



IN THE FAIR WORK COMMISSION

**4 yearly review of modern awards – Broadcasting and
Recorded Entertainment Award [MA000091]**

AUSTRALIAN DIRECTORS GUILD LTD

PO BOX 211, ROZELLE. NSW. 2039.

TEL: 1300 539639

www.adg.org.au

Australian Directors Guild

Outline of Submissions and Responses to other parties on the Exposure Draft of 25 November 2016

1. The Australian Directors Guild represents the professional and industrial interests of Australian Screen Directors in motion picture production for traditional media such as film, cinema and television (cable and broadcast) and alternative and developing digital media including internet based streaming (Netflix, HBO, Twitter, Internet Gaming, YouTube.) The registration of the ADG under the Fair Work (Registered Organisations) Act 2009 was approved by Vice President Hatcher on 18 February 2015¹. Prior to this the ADG existed and operated as an incorporated body representing screen directors since the early 1980s. The MEAA and ADG both have eligibility to represent the industrial interests of Directors albeit that ADG has majority membership with approximately 900 members.

2. Our members are engaged as Directors on the production of motion pictures including commercials, television shows both serials and others, movies and major productions covering all genres including comedy, drama, musical, live to air, major events, documentaries, informationals and reality TV shows.

3. Our membership is defined primarily by

(a) the product they produce, sound and images that are displayed or projected rather than by the medium on or in which it is stored or transmitted.

(b) the director's responsibility for creative control over all aspects of a production including the integration of the work and talent of performers and creative personnel, the implementation of a budget allocated by a producer and the direction of all cast and crew and any other creative talent and

(c) the requirement to have a minimum of twenty minutes of credited screen time.

4. ADG has previously requested an extension of time to lodge an outline of submissions in relation to the review by the Fair Work Commission of the Broadcasting and Recorded Entertainment Award but has not received any response. Accordingly this submission outline will also provide a response to the BREA exposure draft released on 25 November 2016 and the submissions to date of various other parties.

5. At this time ADG is not seeking any specific amendments to the current award but does have substantial concerns with and formally opposes some of the changes proposed by other parties and some of the alterations proposed in the exposure draft. The ADG's concerns and submissions at this stage are in relation to only the General Section and the Motion Picture Production Sections of the award. To be clear the ADG opposes all the SPA proposals.

6. ADG submits that in conducting the review of BREA the Commission and the parties need to have particular regard to those provisions of the Fair Work Act 2009 dealing with the modern award review process, previous relevant decisions of the Commission and its predecessor bodies and the nature and the history of the employment arrangements in the industry. The Commission has

¹ Australian Directors Guild Limited (D 2013/135) [2015] FWC 1174

considered the role and scope of powers in a number of decisions relating to the conduct of the 4 Yearly Review Of Modern Awards. It is not proposed to go them at this stage the most relevant being *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues*.² Contrary the expectations of some the 4 Yearly Award modernisation review is not an opportunity to reduce conditions of employment or to drag out or re-run ancient lost causes.

7. The Commission has made extensive observations concerning the conduct and scope of the review. These are paraphrased below:

Each modern award must be considered in its own right albeit that this does not prevent the Commission from reviewing two or more awards at the same time. The Review must be conducted by a Full Bench

The Commission has access to its usual procedural powers including the capacity to inform itself as it sees fit.

The modern award objective (Section 134 refers) is central to the review and the Commission must take into account the particular considerations identified in Section 134 albeit that no particular primacy is attached to any of the considerations and not all considerations will be relevant to a particular proposal to vary a modern award.

*The Commission's task is to balance the various considerations in Section 134 and ensure that modern awards **together with the NES** provide a fair and relevant minimum safety net of terms and conditions.*

A party seeking to vary a modern award in the context of the review must advance a merit argument in support of the proposed variation. A substantive case is required and the more significant the change in terms of the impact or a lengthy history of particular award provisions the more detailed the case must be. There must be an identifiable change in circumstances.

A modern award may contain terms that supplement the NES subject to no detriment to an employee in any respect when compared to the NES.

The Commission will have regard to the relevant historical context and will take into account previous decisions relevant to any contested issues and the context of those decisions.

*There may be **no one** set of provisions in a particular modern award which can be said to provide a fair and relevant minimum safety net of terms and conditions.*

The application of the modern awards objective may result in different outcomes between modern awards.

8. Consistent with the above the ADG submits that the fair and relevant minimum safety net of terms and conditions is provided by the combination of both the modern award and the NES. Whilst a modern award must contain minimum rates of pay there is no obligation or requirement that it can only contain minimum employment conditions or only reflect the minimum pay rates. The requirements as to content are set out in section 139. The extent to which the NES contributes to the

² Four yearly review of modern awards[2014] FWCFB 1788

minimum safety net in the context of the motion picture production and particularly the employment of Directors is a matter for judgement. Due to the industry prevalence of predominately intermittent, limited duration (5 weeks- 40 weeks) and largely non-continuous employment it can be argued that the service related elements of the NES do not provide the accepted elements the safety net to Directors and accordingly the applicable modern award will differ significantly from other modern awards in some of the accepted content.

9. In addition to the 4 yearly review the Commission also has powers to vary a modern award to remove an ambiguity or uncertainty or to correct an error. A retrospective variation can only be made to remove ambiguities or correct errors and when the Commission is satisfied that exceptional circumstances apply. Section 160 refers

10. Special provisions also apply to limit the capacity of the Commission to reduce the coverage of a modern award.

11. Against this background the ADG makes the following submission and response on both the exposure draft and specific proposed variations being advanced by other parties in relation to the General and Motion Picture Production sections of the award.

Calculation of Overtime by reference to minimum rate of pay or the ordinary hourly rate

12. The ADG notes various proposals to change the content of the award in relation to the calculation of overtime particularly to specify that overtime is payable only at the *minimum rate of pay for a classification* or at the *ordinary hourly rate* so defined and to introduce a provision that overtime is payable on a daily basis. Such an approach is inconsistent with the history and content of the Motion Picture Production Section of the existing award and the provisions of the earlier Motion Picture Production Award.

13. The industry is unique as it operates on a standard working week of 50 hrs, well in excess of the NES standard of 38 hours, minimum daily hours of 10, set periods of high intensity duty and limited duration engagements which limit the effectiveness and opportunity to use averaging of hours and for that matter accrued leave or TOIL.

14. The manner of payment and the calculation of overtime is set out in clauses 76 and 77. Overtime is already calculated on a daily basis rounded to the nearest quarter of an hour if more than 5 minutes is worked. The proposed variations are inconsistent with the current provisions in clause 77.2 and they are also inconsistent with the wording in the exposure draft at clause 81.2 which refer to overtime being payable on the employees gross agreed remuneration. A similar provision was found in the earlier Motion Picture Award. The current proposal would result in a significant reduction in pay.

15. In 2009 SPAA unsuccessfully sought changes to the then award provisions relating to working hours and overtime including restrictions on eligibility for overtime and penalties the claims were rejected by the Award Modernisation Full Bench.

“[16] The Screen Producers Association of Australia (SPAA) put forward a number of proposals in relation to the Broadcasting and Recorded Entertainment Award 2010.¹ They included a suggestion that provision for a 40 hour week should be maintained until 31 December 2014. We do not think it is appropriate to retain provision for a 40 hour week. A 38 hour week has been standard throughout the award system for many years. Where the 40 hour week has remained employers have benefited. As well, the National Employment Standards (NES) provide for a standard 38 hour week and we are reluctant to delay its implementation for a small number of employees who have not yet received the benefit of it.

[17] SPAA also proposed that current award exemptions from hours of work, penalty rates and overtime provisions for specified classifications should be retained until 31 December 2014. There was no persuasive basis advanced for a departure from the model phasing schedule, which will apply to increases in loadings and penalties for the classes of employee concerned. A further proposal for maintaining special hours flexibility in relation to the production of documentaries is rejected. To some extent, however, the matters at issue seem capable of being addressed through the award flexibility provisions.”³ (See 2009 AIRCFB 943 Procedure for carrying out award modernization process Request from the Minister for Employment and Workplace Relations) Copy attached

Ambiguity Errors and Inconsistencies.

16. It is apparent that there are a range of relatively minor ambiguity errors and inconsistencies in the award as currently drafted. In some cases these reflect the variety of the various industries included, the multiple different classification structures introduced into the overarching single or umbrella structure and a lack of appreciation of the actual industry practice both at the time the award was initially made and by the authors of the exposure draft. In this regard there appears to be merit in the Commission convening a further full day conference of all parties to clarify and consolidate issues.

17. The apparent error limiting prescheduled overtime to a maximum of two hours a day in clause 76.3 or proposed exposure draft clause 80.3 could be retrospectively corrected as it represents a provision not amended at the time of the introduction of the modern award and the 38 hrs week. Subject to the agreement of the Commission and other parties the reference to 2 hours would be deleted and replaced with 2.4 hours or 2 hours and 24 minutes. The industry practice is to not apply the two hour limit and to have pre scheduled overtime up to 2.4 hrs. There does not appear to be any financial consequence.

18. ADG understands that the General and Motion Picture Production section of the award applies to Directors whose industrial interests are represented by ADG. We are currently seeking clarification on the application of the Television Broadcasting Section and reserve the right to make submissions at a later date.

Australian Directors Guild

13th February 2017.

³ [2009] AIRCFB 943 Procedure for carrying out award modernization process Request from the Minister for Employment and Workplace Relations

[2009] AIRCFB 943



DECISION

Workplace Relations Act 1996

s.576E—Procedure for carrying out award modernisation process

Request from the Minister for Employment and Workplace Relations—28 March 2008

Award Modernisation

(AM2008/25 – 63)

JUSTICE GIUDICE, PRESIDENT
VICE PRESIDENT LAWLER
VICE PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT HARRISON
SENIOR DEPUTY PRESIDENT ACTON
COMMISSIONER SMITH

MELBOURNE, 3 DECEMBER 2009

[1] This decision deals with award modernisation and in particular the transitional provisions to be included in the modern awards which were made in Stage 3 of the process. The term “transitional provisions” refers to provisions included in a modern award which provide for the transition from pre-modern award terms and conditions of employment to the terms and conditions contained in the modern award. This decision should be read in conjunction with earlier decisions and statements concerning award modernisation and in particular the decision of 2 September 2009 concerning the transitional provisions for priority and Stage 2 modern awards,² the decision of 4 September 2009 concerning the making of the Stage 3 modern awards³ and the statement of 22 September 2009 concerning the transitional provisions for Stage 3 and Stage 4 modern awards.⁴

[2] In its decision of 2 September 2009 the Commission decided upon model transitional provisions. In its decision of 4 September 2009 the Commission made the Stage 3 modern awards but reserved for later consideration the transitional provisions to be included in them. In its statement of 22 September 2009 the Commission indicated that the model provisions would form the basis of transitional arrangements for Stage 3 (and Stage 4) modern awards and announced a process for finalising the transitional arrangements for Stage 3 awards. In doing so the Commission encouraged the parties to confer with a view to agreement, but acknowledged that it was unlikely that all matters would be agreed. The program for written submissions concluded on 6 November 2009. We deal with some matters of a general nature, a number of matters relevant to particular awards and indicate the transitional arrangements which will be included in each of the Stage 3 awards.

[3] The model transitional provisions include, firstly, a model commencement clause and, secondly, a model phasing schedule. In summary the effect of the provisions is that while a modern award comes into operation on 1 January 2010, the new classifications and minimum wages do not commence until the first pay period on or after 1 July 2010. The phasing schedule contains detailed arrangements for phasing-in changes in minimum wages and loadings in five equal instalments concluding on 1 July 2014. For ease of reference we set those provisions out as Attachment A to this decision. The attachment includes some alterations in the model provisions which we refer to later.

GENERAL MATTERS

[4] We received a number of submissions seeking a delay in the commencement of particular provisions until 1 January 2015. To take an example, the Queensland Department of Education and Training submitted that there should be a review of apprentice wages and conditions of employment and training. It proposed that pending the result of such review any currently applying provisions contained in orders made by the Queensland Industrial Relations Commission which are more beneficial than the modern award provisions should continue to apply until 1 January 2015. To take another example, Business SA and the Australian Federation of Employers and Industries (AFEI) submitted that where a modern award requires an employer to make superannuation contributions on behalf of an employee while the employee is on workers' compensation or unpaid leave, employers not previously covered by such a provision should be exempt from the requirements until 1 January 2015. AFEI also proposed that employees who are currently award free should not be entitled to penalty rate provisions until 1 January 2015.

[5] We have given consideration to all of these submissions. We have decided, however, not to depart from the basic principles which underpin the model provisions, namely: only certain provisions identified in our decision of 2 September 2009 should be subject to transitional provisions and the transitional provisions should generally provide for phasing-in over the five year transitional period. While there may be departures we do not think they are warranted in any of the cases in which they have been sought. We mention, in case there is any doubt, that in relation to employees who are not presently covered by an award but who will be covered by a modern award, loadings and penalty rates can be phased-in in accordance with the model phasing schedule. We deal with this matter when we deal with some technical issues.

[6] Business SA sought a delay in the commencement of part-time provisions in modern awards until 1 July 2010. As we understand it this proposal is not limited to Stage 3 awards. We are reluctant to make a general change of such significance in the transitional arrangements. The priority modern awards were made almost 12 months ago. Questions relating to part-time employment have been dealt with in the consultations which preceded the making of a large number of awards and in the proceedings dealing with transitional arrangements for priority and Stage 2 modern awards. Business SA made similar submissions in the latter proceedings and they were taken into account in reaching the overall decision. We do not intend to depart from the conclusions reached in that decision.

[7] Business SA also sought some clarification on how modern award provisions will affect existing employees. In the absence of specific transitional provisions to the contrary, all employees will be covered by the provisions of modern awards once the provisions commence to operate. Most provisions will commence in January 2010, subject to the transitional arrangements.

[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.

[10] We turn to the position of employees covered by enterprise agreements. The starting point for the operation of each of the phasing arrangements in the model phasing schedule is identified by reference to legal obligations which existed immediately prior to 1 January 2010. A standard formulation is used in cl.A2.1, A3.1, A5.1 and A6.1. It has been pointed out that these provisions do not deal with the situation in which an employee was covered by an enterprise agreement made after 1 July 2009 under the *Fair Work Act 2009* (Fair Work Act). We shall amend the model schedule by adding the words “or an enterprise agreement” after the words “agreement-based transitional instrument” in cl.A2.1(b), A3.1(b), A5.1(b) and 6.1(b).

[11] In the model phasing schedule, the starting point for the operation of the phasing arrangements in relation to casual loadings is described as the transitional default casual loading. As has been pointed out, the loading for many casuals is contained in a pay scale. We shall amend cl.A5 and A6 to include a reference to a “transitional minimum wage instrument.” That term is defined in item 5(3) of Schedule 9 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Act) to include a transitional APCS and the transitional default casual loading.

[12] In the remainder of this decision we deal with a number of the submissions advanced in relation to particular modern awards.

THE STAGE 3 MODERN AWARDS

[13] The Australian Ski Areas Association (ASAA) made several submissions in relation to the *Alpine Resorts Award 2010*.⁵ Consistent with our earlier comments the model provisions will be included in the award. There are two matters requiring specific attention. ASAA submitted that a number of the New South Wales awards applying in the industry are preserved collective state agreements pursuant to cl.10 of Schedule 8 to the *Workplace Relations Act 1996* (WR Act) and not award-based transitional instruments. ASAA identified three such agreements. It proposed an addition to the phasing schedule to deal with the situation.

[14] We accept that the awards in question are preserved collective State agreements pursuant to cl.10 of Schedule 8 to the WR Act. They also became collective agreement-based transitional instruments pursuant to cl.2(5) of Schedule 3 to the Transitional Act on 1 July 2009. We note that *enterprise* preserved collective State agreements are enterprise instruments and not included in the Part 10A modernisation process but are to be dealt with separately.⁶ As we understand the provisions, however, preserved collective state agreements which are not enterprise ones are included in the Part 10A process. While we received no detailed submissions on the point, it seems that some of the awards referred to by ASAA are not enterprise preserved collective state agreements. We shall therefore include a reference to preserved collective State agreements in the phasing schedule as proposed.

[15] ASAA also raised some questions relating to the rates of pay for snowsports instructors. Those questions are more appropriately dealt with by an application to vary the award. If there is substantial agreement by those covered by the award an application may be able to be dealt with before the end of the year.

[16] The Screen Producers Association of Australia (SPAA) put forward a number of proposals in relation to the *Broadcasting and Recorded Entertainment Award 2010*.⁷ They included a suggestion that provision for a 40 hour week should be maintained until 31 December 2014. We do not think it is appropriate to retain provision for a 40 hour week. A 38 hour week has been standard throughout the award system for many years. Where the 40 hour week has remained employers have benefited. As well, the National Employment Standards (NES) provide for a standard 38 hour week and we are reluctant to delay its implementation for a small number of employees who have not yet received the benefit of it.

[17] SPAA also proposed that current award exemptions from hours of work, penalty rates and overtime provisions for specified classifications should be retained until 31 December 2014. There was no persuasive basis advanced for a departure from the model

phasing schedule, which will apply to increases in loadings and penalties for the classes of employee concerned. A further proposal for maintaining special hours flexibility in relation to the production of documentaries is rejected. To some extent, however, the matters at issue seem capable of being addressed through the award flexibility provisions.

[18] The AFEI noted an error in one of the allowances in the *Cemetery Industry Award 2010*.⁸ This should be dealt with by an application to vary the award. Alternatively, if the alteration has the agreement of the major parties, it could be dealt with as a residual variation.

[19] The Association of Independent Schools proposed some special transitional provisions in modern awards applying to schools and post-secondary education employees. While we have decided not to depart from the model provisions, we point out that the new salary structures and rates in the awards will not commence to operate before 1 July 2010.

[20] In relation to the *Professional Employees Award 2010*⁹ the Association of Professional Engineers, Scientists and Managers, Australia (APESMA), sought a number of additional transitional arrangements. First, it sought the continuation of some provisions specific to a named employer. We have generally not retained conditions applicable to specific employers, even on a transitional basis, as they rarely constitute part of the safety net. It would not be appropriate to make an exception in this case. Such matters are capable of being dealt with by agreement. Secondly, APESMA sought special transitional provisions related to overtime and public holiday penalty rates. We note that cl.18.3 and 18.4 of the *Professional Employees Award 2010* provide a system of compensation for work in excess of ordinary hours. APESMA seeks to preserve the terms of Notional Agreements Preserving State Awards (NAPSAs) which provide that hours worked in excess of ordinary hours attract penalty rates for a period of five years. This would be inconsistent with the terms of the modern award, as APESMA concedes. The modern award provision should be implemented. APESMA also sought to preserve until 31 December 2014 a vehicle allowance provision applying in one of the pre-reform awards. The provision operates on the basis of a monthly allowance rather than a rate per kilometre. We do not see any justification for a departure from the model provisions. Finally, APESMA also seeks the continuation of award benefits for information technology employees who, it is contended, will become award free. If a class of employees covered by a pre-reform award ends up not being covered by a particular modern award, that is a matter which is capable of being dealt with when Fair Work Australia considers whether the pre-reform award in question should be set aside. In our view that is the appropriate forum in which to deal with the matter.

[21] A number of matters arise in relation to the *Registered and Licensed Clubs Award 2010* (the Clubs Modern Award).¹⁰ There were few objections to the inclusion of the model provisions in the Clubs Modern Award. The New South Wales Branch of the Liquor, Hospitality and Miscellaneous Union (LHMU) opposed the inclusion of the model provisions. There was a modification of the model provisions sought to reflect special provisions in relation to South Australia, agreed between Clubs South Australia and the South Australian Branch of the LHMU. Further, the Club Managers' Association of Australia proposed a transitional provision dealing only with managers, which we take to be a modification of the model provisions. We shall include the model provisions in the award, but modified to

include the agreed arrangements in respect of South Australia, consistent with our decision of 2 September 2009.¹¹ We have not included the special provisions sought for managers. They were not supported by any other interested party and seem unnecessary since the phasing schedule operates with the same effect.

[22] We shall include the model commencement and transitional clause in all of the Stage 3 awards. We have also decided to include the model phasing schedule in all of the Stage 3 awards except the *Dredging Industry Award 2010*.¹² While in some cases the phasing schedule may receive little or no use we consider it desirable to include it unless it is clear that it is not needed. The awards will be varied in due course, where relevant in conjunction with any residual variations.

BY THE COMMISSION:

PRESIDENT

Attachment A to the Full Bench decision of 3 December 2009

Model Transitional Provisions

1. By renaming clause 2 as “Commencement and Transitional”.

2. By inserting the following in clause 2:
 - 2.2 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.

 - 2.3 This award contains transitional arrangements which specify when particular parts of the award come into effect. [Where the phasing schedule is to be included in the award the following text to be added] Some of the transitional arrangements are in clauses in the main part of the award. There are also transitional arrangements in Schedule A. The arrangements in Schedule A deal with:
 - minimum wages and piecework rates

 - casual or part-time loadings

 - Saturday, Sunday, public holiday, evening or other penalties

 - shift allowances/penalties.

 - 2.4 Neither the making of this award nor the operation of any transitional arrangements is intended to result in a reduction in the take-home pay of employees covered by the award. On application by or on behalf of an employee who suffers a reduction in take-home pay as a result of the making of this award or the operation of any transitional arrangements, Fair Work Australia may make any order it considers appropriate to remedy the situation.

 - 2.5 Fair Work Australia may review the transitional arrangements in this award and make a determination varying the award.

2.6 Fair Work Australia may review the transitional arrangements:

- (a) on its own initiative; or
- (b) on application by an employer, employee, organisation or outworker entity covered by the modern award; or
- (c) 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; or
- (d) in relation to outworker arrangements, on application by an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the arrangements relate.

3. By adding a new Schedule A to the award as follows:

SCHEDULE A—TRANSITIONAL PROVISIONS

A.1 General

A.1.1 The provisions of this schedule deal with minimum obligations only.

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.

A.2 Minimum wages – existing minimum wage lower

A.2.1 The following transitional arrangements apply to an employer which, immediately prior to 1 January 2010:

- (a) was obliged,
- (b) but for the operation of an agreement-based transitional instrument or an enterprise agreement would have been obliged, or
- (c) if it had been an employer in the industry or of the occupations covered by this award would have been obliged

by a transitional minimum wage instrument and/or an award-based transitional instrument to pay a minimum wage lower than that in this award for any classification of employee.

A.2.2 In this clause minimum wage includes:

- (a) a minimum wage for a junior employee, an employee to whom training arrangements apply and an employee with a disability;
- (b) a piecework rate; and
- (c) any applicable industry allowance.

A.2.3 Prior to the first full pay period on or after 1 July 2010 the employer must pay no less than the minimum wage in the relevant transitional minimum wage instrument and/or award-based transitional instrument for the classification concerned.

A.2.4 The difference between the minimum wage for the classification in this award and the minimum wage in clause A.2.3 is referred to as the transitional amount.

A.2.5 From the following dates the employer must pay no less than the minimum wage for the classification in this award minus the specified proportion of the transitional amount:

First full pay period on or after	
1 July 2010	80%
1 July 2011	60%
1 July 2012	40%
1 July 2013	20%

A.2.6 The employer must apply any increase in minimum wages in this award resulting from an annual wage review.

A.2.7 These provisions cease to operate from the beginning of the first full pay period on or after 1 July 2014.

A.3 Minimum wages – existing minimum wage higher

A.3.1 The following transitional arrangements apply to an employer which, immediately prior to 1 January 2010:

- (a) was obliged,
- (b) but for the operation of an agreement-based transitional instrument or an enterprise agreement would have been obliged, or
- (c) if it had been an employer in the industry or of the occupations covered by this award would have been obliged

by a transitional minimum wage instrument and/or an award-based transitional instrument to pay a minimum wage higher than that in this award for any classification of employee.

A.3.2 In this clause minimum wage includes:

- (a) a minimum wage for a junior employee, an employee to whom training arrangements apply and an employee with a disability;
- (b) a piecework rate; and
- (c) any applicable industry allowance.

A.3.3 Prior to the first full pay period on or after 1 July 2010 the employer must pay no less than the minimum wage in the relevant transitional minimum wage instrument and/or award-based transitional instrument for the classification concerned.

A.3.4 The difference between the minimum wage for the classification in this award and the minimum wage in clause A.3.3 is referred to as the transitional amount.

A.3.5 From the following dates the employer must pay no less than the minimum wage for the classification in this award plus the specified proportion of the transitional amount:

First full pay period on or after	
1 July 2010	80%
1 July 2011	60%
1 July 2012	40%
1 July 2013	20%

A.3.6 The employer must apply any increase in minimum wages in this award resulting from an annual wage review. If the transitional amount is equal to or less than any increase in minimum wages resulting from the 2010 annual wage review the transitional amount is to be set off against the increase and the other provisions of this clause will not apply.

A.3.7 These provisions cease to operate from the beginning of the first full pay period on or after 1 July 2014.

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.

A.5 Loadings and penalty rates – existing loading or penalty rate lower

A.5.1 The following transitional arrangements apply to an employer which, immediately prior to 1 January 2010:

- (a) was obliged,
- (b) but for the operation of an agreement-based transitional instrument or an enterprise agreement would have been obliged, or
- (c) if it had been an employer in the industry or of the occupations covered by this award would have been obliged

by the terms of a transitional minimum wage instrument or an award-based transitional instrument to pay a particular loading or penalty at a lower rate than the equivalent loading or penalty in this award for any classification of employee.

A.5.2 Prior to the first full pay period on or after 1 July 2010 the employer must pay no less than the loading or penalty in the relevant transitional minimum wage instrument or award-based transitional instrument for the classification concerned.

A.5.3 The difference between the loading or penalty in this award and the rate in clause A.5.2 is referred to as the transitional percentage.

A.5.4 From the following dates the employer must pay no less than the loading or penalty in this award minus the specified proportion of the transitional percentage:

First full pay period on or after	
1 July 2010	80%
1 July 2011	60%
1 July 2012	40%
1 July 2013	20%

A.5.5 These provisions cease to operate from the beginning of the first full pay period on or after 1 July 2014.

A.6 Loadings and penalty rates – existing loading or penalty rate higher

A.6.1 The following transitional arrangements apply to an employer which, immediately prior to 1 January 2010:

- (a) was obliged,
- (b) but for the operation of an agreement-based transitional instrument or an enterprise agreement would have been obliged, or
- (c) if it had been an employer in the industry or of the occupations covered by this award would have been obliged

by the terms of a transitional minimum wage instrument or an award-based transitional instrument to pay a particular loading or penalty at a higher rate than the equivalent loading or penalty in this award, or to pay a particular loading or penalty

and there is no equivalent loading or penalty in this award, for any classification of employee.

- A.6.2** Prior to the first full pay period on or after 1 July 2010 the employer must pay no less than the loading or penalty in the relevant transitional minimum wage instrument or award-based transitional instrument.
- A.6.3** The difference between the loading or penalty in this award and the rate in clause A.6.2 is referred to as the transitional percentage. Where there is no equivalent loading or penalty in this award, the transitional percentage is the rate in A.6.2.
- A.6.4** From the following dates the employer must pay no less than the loading or penalty in this award plus the specified proportion of the transitional percentage:

First full pay period on or after	
1 July 2010	80%
1 July 2011	60%
1 July 2012	40%
1 July 2013	20%

- A.6.5** These provisions cease to operate from the beginning of the first full pay period on or after 1 July 2014.

A.7 Loadings and penalty rates – no existing loading or penalty rate

- A.7.1** The following transitional arrangements apply to an employer not covered by clause A.5 or A.6 in relation to a particular loading or penalty in this award.
- A.7.2** Prior to the first full pay period on or after 1 July 2010 the employer need not pay the loading or penalty in this award.
- A.7.3** From the following dates the employer must pay no less than the following percentage of the loading or penalty in this award:

First full pay period on or after	
1 July 2010	20%
1 July 2011	40%
1 July 2012	60%
1 July 2013	80%

A.7.4 These provisions cease to operate from the beginning of the first full pay period on or after 1 July 2014.

BY THE COMMISSION:

PRESIDENT

Decision Summary

AWARDS – award modernization – model transitional provisions – Stage 3 awards – commencement – phasing schedule – s576E Workplace Relations Act 1996 – model transitional provisions for Stage 3 (and 4) awards – modern awards come into operation 1 January 2010 – new classifications and minimum wages commence first pay period on/after 1 July 2010 (phased in by 5 equal instalments ending 1 July 2014) – amendments to model provisions: (1. model provisions apply to enterprise agreements made under FW Act as well as agreement-based transitional instruments; (2. clarified how phase-in applies if no relevant award-based transitional instrument; (3. clarified how phase-in applies if there is award-based transitional instrument but no equivalent provision to phased-in provision; (4. included reference to ‘transitional minimum wage instrument’ to

address fact that some casual loadings currently derived from AFPC pay scales – request for 40 hour week (rather than 38 hour) rejected – request for continuation of award benefits for IT employees who may become award free under new system rejected – additional transitional provisions for *Alpine Resorts Award* and the *Registered and Licensed Clubs Award* – inserted model commencement and transitional clause in all Stage 3 awards – inserted model phasing schedule in all Stage 3 awards except *Dredging Industry Award 2010*.

Request from the Minister for Employment and Workplace Relations of 28 March 2008 – Re: Award Modernisation

AM2008/25 – 63

[2009] AIRCFB 943

Giudice J
Lawler VP
Watson VP
Watson SDP
Harrison SDP
Acton SDP
Smith C

Melbourne

3 December 2009

Citation: *Request from the Minister for Employment and Workplace Relations of 28 March 2008 – Re: Award Modernisation* [2009] AIRCFB 943 (3 December 2009)

Printed by authority of the Commonwealth Government Printer

<Price code C, PR991426>

² [2009] AIRCFB 800.

³ [2009] AIRCFB 826.

⁴ [2009] AIRCFB 855.

⁵ MA000092.

⁶ See Schedule 6 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, items 2(1), 2(3) and 4.

⁷ MA000091.

⁸ MA000070.

⁹ MA000065.

¹⁰ MA000058.

¹¹ [2009] AIRCFB 800 at para 48.

¹² MA000085.