

**SUBMISSION TO FAIR
WORK AUSTRALIA**



**Award Modernisation
Termination of Modernisable Instruments**

 **AUSTRALIAN INDUSTRY GROUP**

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Award Modernisation

Termination of Modernisable Instruments

1. In a Statement of 23 April 2010, the President of FWA announced the process which the Tribunal has decided to follow in terminating modernisable instruments.
2. Ai Group appreciates the relatively lengthy period which the Tribunal has provided to parties (ie. some 10 weeks) to analyse the list of award-based transitional instruments proposed to be terminated.
3. Ai Group has reviewed the list of award-based transitional instruments and has not identified any concerns regarding the termination of any instrument on the list.
4. Item (3)(2) of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Transitional Act) requires that FWA, as soon as practicable after all modern awards have come into operation, terminate any remaining modernisable instruments (other than enterprise instruments).
5. The award modernisation process under Part 10A of the *Workplace Relations Act 1996* came to an end on 31 December 2009 and all modern awards came into operation on 1 January 2010. Accordingly, all modernisable instruments have now come into operation and Item (3)(2) requires that any modernisable instruments which remain in operation must be terminated as soon as practicable.
6. Item 3(4) empowers FWA to establish a process for making decisions to terminate or vary modernisable instruments. Such a process has been determined and announced in the President's Statement of 23 April 2010. Ai Group supports the process.

7. At first glance, a party might believe that there is some conflict between the requirements of Item 3(1) and Item 3(2) of the Transitional Act. However, we submit that the key difference between Item 3(1) and Item 3(2) is that Item 3(2) applies to the circumstance where **all** modern awards have come into operation. That is the circumstance which now exists.

8. Item 3(1), we submit, would have had work to do if **one or some** (but not all) modern awards had come into operation at an earlier time than the point in time when **all** modern awards had come into operation. This situation would have occurred if the Minister had varied the Award Modernisation Request to allow more time for the completion of the award modernisation process. Part 10A of the *Workplace Relations Act 1996* prevented modern awards from coming into operation before 1 January 2010 but permitted them to operate from a later date. Part 10A also gave the Minister the power, by written instrument, to vary the Award Modernisation Request and specify a later time for the completion of the award modernisation process. Such a variation was not made and the award modernisation process was completed on 31 December 2009.

9. Accordingly, we submit that FWA should:
 - a. Consistent with the President's Statement of 23 April 2010, terminate all modernisable instruments on the list issued by FWA, unless a party has made a submission indicating that a particular modernisable instrument should not be terminated and has identified particulars of the grounds;

 - b. Schedule a hearing before a Member of FWA to determine the appropriate course of action where a submission has been received objecting to the termination of a particular modernisable instrument.

10. We submit that FWA should not permit any modernisable instrument to remain in force indefinitely because to do so would offend the requirements of:
 - Item 3(2) of the Transitional Act; and
 - Sections 3(b) and 134 of the *Fair Work Act* which specify that modern awards, the National Employment Standards and national minimum wage orders comprise the safety net for workers covered under the national workplace relations system (not award-based transitional instruments).
11. Award-based transitional instruments are of course transitional in both name and nature. They are not intended to operate indefinitely.
12. If a relevant party is able to identify a legitimate reason why a class of employees should retain award coverage it is open to that party to apply to FWA to vary a modern award under s.158 of the *Fair Work Act* or open to FWA to vary a modern award on its own initiative, if the variation is necessary to achieve the modern award objective.
13. A legitimate reason would not include circumstances where the class of employees has been considered during the award modernisation process and intentionally excluded from the coverage of a modern award.