

Transitional arrangements in modern awards

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			Application (AM2010/68) by the AMWU to vary clause A.4 of Schedule A and application (AM2010/72) by the Ai Group to vary clause 2.2 of the <i>Manufacturing and Associated Industries Modern Award 2010</i> [2010] FWAFB 4488
			Award modernisation decision (Division 2B State awards) [2010] FWAFB 8558, 5 November 2010

1. The purpose of FWO Guidance Notes

- 1.1. Guidance Notes are a means by which the Office of the Fair Work Ombudsman (**FWO**) publishes and disseminates advice on the interpretation of the laws it enforces or about its internal policies and/or procedures.
- 1.2. The FWO will publish Guidance Notes from time to time on a range of subject matters concerning the *Fair Work Act 2009* (**FW Act**). The public are welcome to suggest subject matter for future Guidance Notes.

2. This Guidance Note

- 2.1. The purpose of this Guidance Note is to provide the community with an understanding how the Fair Work Ombudsman has interpreted and will apply the transitional arrangements in modern awards, and, in particular, the model transitional provisions. It is to be referred to as:
 - (a) Guidance Note 7; or
 - (b) the FWO model transitional provisions (modern awards) principles.
- 2.2. The Guidance Note has been finalised after a formal, public consultation process.
- 2.3. The Guidance Note represents FWO's views of the model transitional provisions. The Guidance Note does not have the force of statute. FWO may amend the Guidance Note in response to changes in the law, including decisions by the Fair Work Commission (previously Fair Work Australia).
- 2.4. The principles contained in this Guidance Note underpin FWO's advice and information to the public about rates of pay and FWO's compliance activity. This includes information and online tools published by FWO on its website which assist employers and employees to implement transitional arrangements in modern awards including PayCheck Plus, Pay Rates Calculator and Pay and Conditions Guides. (See ['Finding the right pay'](#))
- 2.5. These tools provide practical and step-by-step guidance (including detailed examples and industry-specific information) to implement the principles set out in this Guidance Note. Employers and employees can also contact the Fair Work Infoline on 13 13 94 for advice and assistance.
- 2.6. In addition to the tools and services provided by the FWO, employers and employees may wish to seek detailed professional advice that is tailored to their specific circumstances.
- 2.7. This Guidance Note addresses the following topics:
 - (a) The purpose of FWO Guidance Notes (paragraph 1);
 - (b) This Guidance Note (paragraph 2);
 - (c) About the Fair Work Ombudsman (paragraph 3);
 - (d) History and commencement of modern awards (paragraph 4);
 - (e) Transitional provisions in modern awards (paragraph 5);

- (f) model transitional provisions (paragraph 6 and Schedule 1):
 - I. 'New' employers and employees
 - II. Special rules for State referral employees in NSW, QLD, SA and TAS
 - III. Phased entitlements
- (g) Take-home pay orders and over-award payments (paragraph 7):
 - I. Take-home pay orders
 - II. Absorption and offsetting of over-award payments
- (h) The FWO's approach to calculating transitional wages (paragraph 8):
 - I. Classification translation
 - II. Base rates of pay
 - III. Industry allowances
 - IV. Calculation principles
- (i) The FWO's approach to loadings and penalty rates (paragraph 9):
 - I. New entitlements
 - II. Identical entitlements
 - III. Difference in modern award and pre-modern award entitlements
 - IV. The FWO's approach to determining when entitlements are "equivalent"
 - V. Phasing of penalties / loadings which are equivalent
 - VI. Phasing of penalties / loadings which are not equivalent
- (j) The FWO's approach to loading and penalty rates for casual employees (paragraph 10):
 - I. The interaction between casual loadings and penalty rates
 - II. Casual employees' entitlement to additional 1/12th loading
 - III. Phasing of penalties and loadings which are equivalent
 - IV. Phasing of penalties and loadings which are not equivalent
- (k) Overtime is not subject to phasing (paragraph 11):
 - I. There can be a distinction between "overtime" and "overtime rates"
- (l) Allowances are not subject to phasing (paragraph 12).

3. About the Fair Work Ombudsman

- 3.1. The Fair Work Ombudsman, Nicholas Wilson, is a statutory office holder pursuant to section 681 of the FW Act.
- 3.2. The FWO is a statutory office pursuant to section 696 of the FW Act, empowered to investigate workplace complaints and enforce compliance with Australia's workplace laws.
- 3.3. The FW Act provides that the Fair Work Ombudsman is an independent decision maker with respect to the exercise of its investigatory and enforcement jurisdiction. The FW Act provides that Minister may, by legislative instrument, give general directions to the Fair Work Ombudsman about the performance of his or her functions. To date, no such general directions have been given by the Minister.
- 3.4. The FWO is independent of the management of the Department of Education, Employment and Workplace Relations.
- 3.5. In broad terms, the Fair Work Ombudsman:
 - (a) promotes harmonious, productive and cooperative workplace relations;
 - (b) assists employees and employers to understand their rights and obligations;
 - (c) provides advice and disseminates information;
 - (d) promotes and monitors compliance with Commonwealth workplace laws;
 - (e) investigates complaints;
 - (f) inquires into, and investigates, any act or practice that may be contrary to Commonwealth workplace laws;
 - (g) commences proceedings or makes applications to enforce Commonwealth workplace laws and, where appropriate, seeks a penalty for contravention of Commonwealth workplace laws; and
 - (h) represents workers who are, or might become, a party to proceedings.
- 3.6. The FWO employs staff to provide education, assistance and advice to employees, employers, outworkers, outworker entities and organisations in relation to rights and obligations under the FW Act and associated legislation, including in relation to modern awards.
- 3.7. The Fair Work Ombudsman also appoints Fair Work Inspectors that are empowered to investigate and enforce compliance with a range of workplace relations matters, including, but not limited to, minimum entitlements under

modern awards.

4. History and commencement of modern awards

- 4.1. Modern awards operate together with the National Employment Standards (**NES**) to provide minimum conditions of employment for employers and employees in the 'national system'.¹
- 4.2. The NES sets out ten minimum statutory entitlements including leave and termination of employment entitlements. Modern awards supplement the NES by setting out additional minimum terms and conditions that apply in a particular industry or occupation including monetary entitlements such as wages, penalty rates and allowances.
- 4.3. For most people both modern awards and the NES commenced operation on 1 January 2010.²
- 4.4. Modern awards consolidated and replaced terms and conditions of employment that were previously contained in thousands of federal and State-based awards (e.g. pre-reform awards and NAPSAs).³ Modern awards also include minimum wage entitlements that were previously contained in the Australian Fair Pay and Conditions Standard (e.g. pay scales and the federal minimum wage).⁴
- 4.5. Minimum wage entitlements in a modern award override lesser entitlements in an agreement or contract of employment at all times, including agreements / contracts that were made before the commencement of the FW Act.⁵
- 4.6. For the purposes of this Guidance Note, the terms and conditions of employment that have been replaced by modern awards will be referred to as **'pre-modern award entitlements.'**
- 4.7. Pre-modern award entitlements include:

¹ The national system (the Fair Work Act system) applies to most employees and employers in Australia. However, some State public sector employees are not part of the national system. Further, the national system does not apply to non-incorporated employers and their employees in Western Australia (e.g. sole traders and partnerships).

² However, if the business and the type of work that the employees do was covered by a State award (in TAS, QLD, NSW or SA) immediately before 1 January 2010, the State award generally continues to apply in full until 31 December 2010 (as a "Division 2B State award") with the modern award starting to cover the employees on and from 1 January 2011.

³ Some employers and employees are covered by enterprise awards. A separate modernisation process applies to enterprise awards (see Schedule 6, *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*).

⁴ Minimum wage entitlements for employees covered by transitional awards were included in the transitional award rather than the Australian Fair Pay and Conditions Standard.

⁵ See section 206 of the *Fair Work Act 2009* and item 3, Schedule 9 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

- wage entitlements in Australian Pay and Classification Scales, the Federal Minimum Wage and transitional awards; and
 - loading and penalty entitlements from the Australian Fair Pay and Conditions Standard (the default casual loading) and award-based transitional instruments (i.e. awards, NAPSAs, State reference transitional awards and common rules).
- 4.8. The commencement of modern awards means that there have been changes to minimum terms and conditions for a number of employees. The extent and nature of these changes varies between States, industries and employees.
- 4.9. Transitional arrangements have been included in most modern awards to give employers and employees time to adjust to changes to pay rates. In most cases, the effect of these arrangements was to defer the commencement of some monetary entitlements in modern awards until 1 July 2010, and provide for the gradual implementation of changes to those entitlements over a four year period (ending on the first full pay period on or after 1 July 2014).

5. Transitional provisions in modern awards

- 5.1. Almost all modern awards include provisions to 'transition' employers and employees from their pre-modern award entitlements to the modern award system.
- 5.2. It is important to check the modern award to determine what, if any, transitional arrangements apply to relevant employee(s):
- most modern awards include 'model transitional provisions';
 - some modern awards include industry specific arrangements;
 - a small number of modern awards contain different transitional arrangements (such as the preservation of an entitlement for a limited period of time). The full terms of these modern awards applied from 1 January 2010.
- 5.3. In addition to checking the transitional arrangements, it is necessary to consider the terms of modern awards on an ongoing basis to determine how transitional wages, loadings and penalty rates interact with other terms of the modern award.

6. Model transitional provisions

- 6.1. The model transitional provisions were created by the Australian Industrial

Relations Commission as part of the award modernisation process. The provisions are reproduced at **Schedule 1** of this Guidance Note.

- 6.2. The model transitional provisions provide for the ‘phasing in’ of increases or decreases in certain monetary entitlements in five set instalments over four years (20% per year) beginning from the first full pay period on or after 1 July 2010 and ending at the first full pay period on or after 1 July 2014, when modern award rates apply in full.⁶ This means that until 2014, wage, loading and penalty entitlements under modern awards will change on the first pay period on or after 1 July each year, and need to be re-calculated accordingly. For the purposes of this Guidance Note, this process is referred to as **‘phasing’** and the entitlements that are affected are referred to as **‘transitional’** (e.g. ‘transitional wage rate’).

“New” employers and employees

- 6.3. The phasing arrangements in the model transitional provisions apply to employers and employees in the national system to whom the modern award applies. This includes cases where the employer establishes its business after the commencement of modern awards on 1 January 2010 (including after 1 July 2010). In this situation, the employer will need to 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 (including after 1 July 2010).⁷ For specific information about what pre-modern award entitlements would be relevant to a particular new employer or employee, refer to [Award Finder](#) or contact the Fair Work Infoline on 13 13 94.

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

- 6.4. 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.

⁶ Until the first full pay period on or after 1 July 2010, an employee’s pre-modern award wages, loadings and penalty rates continue to apply.

⁷ This is because the model transitional provisions are expressed to apply also to an employer that “would have been obliged” to pay minimum rates of pay for “any classification of employee” as though “it had been an employer” in the industry covered by the modern award immediately before 1 January 2010. Clauses A.2.1, A.3.1, A.5.1, A.6.1 and A.7.1 set out the application of phasing arrangements to employers and their employees

- 6.5. 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 was covered by a State award immediately before 1 January 2010.
- 6.6. 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 2010.⁸
- 6.7. 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 generally continued to apply in full until 31 December 2010 (as a "Division 2B State award").⁹ The modern award started to cover these employees from 1 January 2011. However, the model transitional provisions in the modern award continued the terms and conditions in Division 2B State awards until the end of January 2011. The phasing arrangements in the model transitional provisions started to apply to these employers and employees from the first full pay period on or after 1 February 2011.¹⁰
- 6.8. Subject to the two exceptions set out in paragraph 6.9 below, the model transitional provisions ensure that these employers and employees are subject to the same transitional rates as other employers and employees in the national system. For example, penalty rates will phase from the corresponding NAPSA to the modern award and minimum wage rates will phase from pay scales derived from that NAPSA to the modern award. This is because the wage and penalty rates are calculated by reference to the modern award rates and the pre-modern award entitlements that would have applied under the national system – not the wages and penalty rates in the Division 2B State

⁸ Wages will apply in full because the model transitional provisions only apply in respect of wages where there is a difference, in monetary or percentage terms, between a provision in a relevant transitional minimum wage instrument (in the federal system) and the modern award (see clause A.1.2(a) and A.2.1 of the model transitional provisions). These employees do not have, and could not have had, transitional minimum wage instruments (as defined) immediately before 1 January 2010 because they are new to the federal system. They also do not have an award-based transitional instrument to compare penalties and loadings against the modern award entitlements. However, the model transitional provisions provide for the phasing in of loadings and penalties where the employee does not have an equivalent entitlement in an award-based transitional instrument (see clauses A.1.2(d) and A.7)

⁹ The provisions of Division 2B State awards relating to the minimum terms and conditions of some apprentices and trainees and some specific programs in Queensland continue to operate beyond 31 December 2010. Similarly, Division 2B State enterprise awards can continue to apply beyond 31 December 2010 – see items 21, 36A and 36B, Schedule 3A, *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* as modified by regulation 3A.01 of the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*

¹⁰ *Award modernisation decision* [2010] FWAFB 8558, 5 November 2010

award.

- 6.9. However, there are two circumstances in which the wage and penalty rates in the Division 2B State award will continue to be relevant under the model transitional provisions.
- where the rate in the Division 2B State award is higher than the rate in the modern award but the phased rate is lower than the rate in the modern award, the rate that is written in the modern award will be the minimum rate of pay (not the lower phased rate of pay);
 - where the rate in the Division 2B State award is lower than the rate in the modern award, but the phased rate is higher than the rate in the modern award, the rate that is written in the modern award will be the minimum rate of pay (not the higher phased rate of pay).¹¹

Example 1

The rate of pay under Ben's Division 2B State award was \$17, the rate of pay in the modern award is \$16 (as at 1 February 2011) and the phased rate of pay is \$15 (as at 1 February 2011).

Ben's minimum rate of pay (from the first full pay period on or after 1 February 2011) is \$16.

Example 2

The rate of pay under Fiona's Division 2B State award rate was \$15, rate of pay in the modern award is \$16 (as at 1 February 2011) and the phased rate of pay is \$17 (as at 1 February 2011).

Fiona's minimum rate of pay (from the first full pay period on or after 1 February 2011) is \$16.

NB: The minimum rates of pay that are set out in modern awards change in July each year to take account of the Fair Work Commission's (previously known as Fair Work Australia (**FWA**)) annual wage review. Phased rates of pay under modern awards also change from the first full pay period on or after 1 July each year (until 2014) in accordance with the model transitional provisions.

- 6.10. Like other employers and employees, the wage and penalty rates need to be re-calculated under the model transitional provisions from the first full pay period on or after 1 July in 2011, 2012, 2013 and 2014.

¹¹ These circumstances are set out in clause A.8 of the model transitional provisions.

6.11. Modern awards can also include transitional arrangements for employers and employees that were covered by a Division 2B State award. For example, some modern awards preserve redundancy and accident pay entitlements under Division 2B State awards until 31 December 2014.¹² There are also special arrangements for long service leave.

For more information about arrangements for employers and employees moving into the national system from a State system, contact the Fair Work Infoline on 13 13 94.

Phased entitlements

6.12. The phasing arrangements in the model transitional provisions apply to the following entitlements:

- minimum wages, including piecework rates and applicable industry allowances;
- casual and part-time loadings;
- Saturday, Sunday and public holiday penalty rates;
- evening and other penalty rates; and
- shift allowances.

6.13. The model transitional provisions do not cover any other entitlements in modern awards, including allowances (other than industry allowances) and overtime. This means that those entitlements took effect in full from 1 January 2010 (i.e. phasing does not apply to those entitlements).

6.14. The remainder of this Guidance Note sets out the FWO's approach to the implementation of the model transitional provisions.

7. Take-home pay orders and over-award payments

7.1. Modern awards provide for minimum entitlements. An employer may pay higher rates than those set out in the modern award. For example, if the rates of pay under the modern award are higher than the equivalent rates in the relevant pre-modern award, it is open to the employer to pay the modern award rates immediately.

7.2. On the other hand, if the pre-modern award rates are higher than those in the modern award, an employer could keep paying higher rates of pay that applied

¹² See Appendix B to *Award modernisation decision* [2010] FWAFB 8558, 5 November 2010

under the pre-modern award.¹³

- 7.3. There may be consequences if an employer reduces an existing employee's pay. For example, if an employee suffers a reduction in take home pay, the employer may be the subject of an application for a take-home pay order - see below. In addition, employers should consider whether they have any contractual obligations to maintain existing rates of pay. Remedies may be available to employees at common law if an employer unilaterally reduces rates of pay of existing employees.

Take-home pay orders

- 7.4. Both the FW Act and the model transitional provisions provide that the implementation of modern awards is not intended to result in the reduction of an employee's 'take-home pay'.
- 7.5. If an employee suffers or is likely to suffer a reduction in his or her 'take-home pay' as a result of transitional arrangements under the model transitional provisions, the employee or his/her union is entitled to apply to Fair Work Australia for a 'take-home pay order'.¹⁴
- 7.6. A "take-home pay" order can require an employer to retain existing rates of pay to ensure that employees do not suffer a reduction in their 'take-home pay'.¹⁵
- 7.7. An employee's 'take-home pay' will be assessed on an overall basis, taking into account that some entitlements may increase, and some may decrease under transitional arrangements.

For more information about take-home pay orders refer to, [What's my rate of pay?](#)

¹³ See also *Award modernisation decision* [2009] AIRCFB 800, 2 September 2009 at [38]. Note however that the transitional provisions phase minimum wages separately to other entitlements such as penalty rates and loadings. These entitlements may be phasing in different directions (e.g. base rates of pay may be phasing down, while penalty rates are phasing up). To ensure that the correct minimum amount is being paid in relation to each entitlement, it is important to determine the appropriate transitional rates for a particular shift and ensure that the total amount paid is at least the transitional amount. The FWO encourages employers who wish to preserve existing rates of pay or to immediately start paying the modern award to seek professional advice to ensure they are meeting their minimum obligations.

¹⁴ See Part 3, Schedule 5, Division 2, Part 4, Schedule 3A, *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and clause 2.4 of the model transitional provisions.

¹⁵ Take-home pay orders can be made in relation to minimum entitlements only; they cannot require an employer to maintain over-award payments.

Absorption and offsetting of over-award payments

7.8. The model transitional provisions provide that:

“The monetary obligations imposed on employers by this award may be absorbed into over-award payments. Nothing in this award requires an employer to maintain or increase any over-award payment.”¹⁶

7.9. This means that if an employer was paying \$2 more per hour than the minimum wage and the minimum wage was increased by \$1 per hour, 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).

7.10. In a decision of 25 June 2010,¹⁷ a full Bench of FWA confirmed that this provision:

*“...permits the absorption of the monetary increases arising from the modern award into over-award payments when an employer is not otherwise obliged to maintain the over-award payments”.*¹⁸

7.11. At paragraph 19 of its decision FWA confirmed the intention of this provision that:

“...where monetary obligations increase as a result of the implementation of modern awards, employers should be able to absorb those increases into existing overaward payments. Nevertheless, the award clause adopted to reflect this intent is confined to the treatment of award obligations themselves, and does not extend to regulating any additional matters in contracts of employment. There may be some examples of contractual entitlements to overaward payments irrespective of the nature and extent of award obligations. However in the vast majority of cases, it is likely no such entitlement will exist. The wording of the clause is permissive, not mandatory, and does not modify the effect of any ongoing entitlement to over award payments. Further, the clause is a transitional clause. It does not have application beyond the

¹⁶ Clause 2.2 of the model transitional provisions – see also *Award modernisation decision* [2009] AIRCFB 800, 2 September 2009 at [19].

¹⁷ Application by the AMWU (AM2010/68) to vary clause A.4 of Schedule A and application by the Ai Group (AM2010/72) to vary clause 2.2 of the *Manufacturing and Associated Industries Modern Award 2010* [2010] FWAFB 4488.

¹⁸ [2010] FWAFB 4488 at [17]

transitional period.”¹⁹

7.12. FWA’s decision confirmed that this provision is not intended to modify the principles regarding set-off that have been established the Courts.²⁰

8. The FWO’s approach to calculating transitional wages

8.1. The model transitional provisions set out a formula to calculate transitional minimum wage entitlements (see paragraphs 8.19 – 8.28 below).²¹ However, before the formula can be applied it is necessary to first identify the relevant employee’s pre-modern award and modern award classifications and base rates of pay. This is because the phasing is worked out by reference to entitlements under the relevant pre-modern award.

8.2. These preliminary steps are important because they ensure that corresponding pre-modern award entitlements and modern award entitlements properly ‘match-up’ before the differences are phased. For example, an employee’s base rate of pay under a pre-modern award and a modern award is based on what his or her classification is. If the classifications are not properly identified, the wrong base rates of pay would be compared, resulting in an incorrect assessment of the transitional minimum wage entitlement.

Classification translation

8.3. To calculate an employee’s transitional wage rate, employers need to first identify the employee’s pre-modern award and modern award classifications.

8.4. Fair Work Australia (**FWA**) (now the Fair Work Commission) published a document that set out which pre-modern awards ‘match’ each modern award. This is the starting point to establish the relevant modern award for classification translation purposes. For more information refer to the awards audit document available at www.fwc.gov.au.

8.5. An employee’s pre-modern award and modern award classification should always be identified based on the work they perform. That is, an employee’s classification is determined based primarily on an employee’s duties. Occupation, skills, competency and level of responsibility are also relevant factors.

8.6. Where an existing employee changes classification (e.g. due to an annual increment or because of a promotion/change of duties), the corresponding pre-

¹⁹ [2010] FWAFB 4488 at [19]

²⁰ [2010] FWAFB 4488 at [18] and [14]

²¹ See clauses A.2 and A.3 of the model transitional provisions

modern award classification is used for phasing purposes, i.e. the one that matches the employee's current duties, not the one that applied to the duties the employee was carrying out at some earlier point in time.²²

- 8.7. Employees may not always be covered by the modern award classification which provides the closest wage rate to their pre-modern award wage rate, although this will commonly be the case where pre-modern award and modern award classifications structures are similar.
- 8.8. The FWO has also published a set of classification translation principles to assist employers and employees work out which classification in the modern award applies to a particular employee. These principles apply to all modern awards. For more information refer to [Classification Translation Principles](#) and / or contact the Fair Work Infoline on 13 13 94.
- 8.9. Classification translations can be found in Pay and Conditions Guides for the most common modern awards. These translations are indicative only. The circumstances of a particular workplace may require different translations. For more information refer to [Pay and Conditions Guides](#) and / or contact the Fair Work Infoline on 13 13 94.

Example

Mitchell is based in Victoria and employs a number of people to perform basic clerical duties.

Mitchell's employees were always classified as a 'Grade 1' under the Clerical and Administrative Employees (Victoria) Award 1999 [AP773032] (pre-modern award). Under that instrument, the employees' particular classification and wage rate were determined based on the following lengths of experience at that level:

- less than six months' experience;
- between six and 12 months' experience; and
- more than 12 months' experience.

From 1 January 2010, Mitchell knows that his employees are covered by the Clerks – Private Sector Award 2010 [MA000002] (modern award).

Mitchell quickly identified that the work of a 'Level 1' employee under the modern award is comparable to that of a 'Grade 1' under his pre-existing instrument.

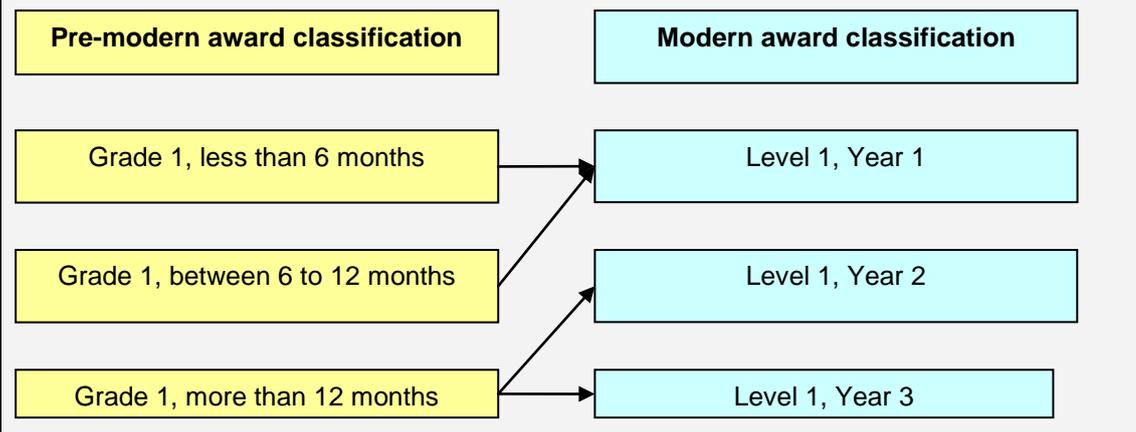
²² The model transitional provisions require the calculation of a transitional amount with respect to each classification concerned, rather than with respect to a particular employee in relation to their role at any particular point in time.

However, the classifications and wage rates in the modern award are based on different lengths of experience, being:

- up to one year's experience
- between one and two years' experience
- more than two years' experience

Grade 1 employees with less than six months' experience and between six and 12 months' experience will both translate into the same modern award classification. That is, the Level 1 modern award classification for employees with less than one year's experience.

The classification for a Grade 1 employee with more than 12 months' experience will translate into two modern award classifications. That is, those employees may move to the Level 1 modern award classification for employees with between one and two years' experience or for employees with more than two years' experience.



Base rates of pay

8.10. Under the model transitional provisions, minimum wage rates include base wage rates, piecework rates and any applicable industry allowance.

8.11. The FWO publishes a number of Pay Scale Summaries which set out pre-modern award wage entitlements for particular classifications. Rates contained in published Pay Scale Summaries will continue to be relied upon to calculate transitional wage rates. For more information refer to [Pay Scale summaries](#).

Industry allowances

- 8.12. The model transitional provisions provide that the ‘minimum wage’ is to include “any applicable industry allowance.”²³
- 8.13. An industry allowance is a payment that is made to all employees across an industry, for all hours they work, to compensate for the nature of work in the industry.
- 8.14. The FWO considers that an industry allowance will be included in minimum wages for phasing purposes where the industry allowance:
- is paid to every employee in the industry;
 - has historically formed part of their minimum wage rate; and/or
 - is clearly intended to form part of the minimum wage.
- 8.15. The terms of each instrument need to be considered to determine whether a particular allowance is considered an ‘industry allowance’ for phasing purposes and it is important to consider the nature of the allowance rather than what is called. It is possible, for example, that one modern award can cover more than one industry or occupation and that each may have a separate ‘industry allowance’, or alternatively, that only one of the industries covered by the modern award has an industry allowance.
- 8.16. This approach is consistent with FWO’s approach to determining whether an ‘industry allowance’ formed part of an employee’s base rate in its published Pay Scale Summaries. Therefore, where an industry allowance forms part of the pre-modern award base rate of pay for phasing purposes, that industry allowance will have been included in the published Pay Scale Summary.

Example

Louise is a full-time depot hand at a recycling centre. The Waste Management Modern Award 2010 [MA000043] applies to Louise’s employment.

Louise’s modern award minimum wage rate is \$15.60 per hour (\$592.90 per week). All employees in the industry are entitled to an industry allowance of 11% (pro-rated) of the standard rate per week in addition to the appropriate minimum wage. The industry allowance is paid for all purposes of this award and is paid in “total recognition of the unique features associated with the waste industry”.

The industry allowance in the modern award would be included as part of Louise’s

²³ See clauses A.2.2 and A.3.2 of the model transitional provisions

minimum wage rate for phasing purposes.

This means that Louise's modern award rate of pay for phasing purposes would be \$17.30 per hour (\$658.10 per week).

Other items may also be included in an employee's base rate of pay

8.17. Base wage rates in some pre-modern award instruments and modern awards are comprised of different monetary items, including some which may be described as allowances. As a general rule, allowances apply in full from modern awards from 1 January 2010 (see paragraph 12). However, where it is clear that those items are intended to form part of a base rate of pay, they will be part of an employee's minimum wage for phasing purposes.

8.18. Allowances do not usually form part of a base rate of pay, so this situation is not common. However, the Building and Construction General On-site Award 2010 is an example of a modern award where a number of allowances do form part of the base rate of pay.

Example

Suzy is a daily hire employee to whom the Building and Construction General On-site Award 2010 [MA000020] (modern award) applies.

Clause 19 (entitled "Minimum Wages") makes it clear that hourly rates for daily hire employees comprise a minimum wage rate and other items, such as a 'tool allowance'.

These items are part of Suzy's base wage rate and will be part of her minimum wage for phasing purposes.

NB: If it was not clear in the modern award that a tool allowance formed part of Suzy's minimum wage, the tool allowance in the modern award would apply in full from 1 January 2010 and is not to be phased under the model transitional provisions.

Calculation principles

8.19. The model transitional provisions set out a formula to calculate transitional minimum wage entitlements.²⁴

8.20. As a first step, the dollar difference between the pre-modern award rate for the employee's classification and modern award wage rate for the employee's classification (including any applicable industry allowances), as at 1 January 2010, is calculated and preserved as a "transitional amount".

²⁴ See clauses A.2 and A.3 of the model transitional provisions

- 8.21. For employees who are paid as a percentage of the adult rate, such as juniors, apprentices or trainees, the dollar rate can be found by applying the relevant apprentice or trainee percentage to the relevant adult rate (as at 1 January 2010).
- 8.22. Next, the dollar modern award wage rate that applies to the relevant employee(s), including any increases from the Fair Work Commission's annual wage review, needs to be identified. The Fair Work Commission annual wage review takes effect on 1 July each year.²⁵
- 8.23. Once the "transitional amount" and the modern award wage rate (including annual increases) have been identified, a proportion of the transitional amount can then be added to or subtracted from the modern award rate (which already includes any annual wage increases) to determine the employee's transitional wage rate for that year.
- 8.24. For those employees who are paid as a percentage of the adult rate, such as juniors, apprentices or trainees, the proportion of the transitional amount should be added to or subtracted from the modern award dollar rate which is found by applying the relevant modern award apprentice or trainee percentage to the relevant modern award adult rate which already includes any annual wage increases.
- 8.25. Changes to minimum wage entitlements are effective from the first full pay period on or after 1 July each year up until 1 July 2014.²⁶ Therefore, transitional wage rates need to be re-calculated each year.
- 8.26. The "transitional amount" for the relevant classification stays the same every year (it is not affected by subsequent increases from annual wage reviews) but the proportion of it that is added or subtracted to the modern award rate will change by 20% each year in accordance with the table at paragraph 8.25 below. Modern award rates will also change every year, to take account of the Fair Work Commission's annual wage review. This means that wage rates need to be re-calculated each year from the first full pay period on or after 1 July 2010.
- 8.27. The following percentages of the transitional amount can be added to or subtracted from the dollar modern award rate that applies from 1 July each year (including any annual wage increases).

²⁵ See Division 3 of Part 2-6, FW Act

²⁶ From the first full pay period on or after 1 July 2014 the full wage rate in the modern award rate will apply.

First full pay period on or after	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 as at 1 January 2010 is lower, the minimum wage rate is obtained by adding the proportion of the transitional amount to the modern award rate as at 1 July 2010 (including any increase from the annual wage review).
- Where the modern award rate as at 1 January 2010 is higher, the minimum wage rate is obtained by subtracting the proportion of the transitional amount from the modern award rate as at 1 July 2010 (including any increase from the annual wage review).

8.28. 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 the 2010 annual wage review, the increase cancels out the transitional amount and phasing is not required.

Example

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

2010 wage rate

On 1 July 2010, 80% of the transitional amount should be subtracted from the modern award rate (including the annual wage increase for 2010) to obtain Alitia's minimum wage entitlement for this year.

FWA increased the annual wage in Alitia's modern award by \$26.00 per week (0.68c per hour) in its 2009 - 2010 annual wage review.²⁷ This increase operates from 1 July 2010. This means that Alitia's modern award rate would therefore be \$18.68 for 2010.

$$\$18.68 \text{ (modern award rate)} - \$1.60 \text{ (80\% of the \$2 transitional amount)} = \$17.08$$

Therefore, from the first pay period on or after 1 July 2010 Alitia's minimum wage rate will be \$17.08.

2011 wage rate

On 1 July 2011 60% of the transitional amount should be subtracted from the modern award rate (including the latest annual wage increase) to obtain Alitia's minimum wage entitlement for that year.

FWA increases annual wages by 3.4% in 2011.²⁸ Alitia's modern award rate is therefore \$19.31.

$$\$19.31 \text{ (modern award rate)} - \$1.20 \text{ (60\% of the \$2 transitional amount)} = \$18.11$$

From the first pay period on or after 1 July 2011 Alitia's minimum wage rate will be \$18.11.

* The same process (using the appropriate "transitional proportion" from the table in paragraph 8.18 above) applies to determine the 2012 and 2013 wage rates.

** An employer may choose to apply the higher amount in the modern award in full (i.e. \$18.68 per hour) from 1 July 2010 rather than phasing in the increase as set out above.

²⁷ See *Annual Wage Review 2009-10* [2010] FWA 4492 for general principles. However, note that the wage rates in each modern award have been varied in accordance with specific determinations made for each modern award.

²⁸ [2011] FWA FB 3400

8.29. In addition to transitional minimum wage entitlements, an employee may also be entitled to penalty rates and/or loadings for some or all hours that they work. In most cases, the dollar amount of penalties is obtained by applying the transitional penalty to the transitional base rate of pay.²⁹ The FWO's approach to loadings and penalty rates is set out at paragraphs 9 and 10 below.

9. The FWO's approach to loadings and penalty rates

New entitlements

9.1. Where an employee did not have a particular 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).³⁰

Example

Nicky did not have an entitlement to a Sunday penalty rate prior to 1 January 2010. Nicky's modern award provides for double time on Sundays (ordinary time rate plus a penalty of 100%) with a minimum payment for three 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 three 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 three hours' work on Sunday.

Identical entitlements

9.2. 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.

²⁹ Where a modern award penalty is paid as a percentage of a defined 'standard rate', the transitional penalty rate will be applied to the full, un-phased standard rate contained in the body of the modern award. Where a transitional instrument penalty rate is paid as a percentage of a specified classification rate, the transitional penalty rate will be paid as a percentage of the phased, transitional minimum wage for that specified classification.

³⁰ Loading and penalty entitlements before 1 January 2010 were set out in award-based transitional instruments and the Australian Fair Pay and Conditions Standard (for the default casual loading).

Example

Ann had a pre-modern award entitlement under the Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1998 [AP783479] to a 25% penalty rate (paid on the base rate that applied to her classification) for working ordinary hours at any time on a Saturday.

The Hospitality Industry (General) Award 2010 [MA000009] is the modern award that now applies to Ann's employment. The modern award also provides employees with a 25% penalty (paid on the base rate that applied to her classification) for ordinary hours worked at any time on a Saturday.

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

- 9.3. 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.
- 9.4. 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”.³¹
- 9.5. FWO is of the view that 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. As the AIRC noted, these approaches leave significant discretion to employers and employees and would result in uncertain and inconsistent outcomes. This in turn means that entitlements would be difficult to identify and enforce.³² The FWO view follows the AIRC principle that each circumstance needs to be considered and determined individually.

The FWO’s approach to determining when entitlements are “equivalent”

- 9.6. The model transitional provisions do not define “equivalent”.
- 9.7. The 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:
- for the same purpose;
 - for the same time periods; and
 - in the same way.
- 9.8. The FWO considers that a pre-modern award and modern award loading / penalty applies in the same way if the entitlements are both:
- paid at the same frequency, such as per hour or per shift; and

³¹ See clause A.1.2 of the model transitional provisions

³² *Award modernisation decision* [2009] AIRCFB 800, at paragraph 25

- 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).
- 9.9. FWO notes that it is possible to take a broader approach to what is "equivalent". FWO considered a number of other options. In considering these options, FWO found that these approaches could not be applied in a straightforward or consistent manner to all scenarios. In some cases, it was unclear how to apply these options because of differences between the modern and pre-modern award. The result of this was that different people could carry out the calculations slightly differently, potentially producing inconsistent results and/or different pay outcomes to FWO's approach.
- 9.10. FWO considers that it is essential that employers and employees can confidently apply the model transitional provisions in all cases in a manner which produces consistent results. FWO's approach, while arguably stricter than some other options, meets these requirements because following this methodology guarantees that the correct minimum rates are calculated in all cases.

Example

Wendy had a 50% pre-modern award penalty entitlement under the Hotel Employees (State) Award NAPSA [AN120249] for working ordinary hours on a Saturday.

The Hospitality Industry (General) Award 2010 [MA000009] 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 both:

- paid at the same frequency (per hour)
- paid as a percentage of the same amount (Wendy's base rate of pay), but

the entitlements are different percentage amounts (50% in the pre-modern award and 25% in the modern award).

Phasing of penalties / loadings which are equivalent

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

- (a) The difference between the two loading / penalty rates is calculated and preserved as a “transitional percentage”.³³
- (b) A proportion of the transitional percentage is calculated each year as follows:

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

- (c) Where the modern award loading / penalty is higher, the penalty rate is obtained by subtracting the proportion of the transitional percentage.
- (d) Where the modern award loading / penalty is lower, the penalty rate is obtained by adding the proportion of the transitional percentage.

³³ The “transitional percentage” may be a dollar figure rather than a percentage where, for example, the pre-modern award and the modern award entitlement are expressed as a dollar amount rather than a percentage.

Example

Cletus works in a hotel in NSW on Saturdays, from 10am to 4pm.

Cletus is covered by the *Hospitality Industry (General) Award 2010* [MA000009] (modern award) and gets a 25% penalty for ordinary hours on a Saturday. He used to be covered by the *Hotel Employees (State) Award NAPSA* [AN120249] and got a 50% penalty for ordinary hours on a Saturday.

The “transitional percentage” is 25% (the difference between the 50% pre-modern award penalty and the 25% modern award penalty).

2010 penalty rate

On 1 July 2010 80% of the transitional percentage should be added to the modern award penalty rate to obtain Cletus’ penalty entitlement for that year.

80% of the 25% transitional percentage = 20% (proportion of transitional percentage)

25% (modern award penalty) + 20% (proportion of transitional percentage for 2010) = 45%

From the first full pay period on or after 1 July 2010 Cletus’ Saturday penalty entitlement is 45%.

2011 penalty rate

On 1 July 2011 60% of the transitional percentage should be added to the modern award penalty rate to obtain Cletus’ penalty entitlement for that year.

60% of the 25% transitional percentage = 15% (proportion of transitional percentage)

25% (modern award penalty) + 15% (proportion of transitional percentage for 2011) = 40%

From the first full pay period on or after 1 July 2011 Cletus’ Saturday penalty entitlement is 40%.

* The same process applies (using the appropriate “proportion of transitional percentage” from the table in paragraph 9.8 above) to determine the penalty rate for 2012 and 2013.

** An employer may choose to continue paying the higher penalty from the pre-modern award (50%) rather than phasing down to the modern award penalty.

FWO's approach to phasing of penalties / loadings which are not equivalent

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

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

First full pay period on or after	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%

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

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

9.13. 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.

9.14. 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 1 – different time periods and types of penalties

Richard works as a security guard for an incorporated company in Western Australia. He works from 1pm to 9pm on Thursdays.

Under the Security Services Industry Award 2010 [MA000016] Richard is entitled to a 21.7% night span loading for any hours he works after 6pm. Richard's pre-modern award entitlement under the Security Officer's Award [AN160287] (NAPSA) was 15% for all the time he worked on this shift.

These entitlements are not "equivalent" because they apply to different time periods and are different types of penalties, so the modern award penalty is "phased in" and the pre-modern award penalty is "phased out".

2010 penalty

From the first full pay period on or after 1 July 2010 Richard is entitled to 20% of the modern award penalty from 6pm and 80% of the pre-modern award penalty for all hours worked on the shift.

12% penalty (80% of 15%) for all hours worked + 4.34% penalty (20% of 21.7%)
for hours worked after 6pm

2011 penalty

From the first full pay period on or after 1 July 2011 Richard is entitled to 40% of the modern award penalty from 6pm and 60% of pre-modern award penalty for all hours worked on the shift.

9% penalty (60% of 15%) for all hours worked + 8.68% penalty (40% of 21.7%) for
hours worked after 6pm

* The same process applies (with the appropriate phasing percentages set out in the tables at paragraph 9.9 above) to determine the penalty rates for 2012 and 2013.

Example 2 – penalties do not apply in the same way

Dianna is full-time hairdresser in Victoria.

Under the *Hair and Beauty Industry Award 2010* [MA000005] Dianna is entitled to a loading of 33% for ordinary hours of work on a Saturday, paid on the base rate of pay. Dianna's pre-modern award entitlement under the *Hairdressing and Beauty Services – Victoria 2001* [AP8068016] 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".

2010 penalty

From the first full pay period on or after 1 July 2010 Dianna 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%)

2011 penalty

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 at paragraph 9.9 above) to determine the penalty rates for 2012 and 2013.

10. The FWO's approach to loadings and penalty rates for casual employees³⁴

The interaction between casual loadings and penalty rates

10.1. The way that casual loadings and penalty rates interact needs to be considered every time a casual employee is entitled to a penalty rate. This is because the way those entitlements interact affects the total amount which the

³⁴ The same principles apply in relation to part-time employees who are entitled to a part-time loading. However, part-time employees will not have an entitlement to the 1/12th loading referred to in paragraph 9.1.

employee is entitled to be paid. For example, casual loadings and penalty rates can interact in the following ways:

- both the loading and penalty rate are calculated on the base hourly rate:

i.e. Base hourly rate + Loading paid on the base rate + Penalty paid on the base rate

- the penalty rate is payable on the loaded rate (base hourly rate plus loading):

i.e. (Base hourly rate + Loading) x Penalty paid on the loaded rate

Casual employees' entitlement to additional 1/12th loading

10.2. If a casual employee was entitled to an additional 1/12th loading in lieu of annual leave (as well as a casual loading),³⁵ that amount also forms part of the pre-modern award casual loading for phasing purposes.³⁶ These 1/12th entitlements are not included in Pay Scale Summaries because they were not part of basic periodic rates of pay under the *Workplace Relations Act 1996*.

Example – 1/12th paid on casually loaded rate

Lauren is a casual security guard in New South Wales.

Lauren was entitled to a casual loading of 15% plus an additional 1/12th of her casually loaded rate of pay per hour under the Security Industry (State) Award – NSW [AN120497] (NAPSA).

To find Lauren's total casual loading, the base casual loading is added to the 100% base rate to find the casually loaded rate.

$$100\% + 15\% \text{ casual loading} = 115\%$$

The casually loaded rate can then be multiplied by 1/12th.

$$115\% \text{ casually loaded rate} \times 1/12 = 9.58\%$$

This amount can then be added to the base casual loading to find the total casual

³⁵ Most casual employees in NSW are entitled to a 1/12th loading because of provisions in State legislation which were preserved as part of the employees' notional agreement preserving State awards (NAPSA). Similarly, some casual employees in Victoria are also entitled to a 1/12th loading in some circumstances under an applicable award (see for example clause 10.2.5 of the Licensed Clubs (Victoria) Award 1998 [AW787060CRV])

³⁶ See *Award modernisation decision* [2009] AIRCFB 800, 2 September 2009 at [41] Depending on the terms of the award-based transitional instrument (i.e. pre-reform award, NAPSA or transitional award), the 1/12th can be added to a loaded up rate (i.e. where the entitlement applies to base rate + casual loading) or an unloaded rate (i.e. where the entitlement applies to the base rate of pay only).

loading which is phased.

$$15\% \text{ casual loading} + 9.58\% \text{ } 1/12^{\text{th}} \text{ component} = 24.58\%$$

Lauren's pre-modern award casual loading for phasing purposes is 24.58%.

Example – 1/12th paid on base rate

Mairin is a casual clerical employee in Victoria.

Mairin was entitled to a casual loading of 25% plus an additional 1/12th of the base rate of pay per hour under the Clerical and Administrative Employees (Victoria) Award 1999 [AP773032CRV].

The 1/12th entitlement needs to be converted to a percentage (8.33%) before it can be added to the casual loading percentage of 25%.

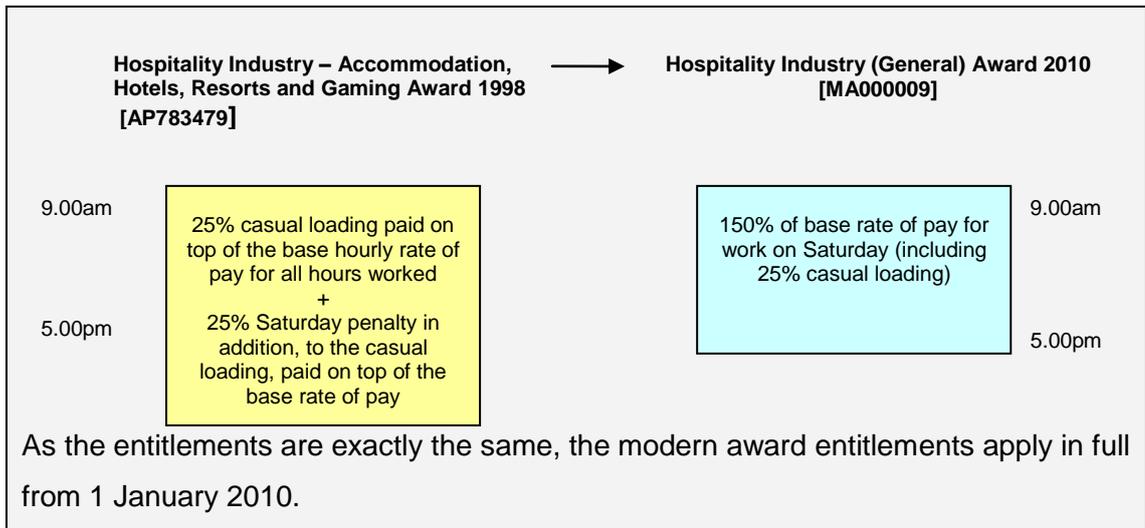
Mairin's pre-modern award casual loading for phasing purposes is 33.33%.

Phasing of penalties and loadings which are equivalent

- 10.3. Where the entitlements are exactly the same in the pre-modern award and the modern award, including the way the loading and penalty interact with each other, there is no need to phase in differences (because there are none) and the modern award entitlements apply in full from 1 January 2010.
- 10.4. It is necessary to read the terms of the pre-modern award entitlement (e.g. in the NAPSA or pre-reform award) and the modern award entitlement because in some cases, the entitlements may be explained in different ways, but are in substance the same.

Example

The Hospitality Industry (General) Award 2010 [MA000009] (modern award) and the Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1998 [AP783479] have the same penalties, loadings and interaction rules for casual employees working on a Saturday.



- 10.5. If the loadings and penalty rates, and the way they interact, are “equivalent” (see paragraphs 9.5 to 9.7 above) the approach in paragraph 9.8 above applies. In this situation the transitional penalty rate will continue to interact in the same way with the transitional casual loading.

Phasing of penalties and loadings which are not equivalent

- 10.6. If the loadings and penalty rates, and the way they interact, are not equivalent, the phasing approach in paragraph 9.12 above applies. Each entitlement is treated separately and continues to be applied in accordance with the terms of the instrument that it comes from (either the pre-modern award entitlement or the modern award).
- 10.7. For example, where a penalty rate is paid on top of a loaded rate (base rate + casual loading), the transitional penalty rate will be paid on top of the transitional casually loaded rate. The casually loaded rate is comprised of the transitional minimum wage plus the transitional casual loading for the instrument which the penalty rate is derived from.

Example

Metal Industry (Northern Territory) Award 2003 [AP825130]



Manufacturing and Associated Industries and Occupations Award 2010 [MA000010]

20% casual loading paid on the base rate of pay

100% Sunday penalty all day, paid on the base hourly rate

25% casual loading paid on the base rate of pay

100% Sunday penalty all day, paid on casually loaded rate (base rate + casual loading)

The pre-modern award and modern award entitlements are not “equivalent” because the casual loadings and penalty rates under each instrument interact differently. Therefore, the modern award casual loading and penalty rate need to separately be phased in from zero and the pre-modern award casual loading and penalty rate need to be separately phased out to zero.

As the modern award penalty rate is paid on the casually loaded rate, the transitional modern award penalty rate will need to be paid on the transitional modern award casually loaded rate.

The transitional modern award casually loaded rate is comprised of an employee’s transitional minimum wage and the transitional casual loading from the modern award only. This transitional modern award casually loaded rate is multiplied by the transitional modern award penalty rate to find the total transitional modern award penalty rate to be paid.

2010 entitlement

From the first full pay period on or after 1 July 2010 a casual employee’s entitlement for work on a Sunday is calculated as follows:

Pre-modern award entitlements phasing out

+

Modern award entitlements phasing in

80% of the pre-modern award casual loading (80% of 20% = 16%)

+

80% of the pre-modern award penalty rate (80% of 100% = 80%)

+

20% of the modern award casual loading (20% of 25% = 5%)

+

20% of the modern award penalty rate (20% of 100% = 20%, paid on MA casually loaded transitional rate. Therefore, the MA penalty is (100% + 5%) X 20%

2011 entitlement

From the first full pay period on or after 1 July 2011 a casual employee’s entitlement for work on a Sunday is calculated as follows:

Pre-modern award entitlements phasing out

+

Modern award entitlements phasing in

60% of the pre-modern award casual loading (60% of 20% = 12%)

+

60% of the pre-modern award penalty rate (60% of 100% = 60%)

+

40% of the modern award casual loading (40% of 25% = 10%)

+

40% of the modern award penalty rate (40% of 100% = 40%, paid on the modern award casually loaded transitional rate. Therefore, the MA penalty is (100% + 10%) X 40%

* The same process applies (with the appropriate phasing percentages set out in the tables at paragraph 9.9 above) to determine the penalty rates for 2012 and 2013

11. Overtime is not subject to phasing

11.1. Overtime is not included in the model transitional provisions and is therefore not subject to phasing arrangements.³⁷ This means that the obligations in modern awards in relation to overtime commenced operation on 1 January 2010.

There can be a distinction between 'overtime' and 'overtime rates'

11.2. Overtime for full time employees can be defined in modern awards as time worked in excess of 38 hours or outside of ordinary hours. If the payment is made for overtime, the modern award entitlement to overtime applies in full from 1 January 2010. If the payment is made for another purpose (i.e. the time or type of work attracting the penalty falls outside of the scope of 'overtime' within the meaning of the instrument), it is subject to the phasing rules from 1 July 2010. This could include, for example, on-call or re-call entitlements. It is therefore important to ascertain what the underlying entitlement is.

11.3. In some cases, employees may attract a penalty which is not defined as overtime, but is specified to be paid at overtime rates. If the entitlement is a penalty which simply attracts overtime rates, the penalty entitlement is subject to phasing from 1 July 2010.

Example

Clause 31 of the Airline Operations - Ground Staff Award 2010 [MA000048] (modern award) sets out when an employee is entitled to payment for working overtime. It provides that "all work done outside ordinary hours on any day or shift (except where the time is worked by arrangement between the employees themselves) must be paid at time and a half for the first two hours and double time thereafter until the completion of the overtime work." This entitlement is 'overtime' and commenced from 1 January 2010.

Clause 28 provides that where a meal break is not provided after five hours (or six hours by agreement), "all time worked after the commencement time of the regular meal break until the meal break is allowed must be paid for at overtime rates." This entitlement is a 'penalty' and is phased in from 1 July 2010.

³⁷ Application (AM2010/68) by the AMWU to vary clause A.4 of Schedule A and application (AM2010/72) by the Ai Group to vary clause 2.2 of the *Manufacturing and Associated Industries Modern Award 2010* [2010] FWAFB 4488

12. Allowances are not subject to phasing

- 12.1. Allowances are not included in the model transitional provisions and are therefore not subject to phasing arrangements unless the allowance is phased as part of the base rate of pay e.g. an industry allowance (see paragraph 8) above.
- 12.2. Other allowances apply in full from 1 January 2010. It is necessary to consider the terms of the modern award to determine how those allowances interact with transitional wages, loadings and penalty rates.
- 12.3. For example, some modern awards include all purpose allowances which do not form part of base wage rates, but which are added to the base rate of pay before penalty rates are calculated. In this situation penalties / loadings would be paid on top of the transitional wage plus the allowance in the modern award (as it applies in full).

Schedule 1 – Model Transitional Provisions and Commencement and Transitional Clause

(Replicated from *Modern Awards Decision* [2009] AIRCFB 943)

Commencement and Transitional Clause

1. This award commences on 1 January 2010.
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.
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.
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.
5. Fair Work Australia may review the transitional arrangements in this award and make a determination varying the award.
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.

Model 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.

A.8 Former Division 2B employers

- A.8.1** This clause applies to an employer which, immediately prior to 1 January 2011, was covered by a Division 2B State award.

- A.8.2** All of the terms of a Division 2B State award applying to a Division 2B employer are continued in effect until the end of the full pay period commencing before 1 February 2011.

- A.8.3** Subject to this clause, from the first full pay period commencing on or after 1 February 2011 a Division 2B employer must pay no less than the minimum wages, loadings and penalty rates which it would be required to pay under this Schedule if it had been a national system employer immediately prior to 1 January 2010.

- A.8.4** Despite clause A.8.3, where a minimum wage, loading or penalty rate in a Division 2B State award immediately prior to 1 February 2011 was lower than the corresponding minimum wage, loading or penalty rate in this award, nothing in this

Schedule requires a Division 2B employer to pay more than the minimum wage, loading or penalty rate in this award.

A.8.5 Despite clause A.8.3, where a minimum wage, loading or penalty rate in a Division 2B State award immediately prior to 1 February 2011 was higher than the corresponding minimum wage, loading or penalty rate in this award, nothing in this Schedule requires a Division 2B employer to pay less than the minimum wage, loading or penalty rate in this award.

A.8.6 In relation to a Division 2B employer this Schedule commences to operate from the beginning of the first full pay period on or after 1 January 2011 and ceases to operate from the beginning of the first full pay period on or after 1 July 2014.

Glossary

<p><i>Award-based transitional instruments</i></p>	<p>The following types of instruments are award-based transitional instruments:</p> <ul style="list-style-type: none"> • Pre-reform award (all States and Territories) – “AP” • NAPSAAs (all States other than Victoria) – “AN” • State reference transitional award (all States other than WA) – “AT” <ul style="list-style-type: none"> - Division 2A State reference transitional awards - Division 2B State reference transitional awards • Common rule awards (ACT, NT & VIC) <p>This term is defined in subitem 2(5) of Schedule 3 to the FW (TPCA) Act.</p>
<p><i>Division 2B State award</i></p>	<p>State awards that covered State reference employers (e.g. non-constitutional corporations) and their employees in New South Wales, Queensland, South Australia and / or Tasmania immediately before 1 January 2010 are called ‘Division 2B State awards’.</p> <p>Employers must have actually been covered by the former State award on 31 December 2009 in order to be covered by the Division 2B State award.</p> <p>Division 2B State awards (other than Division 2B enterprise awards) generally terminate on 1 January 2011. Those employers and their employees will generally be covered then by modern awards.</p>
<p><i>FWA</i></p>	<p>Fair Work Australia, a Tribunal established by the FW Act, effective 1 July 2009 until 31 December 2012.</p>
<p><i>Fair Work Commission</i></p>	<p>A Tribunal established by the FW Act, effective 1 January 2013</p>
<p><i>FW Act</i></p>	<p><i>Fair Work Act 2009</i></p>
<p><i>FW (TPCA) Act</i></p>	<p><i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)</i></p>
<p><i>FWO</i></p>	<p>Office of the Fair Work Ombudsman</p>

<p><i>Model transitional provisions</i></p>	<p>The Model Transitional Provisions were created by the Australian Industrial Relations Commission as part of the award modernisation process.</p> <p>The Model Transitional Provisions provide for the ‘phasing in’ of increases or decreases in certain monetary entitlements in five set instalments over four years (20% per year) beginning from the first full pay period on or after 1 July 2010 and ending at the first full pay period on or after 1 July 2014, when modern award rates apply in full.</p> <p>Most, but not all modern awards include the Model Transitional Provisions. If a modern award includes the Model Transitional Provisions, they are included in a schedule at the back of the modern award.</p>
<p><i>NES</i></p>	<p>National Employment Standards</p>
<p><i>Phasing</i></p>	<p>The process of implementing certain monetary entitlements in modern awards in five 20% increments over a four year period from the first full pay period on or after 1 July 2010 in accordance with the model transitional provisions.</p> <p>This can involve modern award entitlements ‘phasing in’ and pre-modern award entitlements ‘phasing out’.</p>
<p><i>Pre-modern award</i></p>	<p>A term used by the Office of the Fair Work Ombudsman (not a legal term) to refer to both award-based transitional instruments and transitional minimum wage instruments. These instruments have been or will be replaced by modern awards from 1 January 2010.</p> <p>The term pre-modern award includes all of the following types of instruments:</p> <ul style="list-style-type: none"> • Award-based transitional instruments <ul style="list-style-type: none"> o Pre-reform awards (all States and Territories) – “AP” o NAPSAs (all States other than Victoria) – “AN” o State reference transitional awards (all States other than WA) – “AT” <ul style="list-style-type: none"> - Division 2A State reference transitional awards - Division 2B State reference transitional awards

	<ul style="list-style-type: none"> o Common rule awards (ACT, NT & VIC) • Transitional minimum wage instruments <ul style="list-style-type: none"> o Australian Pay and Classification Scales (APCS) (referred to as a transitional APCS from 1 July 2009). These are commonly referred to as “pay scales”. o The standard Federal Minimum Wage (FMW) (referred to as the transitional standard FMW from 1 July 2009). o A special Federal Minimum Wage (referred to as a transitional special FMW from 1 July 2009). o The 20% default casual loading in the Australian Fair Pay and Conditions Standard (referred to as the transitional default casual loading from 1 July 2009).
<i>Pre-modern award entitlements</i>	<p>A term used by the Office of the Fair Work Ombudsman (not a legal term) to describe terms and conditions of employment that have been replaced by modern awards.</p> <p>Modern award entitlements replace pre-modern award entitlements including:</p> <ul style="list-style-type: none"> • monetary entitlements such as allowances and penalty rates that were set out in award-based transitional instruments (e.g. pre-reform awards and NAPSAs) • minimum wage entitlements that were previously contained in transitional minimum wage instruments (e.g. casual loadings and base rates of pay).
<i>Proportion of transitional percentage</i>	The percentage of the transitional amount that is added to or subtracted from the modern award penalty / loading rate.
<i>Transitional amount</i>	The dollar difference amount between pre-modern award and modern award wage rates (including any applicable industry allowances) that is calculated as at 1 January 2010 for the employee’s classification and frozen for that classification for the duration of the transitional provisions (e.g. until 1 July 2014).
<i>Transitional entitlements</i>	Wage, penalty and loading entitlements that result from phasing to modern award entitlements from pre-modern award entitlements

	from the first full pay period on or after 1 July 2010 to the first full pay period on or after 1 July 2014.
<i>Transitional minimum wage instrument</i>	<p>Transitional minimum wage instruments set out an employee's pre-modern award entitlement to minimum rates of pay.</p> <p>The following types of instruments are transitional minimum wage instruments:</p> <ul style="list-style-type: none"> • An Australian Pay and Classification Scale (APCS) (referred to as a transitional APCS from 1 July 2009). These are commonly referred to as "pay scales". • The standard Federal Minimum Wage (FMW) (referred to as the transitional standard FMW from 1 July 2009). • A special Federal Minimum Wage (referred to as a transitional special FMW from 1 July 2009). • The 20% default casual loading in the Australian Fair Pay and Conditions Standard (referred to as the transitional default casual loading from 1 July 2009). <p>This term is defined in subitem 5(3) of Schedule 9 to the FW (TPCA) Act.</p>
<i>Transitional percentage</i>	The difference between two equivalent loading / penalty rates (frozen as at 1 January 2010).