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award"*.
101. Clearly the Tribunal does not interpret the word *"may"* in the same way as the FWO has in its Guidance Note.
102. The FWO's view that the use of the word *"may"* in subclause 2.2 in the Manufacturing Modern Award requires that the employer reach agreement with every individual employee before absorbing, is not sustainable, when considered in the context that the Tribunal has been using the word *"may"* in its absorption clauses for over 15 years.
103. The absorption clause inserted into awards pursuant to the *Safety Net Review – Wages April 1997 Decision* was re-inserted for each safety net adjustment up to the *Safety Net Review-Wages June 2005 decision [PR002005]* which was the last safety net wage decision before the establishment of the Australian Fair Pay Commission. The only change made to the clause each year between 1997 and 2005 was to insert the name of the relevant decision.

104. From 2006, the Tribunal decided that it was no longer necessary to include an absorption clause, given, we submit, that the right of an employer to absorb was by 2006 universally recognised. The following extract from the *Wages and Allowances Review 2006 Decision* is relevant:

*“[64] ..... ACCL proposed that we should require a commitment to absorption from unions of the kind contained in Principle 8(d). We think such a provision is unnecessary, although the matter can be further considered in the context of the foreshadowed conference. Similarly, there is no need for an award clause of the kind in Principle 8(c). It is clear the variations will only have effect in relation to minimum award rates.*

(Emphasis added)

### 3.13 The Court authorities regarding absorption

105. As stated earlier, under the FWO’s interpretation the absorption clause becomes meaningless. An absorption clause is not needed if such clause only applies where the employee has agreed to absorb. Under the relevant Court authorities absorption by agreement is available without an absorption clause.
106. There a number of key points which arise when considering the relevant Court authorities.
107. The first point relates to any entitlement that an employee may have to receive over-award payments under an over-award agreement (express or implied). If such an agreement exists, the failure to pay at the agreed rate would be a breach of the agreement not a breach of the award.
108. As Anderson J, the Presiding Judge, in *James Turner Roofing Pty Ltd v Peters [2003] WASCA 28*, said (see **Attachment D**):

*“For myself, I can see no basis upon which the amount due upon enforcement of an award can be calculated by reference to an hourly rate which is not the rate prescribed in the award. This is not to say that an employer and an employee may not enter into an over-award agreement, ie an agreement, express or implied, most of the content of which is supplied by the terms of the award but with agreed additions. There is no reason why parties cannot contract by reference to the terms and conditions of an award. So for example, an employer might offer employment expressly or impliedly on the basis that the employee is to receive all of the benefits of the award save that instead of the ordinary hourly base rate prescribed by the award, a higher base rate will be paid. But then the employee who complains of a breach of the obligation to pay at the higher rate is not seeking to enforce the award but is seeking to enforce the agreement: **Amalgamated Collieries of WA Ltd v True** (1938) 59 CLR 417 per Evatt J at 434 and Dixon J at 431. See also (1940) 62 CLR 451 (Privy Council) per Lord Russell at 455. The failure to pay at the agreed rate would be a breach of the agreement, not a breach of the award.”*

(Emphasis added)

109. Whether such an over-award agreement exists in a particular case, which requires the maintenance of an over-award payment, is a matter which can only be determined by considering the terms of the employment contract entered into between the employer and the relevant individual employee. This issue should not be used as the basis for a general interpretation of the absorption clause in modern awards.
110. Justice Giudice raised this issue in his exchange with Mr Calver of the MBA during the public consultations in July 2009:

*“PN897*

*JUSTICE GIUDICE: But what if the contract in a particular case was for an over award payment which was to apply in addition to the award no matter what the circumstances?”*

111. As alluded to by His Honour, it is open to an employer and an employee to agree in a contract of employment that an over-award payment must apply in addition to award entitlements, regardless of the terms of the award. However, such agreements are not common and, as stated, should not be used as a basis for a general interpretation of the absorption clause in modern awards.
112. The next key point is that an employee’s entitlements under a modern award are new entitlements which apply from 1 January 2010, and these new entitlements need to be viewed in conjunction with the absorption clause.
113. An employee covered under a modern award does not simply have an entitlement to the relevant wage rate, annual leave loading, tool allowance etc in isolation. The employee is entitled to the wage rate, annual leave loading, tool allowance etc in the modern award, in the context of the absorption clause.
114. The fact that an employee had an entitlement under a pre-modern award to a wage rate, annual leave loading, tool allowance etc, does not mean that the absorption clause cannot operate as intended. For example, the tool allowance under the modern award is not the same entitlement as the tool allowance under the pre-modern award. The entitlement under the modern award operates in the context of the absorption clause.

115. Justice Anderson’s judgment in *James Turner Roofing Pty Ltd v Peters* [2003] WASCA 28 contains a usefully analysis of the key Court authorities relating to absorption. The following extract is relevant:

“19 *With this understanding, the question of set off arises in this case because the appellant contends that the amount paid to the respondent exceeds the maximum amount which the appellant was obliged to pay to the respondent under the award in respect of any of the periods of work in question. For his part the respondent contends that none of the money which was paid by the appellant over and above the award entitlement for ordinary time can be applied in satisfaction of the appellant's obligation under the award to pay the other entitlements claimed.*

20 *What is at issue here is the manner in which amounts which had been paid to the respondent should be credited to the appellant's obligations under the award. Cases in which this question has been discussed include **Ray v Radano** (1967) AR (NSW) 471;**Pacific Publications Pty Ltd v Cantlon** (1983) 4 IR 415; **Poletti v Ecob (No 2)** (1989) 31 IR 321; **Logan v Otis Elevator Co Pty Ltd** [1999] IRCA 4 and **ANZ Banking Group Ltd v Finance Sector Union of Australia** [2001] FCA 1785.*

21 *These cases must be discussed in some detail, which I will do later, but meanwhile I think the relevant principles that are to be extracted from them can be stated as follows:*

1. *If no more appears than that (a) work was done; (b) the work was covered by an award; (c) a wage was paid for that work; then the whole of the amount paid can be credited against the award entitlement for the work whether it arises as ordinary time, overtime, weekend penalty rates or any other monetary entitlement under the award.*

2. *However, if the whole or any part of the payment is appropriated by the employer to a particular incident of employment the employer cannot later claim to have that payment applied in satisfaction of his obligation arising under some other incident of the employment. So a payment made specifically for ordinary time worked cannot be applied in satisfaction of an obligation to make a payment in respect to some other incident of employment such as overtime, holiday pay, clothing or the like even if the payment made for ordinary time was more than the amount due under the award in respect of that ordinary time.*
3. *Appropriation of a money payment to a particular incident of employment may be express or implied and may be by unilateral act of the employer debtor or by agreement express or implied.*
4. *A periodic sum paid to an employee as wages is prima facie an appropriation by the employer to all of the wages due for the period whether for ordinary time, overtime, weekend penalty rates or any other monetary entitlement in respect of the time worked. The sum is not deemed to be referable only to ordinary time worked unless specifically allocated to other obligations arising within the employer/employee relationship.*
5. *Each case depends on its own facts and is to be resolved according to general principles relating to contracts and to debtors and creditors.*

22 *Applying these principles to the case before us, the first question is whether the appellant made any implied or express allocation to a particular incident of employment, such as ordinary time.”*

116. Ai Group submits that:

- Modern award entitlements operate in the context of the absorption clause for the period during which the clause remains in the award (ie. the transitional period).
- Unless the employer and the relevant individual employee have agreed in their contract of employment that an over-award payment will be maintained regardless of the terms of the relevant award (and do not change their agreement) then the absorption clause enables the employer to meet the modern award obligations by absorbing monetary entitlements into over-award payments.
- The principles in the Court authorities operate subject to the absorption clause in modern awards during the transitional period.
- An employer's monetary obligation under a modern award is to pay the employee each pay period an amount which is no less than the amount that is derived by adding together all of the different monetary entitlements to which the employee is entitled.
- Similar to the approach taken by the Tribunal in its safety net review absorption clause (see paragraphs 98 to 100 above), the monetary entitlements in a modern award are *“fully absorbable against all above award payments”*.

#### 4. AM2010/68 – the AMWU’s application re. overtime

117. Over the past six months or so there has been considerable uncertainty and debate about whether changes in overtime penalties are subject to phasing.
118. It is important that the concept of overtime not be confused with ordinary time that is worked at times where penalty rates are payable (eg. ordinary time worked on weekends or outside the spread of hours). Clearly, higher and lower penalties for ordinary time are subject to phasing, and no differences of view exist on this issue between the FWO and the major industrial parties.
119. The issue of whether overtime penalties are subject to phasing revolves around the meaning of the term “*other penalty*” in Clause A.4 of the model phasing schedule.
120. Clause A.4 states:

**“A.4 Loadings and penalty rates**

*For the purposes of this schedule loading or penalty means a:*

- *casual or part-time loading;*
- *Saturday, Sunday, public holiday, evening or other penalty;*
- *shift allowance/penalty.”*

121. In its Award Modernisation Decision of 2 September 2009, the Full Bench said:

***Model phasing schedule***

*[23] We now deal with the provisions for phasing-in changes in entitlements resulting from the making of modern awards. We received many proposals in relation to the scope of such provisions. At one extreme it was suggested that*

every condition in every award-based transitional instrument should be identified and preserved or phased out in some way. That approach would lead to many pages of schedules to each award and would place an intolerable compliance burden on employers. We regard it as important to balance the need for phasing provisions against the desirability of confining the regulatory burden as much as possible. Unless the provisions are capable of being understood and applied without too much difficulty the modern award objective might be frustrated. We have decided to limit the number of matters which are governed by phasing provisions to the main matters affecting pay. Phasing provisions will necessarily be complex. By limiting the number of matters we hope to minimise complexity and reduce the scope for confusion.

**[24]** The matters we have decided to include in the model provisions relating to phasing are: minimum wages, including wages for junior employees, employees to whom training arrangements apply and employees with a disability, casual and part-time loadings, Saturday, Sunday, public holiday, evening and other penalties and shift allowances. A number of parties suggested that we should include transitional provisions relating to hours of work provisions. Proposals were advanced dealing with changes in the spread of ordinary hours, starting and finishing times and the number of hours of overtime required to be worked at certain rates. While these matters are capable of affecting the pay employees receive and the costs to employers, we have decided not to include phasing provisions in relation to them. There are three reasons. The first is that an employer normally has award rights to alter starting and finishing times and other elements of ordinary hours by giving notice to the employee concerned. Changes of this nature can obviously affect overtime and shift payments. Where such rights are exercised it would be difficult to quantify the effect of the modern award in that respect. Secondly, the award flexibility provision might be too difficult to apply if matters other than those we have chosen were to be subject to transitional arrangements. Thirdly, as we have already pointed out, the greater the

*number of matters which are subject to transitional provisions the greater the scope for complexity and confusion in the application of the provisions.*

(Emphasis added)

122. It appears from the above extract that when the Tribunal originally drafted the term “*other penalty*” it did not intend that overtime be included. A key question is whether that intention changed when the Tribunal handed down its Award Modernisation decision of 3 December 2009.

123. After the Tribunal handed down its decision of 2 September 2009, both employers and unions were concerned about some aspects of the decision. The following extract from Ai Group’s submission of 6 November 2009 on the Stage 3 transitional provisions highlights a significant concern which Ai Group had about changes in penalties resulting from changes in the daily or weekly spread of hours between the relevant pre-modern award and the modern award:

*“27. In a similar vein, where an employee is faced with the reduction or loss of a penalty or an employer is faced with a new or increased penalty due to a change in the daily or weekly spread of hours, we submit that the Model Provisions would apply and the new penalty would be phased-in. The following examples highlight our view:*

- **Example 1:** *An award-based transitional instrument has a spread of hours of 6am to 8pm and the modern award has a spread of hours of 6am to 6pm. The company’s day shift finishes at 7pm and it does not wish to change the shift times. The new penalty (ie. the afternoon shift penalty) would be phased-in in accordance with the model phasing schedule.*

- **Example 2:** *An award-based transitional instrument has a spread of hours of 6am to 6pm, Monday to Saturday with no penalty payable for Saturday, and the modern award implements a Saturday penalty of time and one half. The new Saturday penalty would be phased-in in accordance with the model phasing schedule.*
- **Example 3:** *An award-based transitional instrument provides for a double time penalty for Saturday ordinary time work and the modern award allows ordinary time to be worked on Saturdays without penalty. The old Saturday penalty would be phased-out in accordance with the model phasing schedule.*

28. *The above approach is fair on all parties and we believe that it is consistent with the Full Bench's intentions, as reflected in its 2 September decision."*

124. In its Award Modernisation Decision of 3 December 2009, the Full Bench said:

*"[8] We deal now with some technical issues concerning the drafting of the model transitional provisions. A number of submissions were received which suggested that parts of the model transitional provisions were not clearly expressed, ambiguous or deficient for some other reason. We have carefully considered these submissions and decided to make amendments of three types to the model phasing schedule. The first concerns the operation of the schedule where there is no relevant award-based transitional instrument, or where there is such an instrument but no equivalent provision. The second deals with employees covered by enterprise agreements immediately before 1 January 2010. The third concerns the correct identification of the legal basis for the casual loadings which apply immediately prior to 1 January 2010.*

*[9] A number of employer representatives expressed concern that the phasing provisions might not apply in certain situations and that the position should be clarified. It is our intention that the phasing provisions apply whenever there is a difference between the pre-modern award obligation and the modern award obligation. So, for example, if under the pre-modern award conditions work was permitted in ordinary hours on a Saturday without penalty and the modern award contains a Saturday penalty of 25%, the transitional percentage for work in ordinary hours on a Saturday is 25%. The percentage can be phased-in over five instalments. To take an example of the reverse situation, if the pre-modern award conditions include a penalty of 25% for work in ordinary hours on a Saturday but the modern award does not include a penalty, the transitional percentage is 25%. In that case the percentage can be phased-out in five instalments. We have made amendments to the schedule to clarify the situation and amended other clauses accordingly.*

(Emphasis added)

125. To reflect its 3 December 2009 decision, the Tribunal amended clause A.1.2 in the phasing schedule to add paragraphs (b), (c) and (d) below:

**“A.1.2**        *The provisions of this schedule are to be applied:*

- (a) when there is a difference, in money or percentage terms, between a provision in a relevant transitional minimum wage instrument (including the transitional default casual loading) or award-based transitional instrument on the one hand and an equivalent provision in this award on the other;*
- (b) when a loading or penalty in a relevant transitional minimum wage instrument or award-based transitional instrument has no equivalent provision in this award;*

*(c) when a loading or penalty in this award has no equivalent provision in a relevant transitional minimum wage instrument or award-based transitional instrument; or*

*(d) when there is a loading or penalty in this award but there is no relevant transitional minimum wage instrument or award-based transitional instrument.*

126. Given the Tribunal's 3 December 2009 decision, the FWO and the major industrial parties concurred that where changes in the daily or weekly spread of hours between the pre-modern award and the modern award resulted in changes in penalties, phasing was applicable.

127. However, the FWO's view that overtime is not subject to phasing did not change despite the Tribunal's 3 December 2009 decision.

128. Given that the FWO's view has been consistent on the overtime issue since September last year, and that employer representatives have communicated this fact to their members, most likely few employers would currently regard overtime as subject to phasing.

129. This means that there are a very large number of employers who have been applying the modern award overtime provisions since 1 January 2010.

130. If a change is made at this stage, Ai Group is concerned about the cost and disruption that will result for employers, particularly if the change, in effect, would result in changes to the treatment of overtime for the period between 1 January 2010 and 30 June 2010.

131. If phasing is now held to apply, the result will be that a very large number of employers will have underpaid their employees whenever more than two hours of overtime has been worked on a weekday. Phasing would require that the third hour of overtime be paid at double time for the period between 1 January 2010 and 1 July 2010.
132. Backpay would result in substantial direct and administrative costs for employers. Also, labour hire firms and other contract labour providers are typically unable to recover costs for labour which has already been provided and charged to their client.
133. If phasing is applied to overtime penalties then the following calculations set out the phasing arrangements which would apply where overtime is worked on a weekday.

Pre-modern award overtime	Time and a half for the first 2 hours Double time after 2 hours
Modern award overtime	Time and a half for the first 3 hours Double time after 3 hours
1 <sup>st</sup> hour of overtime	No change to penalty
2 <sup>nd</sup> hour of overtime	No change to penalty
3 <sup>rd</sup> hour of overtime	Decrease from 200% to 150% (phased)
4 <sup>th</sup> hour of overtime	No change to penalty

## Phasing of 3<sup>rd</sup> hour penalty

The “transitional percentage” is 50%.

The phasing arrangements are:

First full pay period on or after	Proportion of transitional percentage
1 July 2010	80%
1 July 2011	60%
1 July 2012	40%
1 July 2013	20%
1 July 2014	0%

The phased penalty rate is obtained by adding the proportion of the transitional percentage to the modern award penalty.

Phased penalties for the third hour of overtime:

- 1 July 2010 to 30 June 2011: 150% + 40% (ie. 80% of 50%)
- 1 July 2011 to 30 June 2012: 150% + 30% (ie. 60% of 50%)
- 1 July 2012 to 30 June 2013: 150% + 20% (ie. 40% of 50%)
- 1 July 2013 to 30 June 2014: 150% + 10% (ie. 20% of 50%)
- From 1 July 2014: 150%