

EDUCATION SERVICES (POST-SECONDARY EDUCATION) AWARD 2010

TRANSITIONAL ARRANGEMENTS

When does the award commence?

The award commences from 1 January 2010, however if you have been covered by an award or wage instrument with different wages, penalties or loadings, then those elements may commence on a phased in basis from 1 July 2010 if transitional provisions are included in the modern award. This has not been decided yet for this award. This fact sheet will be updated when the arrangements are decided.

How do the transitional arrangements apply if the employer was not covered by an award before 1 January 2010?

Many employers in the national system who have not been covered by a preserved state award or a pre-reform federal award have regarded themselves as being 'award free'. However, most employees (other than juniors and trainees) in the federal system are covered by the adult federal minimum wage (currently \$14.31 per hour) and the default casual loading (20%). These two provisions form transitional minimum wage instruments for the purpose of phasing in under the model transitional provisions for modern awards. While being covered by a wage instrument, award free

employers may not have existing loadings and penalties (other than the casual loading) in an applicable instrument, so the transitional provisions for these components of the award (as currently drafted), will see loadings and penalties phased in from zero to the award rate at 20% per year from 1 July 2010.

What are the transitional arrangements for modern awards?

The Australian Industrial Relations Commission (AIRC) has determined that some elements of modern awards will be phased in over a 5 year period. To manage this process the Commission has published a model transitional clause, which will provide a consistent approach to transition while allowing for the development of specific transitional arrangements for particular awards or sectors or to agree that transitional arrangements are not necessary. The model provisions will apply where alternative arrangements are not agreed.

At this stage transitional provisions have not yet been included in this award; however it is likely that the model clause will apply.

The main provisions of the transitional arrangements include:

- the development of a model transitional clause which will phase in minimum award wages and loadings/penalties over a 5 year period commencing from 1 July 2010
- phasing to apply to both award increases and decreases when compared to the existing instrument (usually a pre-reform federal award or preserved state award if applicable or otherwise a minimum wage instrument)
- the phasing will occur in 5 equal instalments of 20%
- where phasing provisions are included in an award the pre-modern award conditions relating to minimum wages, casual and part-time loadings, Saturday, Sunday, public holiday, evening and other penalties and shift allowances will continue to apply until 1 July 2010 when the phasing in of the modern award obligations will commence
- phasing will be subject to the requirement that employees do not suffer reductions in take-home pay as required under the Fair Work Act
- the transitional provisions will apply to wages (including industry allowance) and loadings/penalties only and all other terms and conditions of modern awards will commence from 1 January 2010.



fact sheet

Education Services Transition

The 1 July 2010 time frame will operate in conjunction with the Fair Work Australia annual wage review which will be effective from that date.

How will the phasing work?

Phasing will apply to the difference between the pre-reform or preserved state award (the existing instrument applicable to the employee) or if no award applies the federal minimum wage and default casual loading and the modern award.

Will phasing apply to new employees?

Yes, so that employees are not working alongside each other and subject to different rates of pay, phasing will apply to minimum rates applicable to new employees employed during the phasing period as well as existing employees.

Will all the terms and conditions of modern awards be phased in?

No, the phasing in will only apply to:

- minimum wages, including wages for junior employees, employees to whom training arrangements apply and employees with a disability, and including industry allowance, and
- casual and part-time loadings, Saturday, Sunday, public holiday, evening and other penalties and shift allowances.

All other terms and conditions under a modern award will apply from 1 January 2010.

When will the phasing in commence?

The phasing in arrangements will commence from the first pay period on or after 1 July 2010 which will coincide with the date from which any annual wage increase arising from the annual minimum wage review will commence.

What happens between 1 January 2010 and 1 July 2010?

For those employers that will be subject to phasing arrangements, they will continue to apply the wages, penalties and loadings from the current instrument which is usually the pre-reform award, the preserved state award or the federal minimum wage and default casual loading. All conditions in the modern award that are not subject to phasing will commence from 1 January 2010.

Are all employers covered by the phasing in arrangements?

The transitional arrangements will apply to:

- employers covered by a transitional minimum wage instrument or an award-based transitional instrument immediately prior to 1 January 2010 – if applicable this will usually be a pre-reform federal or preserved state award, but also includes the federal minimum wage and default casual loading
- employers which would have been covered by such an instrument but for the operation of an agreement-based transitional instrument

- employers which would have been covered by a transitional minimum wage instrument or an award-based transitional instrument had they been employers in the industry or of the occupations covered by the award immediately prior to 1 January 2010.

Can an employer pay the higher rate in the modern award rather than phasing in?

Yes, where the modern award wages, loadings and penalties are higher in the modern award than in the current instrument, an employer can choose to pay the modern award rate rather than phasing in the increase over 5 years. However where the modern award wages, loadings and penalties are lower than the current instrument, the employer cannot reduce those wages and conditions below the phased rate each year. In this situation an employer could also choose to maintain the current provisions, rather than reducing wages.

Can minimum increases be absorbed into overaward increases?

Yes, the Commission decided that an employer who makes overaward payments can absorb the increases against any overaward payment.

Is there any process for review?

Yes, where an employer or employee is unhappy with the operation of the transitional provisions in particular cases, they can apply to Fair Work Australia for a review and determination varying the award.



fact sheet

Education Services Transition

Will the same phasing in apply to all modern awards?

No. While most awards will contain the model clause, some awards may contain industry specific provisions or no provisions at all. The arrangements for this award have not yet been determined.

When does the phasing in finish?

The transitional arrangements cease to operate from the beginning of the first pay period commencing on or after 1 July 2014.

Do annual pay increases still apply?

Where the existing minimum wage is lower than the modern award the employer must apply any increase in minimum wages resulting from the annual wage review.

Where the existing award rate is higher than the modern award, the employer must apply any increase in minimum wages in the 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 review the transitional amount is to be set off against the increase and the other provisions of the clause will not apply.

What is a take-home pay order?

The transitional arrangements in modern awards will include the capacity for take-home pay orders to be made by Fair Work

Australia where an employee suffers a reduction in take-home pay as a result of the making of this award or the operation of any transitional arrangements.

Take-home pay is defined as the pay an employee actually receives including wages and incentive-based payments, and additional amounts such as allowances and overtime; but disregarding the effect of any deductions that are made such as salary sacrifice.

If Fair Work Australia is satisfied that an employee, or a class of employees, to whom a modern award applies has suffered a modernisation-related reduction in take-home pay, an order may be made requiring, or relating to, the payment of an amount or amounts to the employee or employees that FWA considers appropriate to remedy the situation.

Can I terminate the employment of an employee who will end up costing more because of an increase in rates of pay?

No, the Fair Work Act prohibits an employer from taking adverse action against an employee because the employee is entitled to the benefit of a workplace law, instrument or order. If an adverse action claim is made, reverse onus of proof applies and the employer would need to establish that they had not acted on the basis of the employee being entitled to a benefit under a workplace instrument.

Adverse action includes dismissing the employee, injuring the employee in their employment, altering the position of the employee to the employee's prejudice; or discriminating between the employee and other employees of the employer.

This advice is general summary only of the provision of the Fair Work Act in relation to this topic. The full text of the Fair Work Act and associated legislation should be used and advice sought before determining any course of action arising from obligations or requirements of the legislation which may be applicable to specific arrangements © WorkSight & ACPET 20 October 2009

