
Australian Council of Trade Unions

Submission to the Australian Industrial Relations Commission

Award Modernisation
Transitional provisions
29 May 2009

Table of Contents

Introduction	1
The role of transitional provisions	3
Existing transitional provisions in modern awards	5
Duration of the transition period	6
<i>State based differentials</i>	6
<i>Non state based differentials</i>	7
Better off overall test	8
The role of take home pay orders	9
The overall economic impact of modern awards	12
The cost impact of modern awards	14
Translation then transition	16
Proposed approach to transitional provisions	17
<i>Definitions</i>	17
Casual employees	18
<i>Principles</i>	19
Transitional provisions form part of the modern award	19
The safety net is the minimum standard	19
No disadvantage	19
Non-absorption	20
Supersession and savings clause	20
Rates of Pay	20
Penalties and loadings	23
Changes to rosters and hours of work	24

Introduction

1. Through the process of award modernisation, thousands of existing pre-reform awards and Notional Agreements Preserving State Awards (NAPSAs) are being consolidated into a much smaller number of industry and occupational-based modern awards. While the new safety net established by the *Fair Work Act 2009* (FW Act), consisting of modern awards and the National Employment Standards (NES), is informed by terms and conditions of employment in pre-existing instruments, it is clear that the new minimum terms and conditions do not correspond to the highest standards found within existing pre-reform awards and NAPSAs. As a result, there is the very real potential for employees to be disadvantaged when the new safety net commences operation on 1 January 2010. It is for this reason that the legislature and the Minister of Employment and Workplace Relations have envisaged the use of transitional arrangements in modern awards.
2. This submission of the ACTU addresses the question of transitional arrangements for modern awards.
3. The submission addresses a number of broad considerations, including:
 - the role of transitional provisions in award modernisation;
 - existing transitional provisions in modern awards already published by the Commission;
 - the duration of the transition period;
 - the role of take home pay orders;
 - consideration of economic benefit and cost; and
 - the distinction between transition and translation.

4. This submission establishes a series of principles which, we submit, should guide the Commission's approach to the formulation of specific transitional arrangements in modern awards.

5. This submission does not propose transitional provisions for specific modern awards published in the Priority Stage and Stage 2. The task of assessing the effect of the modern award in light of the terms of pre-existing NAPSAs and pre-reform awards is best left to the specific relevant consideration, within established principles, of industry parties and the Commission.

The role of transitional provisions

6. Many employees will have their minimum terms and conditions of employment altered as a result of award modernisation.¹ The Award Modernisation Request (the Request) recognises that transitional provisions will be necessary to ensure a smooth and fair transition to modern awards. The Request provides that the Commission may include transitional arrangements in modern awards to ensure that it complies with the objects and principles of award modernisation set out in the Request.² The existence of transitional provisions in modern awards is also recognised in the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (the Transitional and Consequential Bill).³ The Full Bench has observed that it ‘is no doubt the legislature’s intention to permit the Commission to include transitional provisions in modern awards to cushion the impact of changes in wages and other conditions.’⁴
7. The ACTU notes that the Commission is obliged to develop transitional arrangements that are consistent with the award modernisation requirements set out in Part 10A of the Workplace Relations Act 1996 (WR Act). Part 10A provides for the modernisation of the federal award system according to specified criteria and requires the Commission to observe the terms of the Request made by the Minister for Employment and Workplace Relations to the President of the AIRC under s.576C of the WR Act.
8. Section 576(A)(2)(b) of the WR Act provides that modern awards, together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees. As the ACTU has argued in earlier submissions, this fair minimum safety net is not created in a vacuum.⁵ The terms and

¹ Award Modernisation Decision, [2009] AIRCFB 345, 3 April 2009, [19].

² Paragraph [12].

³ See, eg, Schedule 5, Part 2, clause 7 of the Bill which provides for the review of transitional arrangements contained in modern awards.

⁴ Award Modernisation Decision, [2009] AIRCFB 345, 3 April 2009, [19].

⁵ ACTU Award Modernisation Submission, 6 June 2008, [44].

conditions of employment contained in pre-reform awards and NAPSAs are critical both to informing the level of the new safety net established in modern awards and in considering what arrangements are necessary to ensure employees are fairly transitioned to the new awards.

9. The Award Modernisation Request states that the award modernisation process is not intended to disadvantage employees.⁶ It is clear from the Priority Stage and Stage 2 modern awards that in many cases wages and conditions of employment would be reduced if employees were automatically transferred to the modern award as of 1 January 2010. If the Commission does not include transitional arrangements in modern awards, it will fail to comply with the objects and principles of Part 10A of the WR Act and the Request.
10. An objective of award modernisation is to create modern awards that are 'simple to understand and easy to apply'.⁷ The ACTU notes that the Full Bench has already expressed its concern that transitional provisions not be 'overly-complicated', as such an outcome would 'not serve the award modernisation objective'.⁸ The ACTU recognises the need for the development of transitional provisions that are easy to understand and apply by both employers and employees. This consideration must, however, be balanced against the need for fairness. Simplicity cannot be achieved at the expense of the existing safety nets upon which workers rely.

⁶ The Request, 2(c).

⁷ Section 576A of the Act.

⁸ Award Modernisation Decision, [2009] AIRCFB 345, 3 April 2009, [25].

Existing transitional provisions in modern awards

11. The ACTU notes that, although the Commission has expressed its preference for transitional arrangements to be dealt with after modern awards have been published, it has already included a number of provisions within Priority and Stage 2 modern awards directed at preserving existing terms for specific employees on a transitional basis. These provisions include, but are not limited to, transitional provisions with respect to redundancy pay, accident pay and district allowances.⁹ These provisions all cease to have effect as of 31 December 2014.
12. In general, these provisions deal with matters arising due to the existence of state based differences. An expiration date of these provisions of 31 December 2014 is therefore reasonable having regard to the operation of s576T of the WR Act.
13. The ACTU submits that these provisions alone are not sufficient to ensure that employees are not disadvantaged by the award modernisation process as they do not address the wide range of terms and conditions of employment in respect of which employees may suffer disadvantage.
14. The ACTU notes that these provisions provide for the (pre-existing) standards to apply to both existing and new (post 1 January 2010) employees.

⁹ These provisions are discussed in Award Modernisation Decision [2008] AIRCFB 1000.

Duration of the transition period

15. In determining appropriate transitional arrangements for modern awards, a key consideration is the duration of the transition period. The ACTU submits that the duration of transitional arrangements depends on whether the differentials between existing awards and the modern award are 'state based differentials' or whether they are simply differentials that arise as a result of workers moving from the disparate terms and conditions of employment found in pre-reform awards to the one modern award.

State based differentials

16. Under section 576T(2) of the WR Act, modern awards may only contain terms and conditions of employment that are determined by reference to State or Territory boundaries or that do not have effect in each State or Territory for a period of up to 5 years after the commencement of the modern award.¹⁰

17. The ACTU notes that state based differentials exist through a number of mechanisms:

- (a) through the operation of NAPSAs;
- (b) through the operation of state specific provisions in federal awards;¹¹ or
- (c) through federal awards that are restricted in their operation to one state or territory.¹²

18. In the case of state based differentials, the question before the Commission is how to make the best use of the legislated five year transition period so as to ensure that employees who rely on existing safety nets are not disadvantaged when they move to a modern award.

¹⁰ See also s 154 of the Fair Work Act 2009.

¹¹ See, for example, National Building and Construction Industry Award, Clause 20 and others.

¹² See, for example, Clerical and Administrative Employees (Victoria) Award 1999.

Non state based differentials

19. With respect to differentials that arise as a result of the modern award containing different provisions to those in pre-reform instruments (other than state based differences), there is no maximum transition period imposed by legislation. The ACTU submits that the inclusion of a 5 year period for state based differentials and the absence of such a rule for arrangements directed at transitioning employees from differences that are not state based strongly suggests that the legislature and Minister envisaged that transitional arrangements for non state based differentials should remain in place for as long as is necessary to ensure employees are not disadvantaged.

Better off overall test

20. Section 193(1) of the FW Act specifies that

An enterprise agreement that is not a greenfields agreement **passes the better off overall test** under this section if FWA is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.¹³

21. Transitional rates of pay and other relevant transitional provisions must form part of the modern award. This is necessary to ensure that the BOOT is applied by FWA consistently with its policy intent: that is, to ensure that enterprise agreements are only approved when, as a result of the agreement, award covered employees are better off overall.

¹³ s 193, FW Act.

The role of take home pay orders

22. While the ACTU welcomes the inclusion of provisions within the Transitional and Consequential Bill that seek to ensure workers do not suffer a reduction in their take home pay as a result of award modernisation, we submit that the primary means of ensuring that employees are not disadvantaged through award modernisation should be the award modernisation process, not the legislative mechanism of take home pay orders.
23. The ACTU has previously made a submission to the Commission with respect to the role of take home pay orders, including the effect of these proposed orders on the requirement to consider disadvantage to employees under the Request.¹⁴ This earlier submission was prompted by arguments put forth by employer organisations in the award modernisation consultations for the aviation industry to the effect that the availability of take home pay orders means that the Commission does not need to concern itself with disadvantage to employees in the award modernisation process. The ACTU strongly rejects the proposal that the existence of take home pay orders obviates the need for transitional arrangements in modern awards.
24. The obligation placed on the Commission to not disadvantage employees forms part of the instructions given to the President of the Commission by the Minister in the Request. There is nothing in the Transitional and Consequential Bill or its Explanatory Memorandum to suggest that the take-home pay orders are intended to substitute for the obligation placed on the Commission by the Request to ensure employees are not disadvantaged. If it had been intended that the potential to make such orders changed the ground rules this would have been reflected in a change to the Request and/or an amendment to Part 10A of the WR Act and/or a government amendment to the FW Act.

¹⁴ ACTU Submission (filed on behalf of affiliated aviation unions), Award Modernisation – AM2008/25 – Airline Operations, 1 April 2009.

25. In addition, take home pay orders are simply not sufficient to guarantee workers are not disadvantaged by award modernisation. As the Explanatory Memorandum to the Transitional and Consequential Bill notes, '[t]he scope for take home pay orders is tightly constrained.'¹⁵ The limitations imposed on these orders include the following:
- an order is only available in respect of employees covered by the modern award when it commences operation;
 - an order is only available if the employee(s) remains in the same or comparable position after 1 January 2010;
 - the employee(s) must have already suffered an actual reduction in take home pay before applying for an order; and
 - the employee(s) may be able to obtain only one order whereas circumstances may change which requires further consideration and a new order.
26. Moreover, take home pay orders are only directed at remedying losses in take home pay, not other forms of disadvantage. It is clear that disadvantage is not a matter restricted to the take home pay of an individual (though this may be where disadvantage is most acutely felt).
27. Take home pay orders simply do not have the capacity to remedy the multiple forms of disadvantage that may be suffered by employees as a result of award modernisation. They must not be seen as an alternative to the inclusion of appropriate transitional arrangements in modern awards.
28. The ACTU submits that take home pay orders are intended to deal with those matters arising from award modernisation that cannot be adequately dealt with in transitional provisions or to respond to unintended and/or unforeseen consequences of award modernisation and are not intended to provide a shield against deliberate and/or intended

¹⁵ [197].

substantive disadvantage caused by the making of modern awards. Take home pay orders are a matter for consideration after a modern award is operable, which is after the Commission has met the requirements of the WR Act and the Request.

The overall economic impact of modern awards

29. In its decisions on 19 December 2008 and 3 April 2009, the Full Bench indicated that, in formulating transitional provisions, it will consider the overall economic impact of the move to modern awards.¹⁶
30. The ACTU submits that, in considering appropriate transitional arrangements, the Commission is obliged to take into account the range of economic benefits accruing to employers as a result of award modernisation. These economic benefits include, but are not limited to:
- the inclusion of minimum wages in modern awards and a reduction in the length and complexity of modern awards will provide a single and more accessible point of reference for verifying rights and obligations with regard to minimum wages and conditions of employment and assist in 'reducing the compliance costs for the majority of employers committed to observing minimum wage protections for their employees';¹⁷
 - the removal of duplication and cost as a result of the move towards a national award system. In particular, this presents significant gain for employers operating across multiple jurisdictions; and
 - less complexity as a result of a reduction in the number of awards operating in the federal system.
31. The ACTU notes that benefits of award modernisation to employers have been emphasised by the Department of Education, Employment and Workplace Relations (DEEWR): 'the flexibilities and simplifications available through modern awards and the institutional framework should have a positive effect on business costs.'¹⁸

¹⁶ Award Modernisation Decision [2008] AIRCFB 1000, 19 December 2008, [106] and Award Modernisation Decision [2009] AIRCFB 345, 3 April 2009, [25].

¹⁷ *Fair Work Bill 2008*, Explanatory Memorandum, r. 110.

¹⁸ Department of Education, Employment and Workplace Relations, *Submission to the Senate Employment, Workplace Relations and Education Committee's Inquiry into the Fair Work Bill 2008*, 9 January 2009, [2.7].

32. The benefits that this reform process presents to employers are underscored by the fact that employer groups have been advocating for a streamlining and modernisation of Australia's award system for many years.¹⁹

¹⁹ See, for example, Business Council of Australia, *Submission to the Senate Employment, Workplace Relations and Education Committee's Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005*, 8 November 2005, 6; ACCI, *Submission to the Senate Employment, Workplace Relations and Education Committee's Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005*, 8 November 2005, 56; Australian Industry Group, *Submission to the Senate Employment, Workplace Relations and Education Committee's Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005*, 8 November 2005, November 2005, 53-54; Australian Industry Group, *Submission to the Senate Employment, Workplace Relations and Education Committee's Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, 29 February 2008, 21; Julia Gillard, Deputy Prime Minister, 'Fresh Standards Strive to Balance Everyone's Interests', *The Australian*, 13 May 2009, 24.

The cost impact of modern awards

33. The Full Bench of the Commission has further noted that, in considering transitional provisions for modern awards, '[t]he actual cost impact will also be relevant.'²⁰
34. The ACTU does not believe that the cost impact of a specific modern award can be readily quantified. We are very wary of the proposition that the consultations on transitional arrangements are an appropriate forum in which to determine the precise cost impact of specific modern award provisions on employers. The evidence required to perform such a task is simply not available.
35. The ACTU notes that employer groups have made a range of claims as to the costs to employers of modern awards, which have received considerable media attention. In our submission many of these claims are spurious and misleading.
36. Restaurant and Catering Australia (RCA), for example, has made a number of dramatic claims as to the impact of the Hospitality Industry (General) Award 2010,²¹ none of which have been tested objectively.
37. The assertions made by RCA do not hold up under close examination. The RCA claim, for example, that the 175% (or time and three quarters) rate for Sunday work in the modern award means that 'many restaurants will close on Sunday as trading will cease to be viable.'²² The 175% rate, however, already applies to employees in Victoria and Tasmania as well as those under pre-reform federal awards. Moreover, the RCA has failed to acknowledge that, in many instances, its members stand to benefit from proposed changes. Workers in South Australia will see their casual loading on Sunday reduced from 220% to 175%;

²⁰ Award Modernisation Decision [2009] AIRCFB 345, 3 April 2009, [25].

²¹ See, eg, Restaurant & Catering Australia, *Submission to the Senate Education, Employment and Workplace Relations Committee Inquiry into the Provisions of the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*.

²² RCA, *Submission to the Senate Education, Employment and Workplace Relations Committee Inquiry into the Provisions of the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*, [48].

permanent employees in Queensland will see their Sunday loading reduced from 150% to 125% and casual employees in Queensland will see their Saturday loading drop from 173% to 150%.

38. In addition the RCA omit a number of salient facts in putting forward their arguments. Whilst their submissions frequently cite the fact that labour costs rose by 10% per year between 2003/2004 and 2006/2007, they fail to mention that over the same period operating profit increased at an average annual rate of 10.9% from \$422.9 million to \$576.4 million.²³
39. The 'actual cost impact' of a modern award will differ significantly depending on a range of variables, including geographical location, the type of employment, the particular term or condition of employment, an employee's roster and so on. The ACTU does not believe that conjecturing as to precise costs is constructive to the award modernisation process. We would be very concerned if such material were given significant weight in the consultations on transitional arrangements.
40. In no industry has the making of a modern award involved the selection of the most superior conditions found in pre-existing instruments. The modern award therefore will represent a reduction in pay and conditions compared to the pre-existing instruments. Any argument advanced on the 'additional' cost of transition must therefore be weighted against the savings to employers directly and indirectly through award modernisation.

²³ Australian Bureau of Statistics Survey of Café, Restaurant and Catering Businesses 2006-07.

Translation then transition

41. In considering transitional arrangements for modern awards, the ACTU notes there is an important distinction to be drawn between translation and transitional issues. The task of translation involves determining how existing classification structures correspond to classification structures in the modern award. The task of transition involves determining the process and time periods whereby employees will move from those existing classification structures to the corresponding new classification structures.
42. Transitional provisions can only be fully considered and applied after the task of translation has been undertaken. However in our submission translation cannot be completed until it is finally resolved which awards have been superseded by the relevant modern award.²⁴
43. Should the industrial parties to a modern award so agree, translation and transition can be carried out simultaneously on the basis that no employee is disadvantaged by that process.

²⁴ While a list of potentially relevant awards has been published for each industry group, this does not necessarily mean that all of the awards listed for consideration in respect of a particular industry are superseded by the modern award(s) made.

Proposed approach to transitional provisions

44. The ACTU proposes that the following principles be adopted for the development of transitional provisions in modern awards.

Definitions

45. The following definitions apply to the transitional principles in this section:

Existing employee:	An employee employed on 31 December 2009 who remains employed in the same or substantially the same position from 1 January 2010.
Federal award:	A pre-reform federal award as defined in the WR Act.
Modern award:	An award made arising from the award modernisation process.
New employee:	An employee employed on or after 1 January 2010 who is not otherwise considered an existing employee.
Penalties and/or loadings:	Casual loadings, shift loadings, overtime penalties, higher duties/additional responsibilities allowance and the like that are additional to the rate of pay.
Rate of pay, wages, or transition rate of pay:	The base hourly, weekly or annual rate of pay as set out in the modern award, NAPSA or pre-modern federal award wages/salaries clause however described.

Transition and transitional provisions:	The time-based process of moving individuals from their current terms and conditions of employment to those contained in the modern award.
Transitional rate of pay:	The rate of pay which an individual employee receives that is not necessarily a rate of pay reflected in the pay and classification structures of the modern award.
Translation:	The mapping of existing classification structures to the classifications structures contained in the modern award. This may be done by comparing skill levels or by accepting existing salaries as proxies for skill levels.

46. A reference to an award or NAPSA rate of pay is a reference to the relevant Australian Pay and Classifications Standards.

Casual employees

47. For the purposes of transition, a casual employee is considered an existing employee if:
- (a) at the time the transitional provisions for the award were determined they were a long term casual employee;²⁵ or
 - (b) they had been employed for part of December 2009 and would, but for the Christmas break, have been considered a long term casual employee.

²⁵ Fair Work Act, s 12.

Principles

Transitional provisions form part of the modern award

48. The transitional provisions developed for employees covered by the modern award shall form part of the modern award and be appended to the modern award as a schedule.
49. The transitional provisions form part of the award safety net for those employees subject to the transitional provisions for all purposes.

The safety net is the minimum standard

50. Modern awards have been established by the Commission as the appropriate safety net. They, along with the NES, establish a fair minimum enforceable set of terms and conditions. This safety net includes those existing state based differentials that remain in modern awards by virtue of the operation of section 576T of the WR Act.
51. On the basis that the modern award has been determined by the modernisation process to be the safety net it is appropriate to ensure that all employees are in receipt of wages and conditions no less than the modern award as soon as possible.

No disadvantage

52. Movement to the safety net must continue to meet the requirement that the making of the modern award not disadvantage employees.
53. No employee shall suffer a reduction in wages or conditions or be worse off as a result of transition to the modern award.
54. In addition no new employee who would, but for the introduction of the modern award, have been entitled to superior wages and conditions arising from a NAPSA or federal award determined by reference to State boundaries, shall suffer a reduction in wages and conditions as a result of the operation of the modern award. This provision applies in accordance with the principles set out herein until 31 December 2014.

Non-absorption

55. Payments received by virtue of transitional provisions that are in excess of the pay and conditions an employee would otherwise be entitled to receive under the modern award shall not be absorbed into increases arising out of the annual review of wages to be conducted by Fair Work Australia²⁶ or other decisions to increase the safety net.
56. Existing over award payments as at 31 December 2009 shall not be offset against improved benefits flowing from transition to the modern award.
57. A rate of pay received as a result of transition shall be considered salary for all purposes as defined in the modern award.

Supersession and savings clause

58. Each award shall contain a supersession clause and a savings clause.

Rates of Pay

State based differentials

59. The following principles apply to differences in rates of pay attributable by reference to state boundaries.

Existing employees

60. An employee in receipt of a rate of pay as at 31 December 2009 *equivalent*²⁷ to that in the modern award shall be paid the modern award rate from 1 January 2010.
61. An employee in receipt of a rate of pay that is *less* than that payable under the relevant modern award shall transition to the modern award rate of pay as soon as possible but within a period of time not exceeding three years. Such movement to the modern award rate of pay shall be achieved by annual increases paid to the employee in addition to any

²⁶ Fair Work Act, s 285.

²⁷ The terms 'equivalent', 'less' and 'greater' reflect the relationship between an individual's existing (pre-modern award) rate of pay and the rate of pay in the modern award to which that individual's existing classification translates.

movements in minimum wages as determined by Fair Work Australia. Where the difference between the existing and modern award rate is not significant, transition should occur within a shorter time frame.

62. An employee who is in receipt of a rate of pay *greater* than the rate of pay set out in the relevant modern award by virtue of the operation of a NAPSA or federal award shall continue to receive that higher rate of pay (the transitional rate of pay) from 1 January 2010. Alternatively, the employee may be moved, without detriment, to the next highest pay point in the modern award
63. An employee in receipt of a transitional rate of pay shall be entitled to receive any increases arising from the annual review of wages conducted by FW Australia based on their transitional rate of pay. Any such increases shall *not* be absorbed by the transitional rate of pay.
64. An employee in receipt of a transitional rate of pay shall receive that pay rate while they occupy the same position as (or a position that is comparable to) the position they occupied on 31 December 2009.
65. These provisions shall apply until 31 December 2014 at which time the relevant provisions of paragraphs 71-74 will apply.

New employees

66. Where, but for award modernisation, a new employee would have been entitled to a rate of pay under a NAPSA or federal award state differential in excess of the rate of pay under the modern award, the employee shall receive the higher rate of pay (transitional rate of pay) until 31 December 2014 at which time the provisions of paragraphs 71-74 will apply.
67. A new employee otherwise subject to the provisions with respect to state based differentials employed on or after 1 January 2015 shall be employed pursuant to the modern award.

Non state based differentials

Existing employees

68. An employee in receipt of a rate of pay equivalent to the rate of pay in the modern award shall be paid the modern award rate from 1 January 2010
69. An employee in receipt of a rate of pay that is *less* than that payable under the relevant modern award shall move to the modern award rate of pay as soon as possible but within a period of time not exceeding three years. Such movement to the modern award rate of pay shall be achieved by increases in rates of pay to the employee in addition to any movements arising from the annual review of wages by Fair Work Australia.
70. Where the difference between the federal award rate of pay and the modern award rate of pay is small or insignificant such increase to the modern award rate shall be phased in over a lesser period of time.²⁸
71. An employee who is in receipt of a rate of pay *greater* than the rate of pay set out in the relevant modern award shall continue to receive that higher rate of pay (transitional rate of pay) from 1 January 2010 or, alternatively, may be moved without detriment to the next highest modern award salary point.
72. An employee on a transitional rate of pay shall have that rate maintained and shall receive any movements arising from the annual review of wages by Fair Work Australia based on the transitional rate of pay. Any such increases in minimum wages shall *not* be absorbed into the transitional rate of pay.
73. An employee in receipt of a transitional rate of pay shall receive that rate (as adjusted from time to time) for as long as they continue to occupy the same position as (or a position that is comparable to) the position they occupied on 31 December 2009.

²⁸ The ACTU would submit that if the difference is less than 5% of existing salary it should be phased in on the basis of one increase.

74. An employee on a transitional rate of pay who is promoted shall not suffer any loss of pay as a result of that promotion.

New employees

75. Except as provided for in paragraph 66-67 above, an employee employed after 1 January 2010 shall be employed pursuant to the terms of the modern award.

Penalties and loadings

76. In determining application of the provisions below each penalty and/or loading will be considered on a stand alone basis.

State based differentials

Existing employees

77. An employee in receipt of penalties and/or loadings equivalent to those provided for in the modern award shall be paid the penalties and loadings as specified in the modern award from 1 January 2010.
78. An employee in receipt of penalties and/or loadings as at 31 December 2009 which is *less* than that provided for in the modern award shall be entitled to the penalties and/or loadings as provided for in the modern award from 1 January 2010.
79. An employee who, as at 31 December 2009, was in receipt of penalties and/or loadings in excess of that provided for in the modern award, shall continue to receive such penalties and/or loadings while they occupy the same position as (or a position that is comparable to) the position they occupied on 31 December 2009.
80. Such an employee is entitled to continue to receive those penalties and/or loadings until 31 December 2014 at which time the provisions in paragraphs 85 will apply.

New employees

81. Where, but for award modernisation, an employee would be entitled to a penalty and/or loading in excess of that provided for in the modern

award, shall receive the higher penalty and/or loading until 31 December 2014 at which time the provisions in paragraph 85 will apply.

82. A new employee otherwise subject to the provisions set out with respect to state based differentials employed after 1 January 2015 shall be paid pursuant to the terms and conditions in the modern award.

Non state based differentials

Existing employees

83. An employee in receipt of penalties and/or loadings on 31 December 2009 *equivalent* to those provided for in the modern award shall, from 1 January 2010, be entitled to receive those penalties and/or allowances as provided for in the modern award.
84. An employee in receipt of penalties and/or loadings as at 31 December 2009 which are *less* than that provided for in the modern award shall receive the penalties and/or loadings as provided for in the modern award from 1 January 2010.
85. An employee who, as at 31 December 2009, was in receipt of penalties and/or loadings *greater* than that provided for in the modern award shall continue to receive such penalties and/or loadings while they occupy the same position as (or a position that is comparable to) the position they occupied on 31 December 2009.

New employees

86. An employee employed on or after 1 January 2010 shall be entitled to receive the penalties and loadings specified in the modern award.

Changes to rosters and hours of work

87. No employee shall be required to alter their existing roster or hours of work arising from changes to hours or work arrangements in a modern award without agreement.