

Annual Award Wage Review Decision - \$26 per week

Fair Work Australia has decided to increase modern award minimum wages by \$26 per week. This translates into an increase of 69c per hour to modern award wages. The increase will apply from the first full pay period on or after **1 July 2010**.

The increase applies to minimum wages for junior employees, employees to whom training arrangements apply and employees with disability and to piece rates.

Absorption into over-award payments

The increase to modern award minimum rates of pay may be absorbed into over-award payments for Award covered employees.

Employers that have enterprise agreements, collective agreements, certified agreements, AWA or ITEA with their employees will need to apply the provisions of those instruments i.e. where the agreement expressly entitles the employee to the benefit of the adjustment to award wages, then the employer must pass it on to them. If the instrument is silent on the matter then the employer must ensure that the rates of pay under the agreement is no less than the minimum rate of pay for relevant classifications under the modern award.

Allowances

Expense related allowances in modern awards increase from 1 July 2010 if there has been an increase in the applicable index derived from the CPI. If there has not been an increase then there will not be an adjustment. For example, the meal allowance prescribed for work performed during overtime will increase due to the increase in the 'take away and fast food sub-group of the CPI. The vehicle allowance will not increase as there has not been an increase in the private motoring sub-group index. See the relevant modern award for the most recent allowances applicable to your business.

National Minimum Wage and Casual Loading

The National Minimum Wage Order (applicable to award-free employees) provides:

- (i) a National Minimum Wage of \$569.90 per week or \$15 per hour;

- (ii) two special National Minimum Wages for award/agreement free employees with a disability:

- a. for employees with disability whose productivity is not affected a minimum wage of \$569.90 per week or \$15 per hour based on a 38 hour week, and
- b. for employees with disability whose productivity is affected, and who meets the impairment criteria for receipt of a Disability Support Pension, a rate determined under the Supported Wage System.

- (iii) a casual loading for award/agreement free employees of 21 per cent.

Transitional provisions in award wages, penalties and loadings

The Transitional Provisions prescribed in modern awards mean that minimum wages and penalties and loadings will be adjusted not only for the Annual Wage Review increase of \$26 per week, but also by 20% of the difference between pre-modern award and modern award rates.

Where there is a difference between the minimum wages, penalties and loadings applicable under a pre-modern award and the modern award rate then the employer may phase-in the increase or decrease, to the modern rate over the next five years. The transitional provisions are subject to complex formula to determine the actual minimum transitional rates applicable to employees as well as a requirement that employees do not suffer a reduction in 'take home pay.' Consequently, employers need to seek advice before passing on the increases granted under the Annual Wage Review.

Subscribers to Employee Relations Online can download the guide 'Transitional Provisions in Awards – A Guide' for a detailed explanation including examples of how the formula must be applied.

A summary of the requirements of the transitional provisions under modern awards including a commentary appears in this month's Tip of the Month.

Labour Price Index shows wages growth slowed over past year

The ABS Labour Price Index published in March 2010 shows that total hourly rates of pay excluding bonuses increased 2.9% over the past twelve months. In the first quarter of 2010 the increase was only 0.7%. The increases varied significantly between industries. Hourly rates of pay increased 1.8% in the Accommodation and Food Services Industry and 4.8% in Electricity, Gas, Water and Waste services.

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TIP OF THE MONTH: Phasing in modern award wages, penalties and loadings. Does anyone actually understand?

Modern awards commenced on 1 January 2010 and replaced federal awards and notional agreements preserving a state award ("pre-modern awards") made prior to the Fair Work Act. However, not all terms of modern awards commenced on 1 January 2010.

Where there is a difference (either higher or lower) in minimum wages, casual and part-time loadings, evening, weekend and public holiday penalties and shift loadings, the modern rates will be phased in over five (5) years commencing 1 July 2010.

Employers must not pay employees less than the transitional wages, penalties and loadings.

What are the transitional provisions for modern awards?

There are two model clauses of modern awards that prescribe, the transitional provisions:

- Schedule A – Transitional Provisions of modern awards prescribe the phasing-in of minimum wages, casual loadings, shift allowance, evening weekend and public holiday penalties over a 5 year period commencing from 1 July 2010.
- Clause 2 – Commencement and transitional
 - Clause 2.2 of the modern award allows the 'monetary obligations' on employers to be absorbed into over-award payments.
 - Clause 2.4 of the modern award requires the transitional arrangements

are not to result in a reduction in the 'take-home pay' of employees.

Each of those provisions poses significant challenges for employers as the rules regulating each of the provisions, individually and collectively, affect how the employer may pay employees for the work they perform. The aim of this guide is to explain how employers must apply the transitional provisions.

Why are there transitional provisions?

The creation of modern awards such as the Clerks – Private Sector Award 2010, required that Fair Work Australia to take into account the terms and conditions of employment of various federal awards as well as notional agreements preserving state awards (NAPSA) to create the new national modern awards. Inevitably employees across Australia may be advantaged or disadvantaged by the modern award applicable to their employment as they are currently entitled to either more or less than the minimum rates and conditions prescribed in it. In order to minimise the adverse impact on employers from increased costs and on employees from lesser conditions, Fair Work Australia has decided to apply transitional provisions to introduce the full effect of the modern award.

This may be good for employees, but it is potentially a 'minefield' for employers as readers of this guide will soon discover.

A - Calculating Transitional Minimum Wages

Whether you pay minimum or over-award wages (or wages prescribed in an enterprise agreement) you need to understand the rules underpinning the calculation of minimum wages. Unless you can distinguish the minimum rate from the over-award payment then you can never be sure that you are compliant with the law.

First, identify the modern award classification and wage rate that applied to the relevant employee(s) as at 1 January 2010. For the vast majority of employment services employees this will be a classification in the Labour Market Assistance Industry Award 2010.

Secondly, calculate the difference between the pre-modern award rate (pay scale) for the employee's classification (including any applicable industry allowances) and the modern award rate as at 1 January 2010. This amount is preserved as the 'transitional amount.' Employees who are paid as a percentage of the adult rate, such as juniors,

apprentices or trainees, the rate can be found by applying the relevant apprentice or trainee percentage to the relevant adult rate (as at 1 January 2010).

Next, the modern award wage rate that currently applies to the relevant employee(s), including any increases from Fair Work Australia's (FWA) Annual Wage Review, needs to be identified. FWA annual wage reviews take effect on 1 July each year.

Once the transitional amount and the modern award wage rate (including FWA increases) have been identified, a proportion of the transitional amount can then be added to or subtracted from the modern award rate to determine the employee's transitional wage rate for that year.

The following percentages of the transitional amount is added to or subtracted from the modern award rate (\$) that applies from 1 July each year (including any annual wage increases).

First full pay period	Percent of transitional amount
1 July 2010	80%
1 July 2011	60%
1 July 2012	40%
1 July 2013	20%
1 July 2014	0%

Where the modern award rate (including any increase from FWA's annual wage review) is lower, the minimum wage rate is obtained by adding the proportion of the transitional amount.

Where the modern award rate (including any increase from FWA's annual wage review) is higher, the minimum wage rate is obtained by subtracting the proportion of the transitional amount.

If the modern award rate is lower and the transitional amount is equal to or less than the amount of an increase in the modern award minimum wage resulting from FWA's 2010 annual wage review, the increase cancels out the transitional amount and phasing is not required.

Example 1

Jane's pre-modern award wage rate is \$16.00 per hour. Her modern award wage rate on 1 January 2010 is \$18.00 per hour. The "transitional amount" is therefore \$2 (the difference between the old and new wage rates).

On 1 July 2010, 80% of the transitional amount (\$1.60) should be subtracted from the modern award rate (inclusive of FWA's annual wage increase for

2010 i.e. \$18.69) to obtain Jane's minimum wage entitlement for this year.

$\$18.69$ (modern award rate) - $\$1.60$ (80% of the \$2 transitional amount) = $\$17.09$

Therefore, from the first pay period on or after 1 July 2010 Jane's minimum wage rate will be \$17.09.

Example 2

Fred's pre-modern award wage rate is \$18.00 per hour. His modern award wage rate on 1 January 2010 is \$17.00 per hour. The "transitional amount" is therefore \$1 (the difference between the old and new wage rates).

On 1 July 2010, 80% of the transitional amount should be added to the modern award rate (inclusive of FWA's annual wage increase for 2010 i.e. 69c) to obtain Fred's minimum wage entitlement for this year.

$\$17.69$ (modern award rate) + $\$0.80$ (80% of the \$1 transitional amount) = $\$18.49$

Therefore, from the first pay period on or after 1 July 2010 Fred's minimum wage rate will be \$18.49.

Example 3

Lee's pre-modern award wage rate is \$19.50 per hour. His modern award wage rate on 1 January 2010 is \$19.00 per hour. The "transitional amount" is therefore \$0.50 (the difference between the old and new wage rates).

On 1 July 2010 FWA increases the modern award rate by 69c to \$19.69 per hour.

The transitional amount is less than the increase to the modern award and therefore there is no need to apply the formula to obtain a transitional wage or phasing in of the modern award rate.

Therefore, from the first pay period on or after 1 July 2010 Lee's minimum wage rate will be \$19.69.

The same process (using the appropriate "transitional proportion" from the table above) applies to determine the 2011, 2012 and 2013 wage rates.

B - Calculating Transitional Penalties and Loadings

Congratulations if you have read and understood the rules regulating the calculation of transitional minimum award wages. The next step is to understand the calculation of transitional penalties and loadings including casual loadings. In this section, the particular rules depend upon whether the employee(s) entitlement to a modern award

penalty rate, shift, part-time or casual loading arises in one or more of these circumstances:

1. New entitlements
2. Identical entitlements,
3. Difference in entitlements that are
 - a. Equivalent
 - b. Not equivalent

Each of these is explained below.

New entitlements

Where an employee did not have a modern award loading / penalty entitlement before 1 January 2010 (e.g. because they were award-free), the modern award loading / penalty is phased in as a new entitlement from the first pay period on or after 1 July 2010 (in 20% increments each year until 2014).

Example – New entitlement

Nicky is an administrative employee at a post-secondary educational service. She did not have an entitlement to a Sunday penalty rate prior to 1 January 2010. Nicky's modern award (the Educational Services – Post-secondary Education) Award 2010 provides for double time on Sundays (ordinary time rate plus a penalty of 100%) with a minimum payment for four hours' work.

From the first full pay period on or after 1 July 2010 Nicky would be entitled to a penalty rate of 20% (20% of 100%) with a minimum payment for four hours' work on Sunday.

From the first full pay period on or after 1 July 2011 Nicky would be entitled to a penalty rate of 40% (40% of 100%), with a minimum payment for four hours' work on Sunday.

Identical entitlements

Where an employee had an entitlement to a loading / penalty rate before 1 January 2010 that is exactly the same as the modern award loading / penalty entitlement, there is no need to phase in differences (because there are none) and the modern award loading / penalty applies in full from 1 January 2010.

Example – Identical entitlement

Ann had a pre-modern award entitlement under the Community Employment Training and Support Services Award to a 20% penalty rate (paid on the base rate that applied to her classification) for working ordinary hours after 8pm on a week day.

The Labour Market Assistance Industry Award 2010 is the modern award that now applies to Ann's employment. The modern award also provides employees with a 20% penalty (paid on the base

rate that applied to her classification) for ordinary hours worked after 8pm on a week day.

As the penalty rates are identical the modern award penalty applies in full from 1 January 2010.

Difference in modern award and pre-modern award entitlements

Where an employee had an entitlement to loadings / penalty rates before 1 January 2010 that are different in any way from the loading / penalty entitlements in the modern award, the phasing arrangements in the model transitional provisions apply. In this situation the model transitional provisions provide different methods to phase penalties / loadings, depending on whether or not the entitlement(s) in the pre-modern award and the entitlement(s) in the modern award are 'equivalent.'

Each penalty and / or loading entitlement needs to be considered separately. This is because the model transitional provisions apply in relation to 'a particular loading or penalty'. This view follows the reasoning of the Australian Industrial Relations Commission (AIRC) which explicitly rejected proposals to adopt an overall or aggregate approach to transitional arrangements.

(a) *Deciding when entitlements are "equivalent"*

The model transitional provisions do not define "equivalent".

The Fair Work Ombudsman (FWO) considers that for a pre-modern award loading / penalty to be "equivalent" to a modern award entitlement, the percentage or amount of the loading / penalty would be different (e.g. modern award 50% and pre-modern award 25%) but must apply:

- (i) for the same purpose;
- (ii) for the same time periods; and
- (iii) in the same way.

FWO considers that a pre-modern award and modern award loading / penalty apply in the same way if the entitlements are both:

- A. paid at the same frequency, such as per hour or per shift; and
- B. paid as a percentage of the same amount (e.g. both penalties are paid as a percentage of the employee's classification rate, rather than as a percentage of a different amount or paid as a flat dollar amount).

(b). Phasing of penalties / loadings which are equivalent

If the pre-modern award loading / penalty rate is “equivalent” to the modern award loading / penalty rate the model transitional provisions provided that the following approach applies:

The difference between the two loading / penalty rates is calculated and preserved as a “transitional percentage”.

A proportion of the transitional percentage is calculated each year as follows:

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

Where the modern award loading / penalty is higher, the penalty rate is obtained by subtracting the proportion of the transitional percentage.

Where the modern award loading / penalty is lower, the penalty rate is obtained by adding the proportion of the transitional percentage.

Example – Different but equivalent entitlement

Wendy had a 50% pre-modern award penalty entitlement under the Hotel Employees (State) Award NAPSA for working ordinary hours on a Saturday.

The Hospitality Industry (General) Award 2010 is the modern award that now applies to Wendy's employment. The modern award provides employees with a 25% penalty for ordinary hours worked at any time on a Saturday.

Both the pre-modern award entitlement and the modern award entitlement are paid on Wendy's base rate of pay. These penalty rates are equivalent because they are:

- A paid at the same frequency (per hour)
- B paid as a percentage of the same amount (Wendy's base rate of pay), but,
- C the entitlements are different percentage amounts (50% in the pre-modern award and 25% in the modern award).

(c). Phasing of penalties / loadings which are not equivalent

If pre-modern award and modern award penalty rates are not “equivalent”, the following approach applies:

Loadings / penalty rates from a modern award are phased in from zero in five instalments of 20% as follows:

First full pay period	Percent of modern award loading / penalty
1 July 2010	20%
1 July 2011	40%
1 July 2012	60%
1 July 2013	80%
1 July 2014	100%

Pre-modern award loadings / penalty rates are phased out to zero in five instalments of 20% as follows:

First full pay period	Percent of modern award loading / penalty
1 July 2010	80%
1 July 2011	60%
1 July 2012	40%
1 July 2013	20%
1 July 2014	0%

This may result in a pre-modern award penalty rate being ‘phased out’ at the same time that a modern award penalty is ‘phasing in’. This means that two different rates may apply for the same time period.

Applying this methodology will ensure that the correct minimum is paid irrespective of whether the entitlements are “equivalent”. Therefore, if it is not clear whether penalties / loadings are “equivalent”, this above methodology should be adopted.

Example – Different but not equivalent

Skye is a full-time hairdresser in Victoria.

Under the Hair and Beauty Industry Award 2010 Dianna is entitled to a loading of 33% for ordinary hours of work on a Saturday, paid on the base rate of pay. Skye's pre-modern award entitlement under the Hairdressing and Beauty Services – Victoria 2001 was an additional \$6.80 per hour for ordinary hours on a Saturday.

These entitlements are not “equivalent” because they do not apply in the same way; the pre-modern award penalty is paid as a dollar amount and the

modern award penalty is paid as a percentage of Dianna's base rate. Therefore, the modern award penalty is "phased in" and the pre-modern award penalty is "phased out".

From the first full pay period on or after 1 July 2010 Skye is entitled to 20% of the modern award penalty and 80% of the pre-modern award penalty.

\$5.44 per hour (80% of \$6.80) + 6.6% penalty on the base rate of pay per hour (20% of 33%)

From the first full pay period on or after 1 July 2011 Dianna is entitled to 40% of the modern award penalty and 60% of pre-modern award penalty.

\$4.08 per hour (60% of \$6.80) + 13.2% penalty on the base rate of pay per hour (40% of 33%)

The same process applies (with the appropriate phasing percentages set out in the tables above to determine the penalty rates for 2012 and 2013.

C – Absorption of minimum increases in modern award wages, penalties and loadings into over award payments

An employer may absorb the increases (if any) against an over award payment to the employee. The model transitional provisions provide:

"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."

This means that 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).

An employer that pays an employee an amount in excess of the transitional award wages and / or the transitional penalties and loadings satisfies the minimum requirements of the modern award. Therefore the employer does not need to calculate and apply the transitional provisions.

Are there any special requirements that must be met?

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

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). If 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, that arrangement can continue to be relied upon to satisfy increases that arise as a result of the commencement of modern awards. In addition, employers can agree with their employees to enter into such an arrangement with respect to future payments.

An Individual Flexibility Arrangement would need to be agreed to properly 'offset' award entitlements against over-award payments unless an enterprise agreement is in place.

What about minimum rates, penalties and loadings in enterprise agreements?

Although an enterprise agreement and agreement based transitional instruments (AWA, ITEA, certified agreements, State employment agreements) override modern awards whilst they are in operation, the base rate of pay of an employee to which the agreement applies must be no less than the base rate of pay that would have been payable under the relevant modern award or national minimum wage. This means employees under enterprise agreements and agreement based transitional instruments must also be paid no less than the transitional wages prescribed under the relevant award.

There is no requirement to observe the transitional penalties and loadings under modern awards.

D – No reduction in take home pay

The transitional provisions prescribing the phasing in of pay related terms is subject to the requirement that employees do not suffer reductions in take-home pay.

Take-home pay is defined as the pay an employee actually receives including wages and incentive-based payments, and additional amounts such as allowances and overtime; but disregarding the effect of any deductions that they have authorised such as salary sacrifice. It is not an employee's pay net of PAYG tax.

This requirement effectively means that an employee receiving a higher rate of pay than the modern award rate cannot have their pay reduced even though the award minimum rate may reduce during the transition period.

Take-home pay order

Fair Work Australia may make a take-home pay order where an employee suffers a reduction in take-home pay as a result of the making of the modern award or the operation of any transitional arrangements in it. The order may be made requiring the payment of an amount or amounts to the employee or employees that Fair Work Australia considers appropriate to remedy the situation.

An employee suffers a modernisation-related reduction in take-home pay if, and only if:

- a. modern award starts to apply to the employee when the award comes into operation; and
- b. the employee is employed in the same position as (or a position that is comparable to) the position he or she was employed in immediately before the modern award came into operation; and
- c. the amount of the employee's take-home pay for working particular hours or for a particular quantity of work after the modern award comes into operation is less than what would have been the employee's take-home pay for those hours or that quantity of work immediately before the award came into operation; and
- d. that reduction in the employee's take-home pay is attributable to the award modernisation process.

Do the transitional provisions apply to new employers and employees?

The phasing arrangements in the model transitional provisions apply to employers and employees in the national system to which the modern award applies. This includes cases where the employer establishes its business after the commencement of modern awards on 1 January 2010.

In this situation, the employer must consider what pre-modern award entitlements (i.e. transitional minimum wage instrument and / or award based transitional instrument) would have covered them and their employees, had they been in business before 1 January 2010. Similarly, the arrangements also apply to new employees that commenced employment on or after 1 January 2010.

Special rules for State referral employees in NSW, QLD, SA and Tasmania

Some employers are new to the national system because of a referral from a State government (e.g. non-trading corporations, sole traders and partnerships in New South Wales, Queensland, Tasmania and South Australia). These people moved into the national system on 1 January 2010.

Different rules apply to these employers and their employees, depending on whether the employer's business and / or the type of work that its employees perform were covered by a State award immediately before 1 January 2010.

If the business and / or the type of work that the employee does was not covered by a State award immediately before 1 January 2010, the wages in the modern award apply in full from 1 January 2010 and the penalties / loadings will be phased in from zero (in five increments of 20% over four years) from the first full pay period on or after 1 July 2010.

If the business and the type of work that the employees do was covered by a State award immediately before 1 January 2010, the terms and conditions in the State award continue to apply in full until 31 December 2010 (as a "Division 2B State award"). The modern award will start to apply to these employees from 1 January 2011.

What about overtime payments and expense allowances?

The transitional provisions in modern awards do not cover any other entitlements in the modern award, including allowances (other than industry allowances) and overtime. This means that those entitlements took effect in full from 1 January 2010.

Conclusion and lessons

The transitional provisions prescribing the minimum wages, penalties and loadings are ludicrous. They are designed by people who don't have to manage a payroll and have little appreciation of the amount of additional administration that they have created for employers.

The lesson is simple. If you are paying over the modern award rates and in excess of the pre-modern award rates then you are probably compliant. If you pay minimum award rates then you must audit your current payroll and adjust payments using the formula described above.

Get assistance from Maguire Consulting wherever you are unsure or would prefer us to guide you.