SUBMISSION TO FAIR WORK OMBUDSMAN

PUBLIC CONSULTATION DRAFT - GUIDANCE NOTE ON TRANSITIONAL ARRANGEMENTS IN MODERN AWARDS

AUSTRALIAN INDUSTRY GROUP

12 May 2010

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1. Introduction

1. Ai Group appreciates the consultative approach which the FWO is taking in developing its interpretative and advisory materials relating to the implementation of modern awards.

2. However, we are very concerned about aspects of the FWO's Public Consultation Draft Guidance Note on Transitional Arrangements in Modern Awards ("the Draft Guidance Note").

3. As drafted, the Guidance Note will lead to huge problems for employers, including major cost increases which we submit were not intended by Fair Work Australia (FWA) or the Australian Government.

4. Foremost amongst out concerns is the FWO's draft interpretation relating to the absorption clause in the model transitional provisions (paragraph 7 in the Draft Guidance Note).

5. In this submission we have set out in some detail the background to FWA's decision to include the absorption clause in the model transitional provisions, including the submissions made by Ai Group and other employer representative bodies. We believe that this background leaves no room for doubt about FWA's intentions.

6. We urge the FWO to adopt Ai Group's proposed amendments to the Draft Guidance Note as set out in this submission.

Paragraph 1 – The purpose of FWO Guidance Notes

Paragraph 2 – This Guidance Note

Paragraph 3 – About the Fair Work Ombudsman

7. We have not identified any problems with the content of paragraphs 1, 2 and 3 in the Draft Guidance Note.

Paragraph 4 – History and commencement of modern awards

8. In sub-paragraph 4.9, in the first line, Ai Group proposes that the words *"a number of modern awards"* be replaced with *"most modern awards".* This proposed change is more accurate and is consistent with the wording in sub-paragraph 5.2.

Paragraph 5 – Transitional provisions in modern awards

Paragraph 6 – Model Transitional Provisions

9. We have not identified any problems with the content of paragraphs 5 and 6.

Paragraph 7 – Take-home pay orders and over-award payments

10. We have not identified any problems with the content of sub-paragraphs 7.1 and 7.2.

Take-home pay orders (sub-paras 7.3 to 7.6)

11. We propose the following amendment to sub-paragraph 7.6 to highlight that a "like for like" comparison must be made in terms of working hours and the quantity of work.

"7.6 An employee's 'take-home pay' will be assessed on an overall basis, taking into account that some entitlements may increase, and some may decrease under transitional arrangements.

The intention is to allow FWA to deal with cases in which an employee suffers a reduction in their take-home pay for working the same hours or performing the same quantity of work *[Insert footnote to para 201 in the EM for the FW (Transitional Provisions and Consequential Amendments) Bill 2009.* Take home pay orders are not intended to constrain an employer from taking action (e.g. reorganising roster arrangements) that would otherwise be lawful. *[Insert footnote to para 203 in the EM].*

For more information about take-home pay orders refer to [insert link or reference to FWA]."

Absorption and offsetting of over-award payments (sub-paras 7.7 to 7.11)

12. Ai Group very strongly opposes the draft wording in sub-paragraphs 7.7 to 7.11.

13. The interpretation in this section of the Draft Guidance Note is highly inappropriate and damaging.

14. As drafted, the interpretation will lead to huge problems for employers, including major cost increases which we submit were not intended by FWA or the Australian Government.

15. In preparing the Draft Guidance Note, Ai Group submits that the FWO has misunderstood why the Australian Industrial Relations Commission (AIRC) included the absorption clause in the model transitional provisions.

16. The absorption clause was inserted to adopt the proposal strongly advocated by Ai Group and a number of other employer representative bodies. That is:

- The Award Modernisation Request states that modern awards are not intended to increase costs for employers, or disadvantage employees;
- Employees are protected from disadvantage by take home pay orders, however employers do not enjoy similar protection from increased costs;
- 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;
- 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.

Ai Group's submissions and proposals

17. 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.

18. 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.*

19. *"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.

The submissions of other employer groups

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

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

22. For example, its submission of 28 May 2009, Master Builders Australia (at paras 5.4 and 5.5) said:

"5.4 Because of the provisions in the legislation protecting employee interests, It is only employers who are exposed to increased costs as a result of the award modernisation request. In order to reduce the complexity of the modern award, Master Builders

submits that transitional provisions should only relate to matters which protect employers from increased costs. This will assist in streamlining the proposed consultation process in which Master Builders will actively participate. Accordingly, in this submission we have addressed a number of areas where employers will experience increased costs as a result of the introduction of modern awards.

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."*

23. 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 between Mr Calver of the MBA and Justice Giudice took place:

"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."

24. 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, as proposed by Ai Group, the MBA and several other employer groups.

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

> "6. 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."

26. 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."

27. In its submission of 29 May 2009, the Chamber of Commerce and Industry of WA said (at para 17):

> "**Setting off clauses**
>
> 17. Setting off provisions should also be included in modern awards allowing for the variation of existing contracts of employment to absorb additional costs."

The power of the Tribunal to insert an award provision permitting offsetting

18. Ai Group submits that the Tribunal clearly has the power to insert an award clause allowing employers to offset employee's entitlements and benefits against new award provisions.

19. In the *Victorian Common Rule Award Case,* the AIRC decided[1] to insert the following clause in Victorian common rule declarations:

> "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".

20. The above clause was negotiated and agreed upon between employer groups, including Ai Group, and the Victorian Trades Hall Council, during the conciliation process before Vice President Iain Ross and subsequently endorsed by the Full Bench.

21. Similar to the clause in the Victorian common rule declarations, the clause which the AIRC has inserted into modern awards will have a limited life, and will presumably be removed, along with the other transitional provisions, after 2014.

[1] Decision in the *Victorian Common Rule Case* , 17 August 2004, PR950653.

22. 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.

Union submissions

23. Ai Group submits that there was no serious opposition from the unions to the employers' general absorption proposal. During the proceedings relating to the development of the model transitional provisions 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.

24. The main concern expressed by the unions about the employer's 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.

25. 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)

The offsetting provision in the model transitional provisions

26. The offsetting provision 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."

27. 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."

28. When considered in the context of the submissions made in the case, it is very clear what the meaning of the absorption clause provision is:

- During the transitional period an employer is entitled to absorb any monetary obligation in the relevant modern award into over-award payments;
- There is no requirement for the employer to reach agreement with an employee before absorbing modern award entitlements into over-award payments; and
- There is no requirement for the employer to have entered into an offsetting arrangement with an employee before absorbing modern award entitlements into over-award payments.

29. The above interpretation has been widely communicated to employers by Ai Group and other employer bodies, plus a myriad of lawyers and consultants.

Offsetting clauses in common law contracts

30. Many lawyers advise employers to include offsetting clauses in common law contracts and many employers have done so for staff employed under these contracts (typically salaried, "white-collar" staff).

31. However, employers in the manufacturing, transport, construction and other industries which employ predominantly "blue-collar" workers do not typically have common law contracts in place containing offsetting arrangements, nor are they likely to succeed if they seek to negotiate such arrangements.

32. For factories and construction sites with 50, 500 or 5,000 workers, employees are highly unlikely to agree to absorb any new monetary entitlements arising under modern awards into over-award payments. To suggest that these employers could readily reach 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.

33. 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 during the award modernisation process – not specific "line items" in awards.

Proposed amendments to the Draft Guidance Note

34. Ai Group proposes the following amendments to sub-paragraphs 7.7 to 7.11 in the Draft Guidance Note:

> "7.7 The Model Transitional Provisions provide that:
>
> *"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."*[2]

[2] Clause 2.2 of the Model Transitional Provisions – see also *Award Modernisation Decision* [2009] AIRCFB 800, 2 September 2009 at [19]

7.8 This means that, for example, if an employer was paying $2 more per hour than the minimum wage before 1 July 2010 and the minimum wage was increased by $1 per hour from 1 July 2010, the modern award does not require the employer to pay $2 more than the new minimum wage; they can continue paying the same amount per hour (which would be $1 more than the employee's minimum entitlement).[3] DELETE FOOTNOTE 3

~~7.9 This provision applies in conjunction with well established Court authority concerning when employers can offset over-award payments against other award entitlements.~~

~~7.10 As a general principle, over-award payments can only satisfy entitlements to which the payment is directed.~~

~~7.11 This means, for example, that paying a higher wage rate than the award minimum does not offset penalties or loadings in the award unless it is clear that the parties intended to do so (and in fact, the amount satisfies the entitlements that would otherwise be payable to the employee). However, provided that an employer has properly entered into an offsetting arrangement that makes it clear that over-award payments are in satisfaction of all penalties, wages etc due under the award, then that arrangement can continue to be relied upon to satisfy increases that arise as a result of the commencement of modern awards."~~

Paragraph 8 – The FWO's approach to calculating transitional wages

35. We have not identified any problems with the content of sub-paragraphs 8.1 and 8.2 in the Draft Guidance Note.

Classification translation (sub-paras 8.3 to 8.8)

36. We have not identified any problems with the content of sub-paragraphs 8.3 to 8.8 in the Draft Guidance Note.

[3] ~~Employers should take into account any contractual obligations to maintain over-award payments~~ DELETE

Base rates of pay (sub-paras 8.9 to 8.11)

37. Sub-paragraph 8.11 in the Draft Guidance Note is causing confusion. Several people who have reviewed the Draft Guidance Note and provided feedback to Ai Group (particularly those with little knowledge of construction awards) have interpreting this section as indicating that all-purpose allowances are to be treated as part of the base rate of pay for phasing purposes. This is clearly not the intent.

38. Ai Group proposes that the following sentence be added to the end of sub-paragraph 8.11:

> "Note that all purpose allowances and other allowances do not usually form part of a base rate of pay. The Building and Construction General On-site Award 2010 is an example of an award where a number of allowances do form part of the base rate of pay (see clause 19.3(a)).

39. Also, in the example under sub-paragraph 8.11, Ai Group proposes that the term 'tool allowance' be replaced with the term 'industry allowance' to reduce confusion. Tool allowances in industries outside of construction are typically work-related allowances – some are all-purpose and some are not. It is unusual for a tool allowance to form part of a base rate, as it does in the Building and Construction Industry Modern Award.

Industry allowances (sub-paras 8.12 to 8.16)

40. In sub-paragraph 8.14 it is important that the word *"and"* be deleted at the end of the first dot point. It is not correct that in all cases an industry allowance must be paid to all employees in the relevant industry. This is acknowledged in sub-paragraph 8.15.

Calculation principles (sub-paras 8.17 to 8.27)

41. We have not identified any problems with the content of sub-paragraphs 8.17 to 8.27 in the Draft Guidance Note.

Paragraph 9 – The FWO's approach to loadings and penalties

42. We have not identified any problems with the content of paragraph 9.

Paragraph 10 – The FWO's approach to loadings and penalties for casual employees

43. Many thousands of employers will be faced with an increased casual loading as a result of award modernisation and therefore it is important that employers are able to understand the method of calculating loadings and penalties for casual employees during the transition period.

44. We are concerned about the complexity of the FWO's draft approach and believe that a simpler approach needs to be implemented.

45. This issue is particularly problematic for the on-hire industry where most employees are engaged on a casual basis.

46. In its Award Modernisation Decision of 19 December 2008, the Full Bench said:

> "**[50]** In all the circumstances we have decided to confirm our earlier indication that we would adopt a standard casual loading of 25 per cent. We make it clear that the loading will compensate for annual leave and there will be no additional payment in that respect. Also, as a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate." (Emphasis added)

47. Given the abovementioned new, general rule relating to the interaction between casual loadings and penalties – in a high proportion of cases the casual loading in the pre-modern instrument will be deemed *"not equivalent"* to the casual loading in the modern award under the FWO's draft approach, even in circumstances where the penalty in the pre-modern award and the modern award are identical.

48. We propose that the method of interaction between casual loadings and penalties be disregarded for the purpose of determining whether penalties and loadings are *"equivalent".* We further propose that the method of interaction prescribed in the modern award be used during the transition period. In most cases this will be the method referred to in paragraph 50 of the AIRC's Award Modernisation Decision of 19 December 2008, as set out above.

49. As identified in sub-paragraph 10.1 of the Draft Guidance Note, there are typically two different methods of interaction:

- Both the casual loading and the penalty rate are calculated on the base hourly rate [ie. Base hourly rate + Loading paid on base rate + Penalty paid on base rate]; or
- The penalty rate is calculated on the casually loaded rate [ie. Base hourly rate + loading) x Penalty paid on the base rate].

50. The following example highlights Ai Group's proposed approach:

Example

Pre-modern instrument:

Base hourly rate =	$20 per hour
Casual loading =	20%

Saturday penalty =	Time and one half
Method of interaction =	Penalty is calculated on casually loaded rate

Modern award:

Base hourly rate =	$20 per hour
Casual loading =	25%
Saturday penalty =	Time and one half
Method of interaction =	Casual loading and penalty rate are calculated on base hourly rate

Rates payable to casuals for Saturday work (assuming a 3% wage increase paid on 1 July every year):

1 January 2010 to 30 June 2010 (20% loading)	= ($20 + $4) x 1.5 =	$36
1 July 2010 to 30 June 2011 (21% loading) =	$20.60 + $4.33 + $10.30 =	$35.23
1 July 2011 to 30 June 2012 (22% loading) =	$21.22 + $4.67 + $10.61 =	$36.50
1 July 2012 to 30 June 2013 (23% loading) =	$21.86 + $5.03 + $10.93 =	$37.82
1 July 2013 to 30 June 2014 (24% loading) =	$22.52 + $5.40 + $11.26 =	$39.18
From 1 July 2014 (25% loading) =	$23.20 + $5.80 + $11.60 =	$40.60

51. The above approach is much simpler and more practical than the FWO's draft approach but the end point in July 2014 will of course be the same.

Paragraph 11 – Overtime is not subject to phasing

52. We have some sympathy for the ACTU's view that an overtime penalty is an *"other penalty",* for the purposes of clause A.4 of the model transitional provisions, and hence should be treated in a consistent way to other penalties. However, we recognise the practical difficulties.

53. Phasing is more problematic for overtime worked on an irregular basis.

Paragraph 12 – Allowances are not subject to phasing

54. We propose that sub-paragraphs 12.1 and 12.2 be reworded as follows:

> 12.1 Allowances are not included in the Model Transitional Provisions and are therefore not subject to phasing arrangements unless the allowance is a phased as part of the base rate of pay, eg. an industry allowance (see paragraph 8 above).
>
> 12.2 Other allowances apply in full from 1 January 2010. It is necessary to consider the terms of the modern award to determine how those allowances interact with transitional wages, loadings and penalty rates.