



1. OVERVIEW

Whereas Australian Workplace Agreements (or **AWAs**) formed the centre piece of the Howard Government's WorkChoices amendments to the Workplace Relations Act (**WR Act**), the Rudd Government's Fair Work Act (**FW Act**) gives primacy to collective bargaining at an enterprise level.

The new laws governing enterprise bargaining will come into effect on 1 July 2009.

2. TYPES OF AGREEMENTS UNDER THE FW ACT

Under the FW Act, there are 4 types of agreements:

Single-Enterprise Agreements (Section 172(2)(a) of the FW Act)

(1) *Single Enterprise Agreement with a Single Employer*

This is an agreement made in writing between an employer and:

- (a) the employees employed at the time the agreement is or will be made;
- (b) with one or more relevant employee organisations if:
 - (i) the agreement relates to a genuine new enterprise that the employer is establishing or proposes to establish; and
 - (ii) the employer has not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement.

It is expected that the majority of enterprise agreements that will be entered into are 'single-enterprise agreements' between a single employer and its employees.

(2) *Single Enterprise Agreement with a Single Interest Employer*

This is an agreement made in writing between 2 or more employers that are "*single interest employers*" and:

- (a) employees employed at the time the agreement is or will be made; or
- (b) one or more relevant employee organisations if:
 - (i) the agreement relates to a genuine new enterprise that the employer is establishing or proposes to establish; and
 - (ii) the employers have not employed any of the persons who will be

necessary for the normal conduct of the enterprise and will be covered by the agreement.

“*Single interest employers*” are defined as 2 or more employers which are either:

- (a) engaged in a joint venture or common enterprise; or
- (b) related bodies corporate; or
- (c) specified in a single interest employer authorisation that is in operation in relation to the proposed enterprise agreement concerned.

The ability of an enterprise agreement to cover 2 or more single interest employers is designed specifically to cover businesses (such as franchisees) and also certain institutions (such as hospitals or schools) which have a common interest, funding structure and a history of bargaining together on industrial matters.

The criteria for obtaining authorisation as single interest employers requires, amongst other things, that the employers can show a common regulatory regime that applies to them and can satisfy the test as to whether or not it would be more appropriate to make separate enterprise agreements (section 247 & 249 of the FW Act).

Consideration must also be given to whether the employers are competitive or collaborative and whether they operate through the use of government funding.

It would be difficult for competitors in an unregulated industry to obtain authorisation to act as single interest employers.

Multi-Enterprise Agreements (Section 172(3) of the FW Act)

This is an agreement between 2 or more employers that are not single interest employers and:

- (a) employees employed at the time the agreement is made and who will be covered by it; or
- (b) one or more relevant employee organisations if:
 - (i) the agreement relates to a genuine new enterprise that the employer is establishing or proposes to establish; and
 - (ii) the employers have not employed any of the persons who will be necessary for the normal conduct of the enterprise and will be covered by the agreement.

This type of agreement is aimed at covering employers who voluntarily choose to bargain together, whether or not those employers have a common enterprise. There is no public interest test for voluntary multi-enterprise bargaining and no authority is needed from FWA to bargain together in this way.

However, bargaining orders and protected industrial action (discussed below) is not available for multi-enterprise agreements. The relevance of this is discussed in more detail below.

Multi-Enterprise Agreements – low paid bargaining stream (Section 243 of the FW Act)

The FW Act also creates new powers for Fair Work Australia (**FWA**) to inject itself into and facilitate bargaining in respect of multi-employer enterprise agreements for low income workers.

A bargaining representative or an employee organisation that is entitled to represent the industrial interests of an employee in relation to the work to be performed under the agreement can apply to FWA to make a “low pay authorisation”.

The application to FWA must list the employer and employees to be covered by the agreement.

Before deciding to allow specific employers and their employees to enter the “low paid bargaining stream”, FWA will give consideration to a range of factors, including the assistance which would be given to low-paid employees without prior access to collective bargaining, the relationship between the employers listed and their enterprises, the terms and conditions which currently apply to the employees and so on.

Once a group of employees and employers have been designated as part of the low paid bargaining stream, the FWA has a range of powers to bring the parties together to negotiate a multi-employer enterprise agreement.

There is scope to add or remove an employer from the enterprise agreement.

3. AGREEMENT TYPES: COMPARISONS WITH THE WR ACT

AWAs and ITEAS

As of March 2008, the Rudd Government passed legislation amending the WR Act and abolishing the right to offer new AWAs.

The legislation allowed for the creation of transitional individual statutory employment contracts (**ITEAs**). However, the ability to create ITEAs was limited to those employers who had at least one employee on an AWA as at 1 December 2007. The maximum nominal life of an ITEA is 31 December 2009.

There are no agreements in the FW Act which relate to an employer and a single employee.

Greenfields Agreements

As set out above, there is still the capacity to make enterprise agreements between an employer or employers and employee organisations which cover new enterprises before any employees are actually employed (called **greenfields agreements**).

You may recall that under the WorkChoices amendments to the WR Act, “employer greenfields agreements” were introduced for the first time.

This was a new type of greenfields agreement made by an employer in respect of a new business that the employer proposed to establish. It did not require the involvement of any other party (either prospective employees or unions). It was, in essence, an agreement the employer made with itself to bind its employees.

Perhaps unsurprisingly, employer greenfields agreements have been abolished under the FW Act.

Common law agreements

Nothing in the FW Act prevents a single employer and employee from entering into a common law employment agreement. However, this agreement must, as a minimum, be no less favourable than the minimum conditions prescribed in the FW Act. If the employee is covered by a modern award, then the modern award will continue to set out further minimum entitlements for the employee and the common law agreement must be consistent with that.

4. WHAT CAN AND MUST BE INCLUDED IN ENTERPRISE AGREEMENTS?

Permitted Matters

Enterprise agreements may be made about “*permitted matters*”.

The *permitted matters* are as follows:

- (a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer’s employees who will be covered by the agreement;
- (b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;
- (c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement; and
- (d) how the agreement will operate.

The concept of “*matters pertaining to the employment relationship*” has a long history in industrial relations. To summarise the relevant case law, “*matters pertaining to the employment relationship*” include standard terms of employment but also things like the deduction of union fees, the ability to salary sacrifice, and additional employee benefits. Matters which fall outside the scope of matters pertaining to the employment relationship have been held to include conditions like the requirement that an employer only deal with certain third party suppliers, a prohibition on the engagement of contractors or a requirement for employer to donate to third parties.

A term of an enterprise agreement has no effect to the extent that it is not a term about a permitted matter (section 253 of the FW Act).

Mandatory Terms

There are also certain mandatory terms which must be included in an enterprise agreement.

Enterprise agreements **must** include the following terms:

(a) a flexibility term

A flexibility term is a term which allows an individual employee and employer to agree on certain arrangements varying the enterprise agreement to suit their individual needs. It must meet certain requirements, including the 'Better Off Overall Test' which is discussed in more detail below.

If the enterprise agreement does not include a flexibility term, the model flexibility term to be set out in the regulations to the FW Act will apply.

If an enterprise agreement purports to include a flexibility term but the actual term does not meet the requirements prescribed in the FW Act, then the arrangement agreed to by the parties has effect as if it were a flexibility term.

However, the employer will breach the FW Act if the employer is required under the FW Act to ensure the term meets the requirements of the FW Act and the term does not in fact meet those requirements (section 204 of the FW Act).

(b) a consultation term

A consultation term is one which:

- (i) requires the employer(s) to consult the employees about major workplace changes that are likely to have a significant impact on them; and
- (ii) allows for those employees to be represented in any such consultation.

(Section 205 of the FW Act)

If the enterprise agreement does not include a consultation term, the model consultation term to be set out in the regulations to the FW Act will apply.

(c) minimum rate of pay

Enterprise agreements must include minimum base rates of pay which are at least equivalent to the base rate of pay in any modern award that would (but for the existence of the enterprise agreement) cover the employee.

If an employee is not covered by a modern award but would except for the existence of the enterprise agreement be covered by a national minimum wage order, the enterprise agreement must include minimum base rates of pay which are at least equivalent to the national minimum wage order.

If the enterprise agreement includes a rate of pay which is less than the employee's modern award base rate of pay or national minimum wage order base rate of pay, the modern award base rate of pay or national minimum wage order base rate of pay will apply instead.

(Section 206 of FW Act)

Terms necessary for Approval of Enterprise Agreement by FWA

There are a range of other terms which are required for an enterprise agreement to be approved by FWA. Without these terms, FWA will not approve the enterprise agreement.

(a) nominal expiry date

Enterprise agreements must include a nominal expiry date which is not more than 4 years after the day on which FWA approves the agreement.

FWA will not approve an agreement unless it has a nominal expiry date.

(Section 186(5) of the FW Act)

(b) settlement of disputes

Enterprise agreements must include a term that sets out a procedure for settling disputes about matters arising under the agreement and in relation to the National Employment Standards (NES).

The procedure must allow for the representation of employees and require that the FWA or some other independent body settle the dispute.

FWA will not approve an agreement unless it has such a clause.

(section 186(6) of the FW Act)

(c) shiftworkers

If:

- (i) an employee would be covered by a modern award if the enterprise agreement was not in place; and
- (ii) under the modern award, that employee would be described or defined as a 'shiftworker',

the enterprise agreement must also define or describe the employee as a shiftworker for the purposes of additional benefits under the NES.

(Section 196 of the FW Act).

(d) other workers

There are additional requirements for the inclusion or exclusion of references to pieceworkers, outworkers and for school-based apprentices and school-based trainees which must be reviewed by FWA and approved by it before an enterprise agreement relating to

these types of workers can be approved.

(Sections 197 and 198 of the FW Act)

What must be excluded?

The most striking thing about agreement making under the WorkChoices amendments to the WR Act was all the matters which were to be excluded from any workplace agreements. There was a long list of “prohibited matters” such as payroll deductions for union memberships or OH&S training fees if such training was conducted by a union.

These prohibitions have been removed from the FW Act for enterprise agreements entered into on or after 1 July 2009.

However, under the FW Act, agreements cannot contain “*unlawful terms*”.

Unlawful terms are defined in section 194 of the FW Act to be terms that:

- (a) are discriminatory; or
- (b) are objectionable in the sense that they breach unlawful termination provisions in the FW Act or breach the freedom of association provisions in that Act;
- (c) are objectionable in the sense that they require payment of a bargaining services fee to a union;
- (d) confer an entitlement or remedy in relation to a termination of the employee’s employment before the employee has completed the qualifying period of service with the employer or modify or exclude unfair dismissal rights which exist under the FW Act;
- (e) authorise industrial action in a manner which is inconsistent with the FW Act;
- (f) give rights of entry for unions to premises which are inconsistent with the FW Act;
- (g) any term that provides for the exercise of a State or Territory Occupational Health and Safety rights other than in accordance with the FW Act.

A term of an enterprise agreement has no effect to the extent that it is an unlawful term.

5. INTERACTION BETWEEN ENTERPRISE AGREEMENTS AND THE NES

As discussed in our separate paper on the NES, the NES (along with modern awards) will apply from 1 January 2010 and will set the minimum safety net of conditions to apply to all employees.

An enterprise agreement must not exclude the terms of the NES (section 55 of the FW Act).

An enterprise agreement can include terms which are substantially the same as the NES or which are ancillary to the NES (section 55(4) & (5) of FW Act).

If an enterprise agreement includes terms which are the same as the NES, they operate in parallel to the NES but not so as to give the employee a double entitlement to the relevant conditions.

If a term of an enterprise agreement contravenes the NES, it will have no effect and the NES will apply.

6. INTERACTION BETWEEN MODERN AWARDS AND ENTERPRISE AGREEMENTS

A modern award does not apply while an enterprise agreement is in place.

However, see the section below on the 'Better Off Overall Test' which requires that an enterprise agreement leave an employee better off overall all when compared to the applicable modern award.

7. PRE APPROVAL REQUIREMENTS FOR ENTERPRISE AGREEMENTS

Notice of right to bargaining agent & appointment of bargaining agents

An employer to be covered by an enterprise agreement which is not a greenfields agreement must take all reasonable steps to give at least **14 days' notice** to employees who:

- (a) will be covered by the agreement; and
- (b) are employed at the relevant time,

of their right to be represented by a "bargaining representative" in the negotiation of the enterprise agreement (section 173 of the FW Act).

The notice must contain certain content, including an explanation that if the employee is a member of a union, he or she is entitled to have the union act as the bargaining agent for the employee and if the employee does not appoint the union of which they are a member, the union will be deemed to represent the employee's interest as the bargaining agent anyway (section 174 of the FW Act).

However, a union cannot be a bargaining agent of an employee unless it is entitled to represent the industrial interests of the employee in relation to the work to be performed under the enterprise agreement (section 176 of the FW Act).

There are additional requirements for notification when an employee is in the low-paid bargaining stream.

The regulations may prescribe other matters in respect of the content or form of the notice to employees (section 174 of the FW Act).

For employees, bargaining representatives may be their union, employees representing themselves or other persons appointed by an employee in writing (section 176 of the FW Act).

Employers may act as their own bargaining representative.

The appointment of the bargaining agent comes into force on the date specified in the instrument of appointment. The instrument of appointment must be given to the employer (section 178 of the FW Act).

The appointment of bargaining agents can be revoked in writing in accordance with section 178A of the FW Act.

Additional Notice Provisions

Except in relation to greenfields agreements, an employer who intends to introduce an enterprise agreement must “take reasonable steps” to ensure that all eligible employees have the agreement or access to it at least **7 days** before it is voted on (section 180 of the FW Act).

A request for a vote on an enterprise agreement cannot be made until 21 days have passed after the last notice giving details of an employee’s representational rights (as set out in the section immediately preceding this section) is given.

Bargaining in Good Faith

A significant departure from the WorkChoices provisions of the WR Act is the obligation in the FW Act for parties to “bargain in good faith”.

The introduction of the obligation on the employer and its employees to “bargain in good faith” arises in response to several long-running, high profile and fiercely contested industrial disputes. The cases involved workplaces where employers refused to negotiate with the union, notwithstanding the consistent view of their employees to have their union represent them. The employers also refused to consider a collective agreement even when their employees consistently voted down individual agreements.

The obligation to “bargain in good faith” does not require an employer or employees to agree on the terms of an enterprise agreement but it does create obligations for how they deal with each other.

Section 228 of the FW Act imposes the following “*good faith bargaining requirements*” that a bargaining representative for a proposed enterprise agreement must meet:

- (a) attending, and participating in, meetings at reasonable times;
- (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
- (c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;
- (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative’s responses to those proposals;
- (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining; and
- (f) recognising and bargaining with the other bargaining representatives for the

agreement.

The good faith bargaining requirements do not require:

- (a) a bargaining representative to make concessions during bargaining for the agreement; or
- (b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

The FW Act gives FWA the power to make bargaining orders requiring compliance with the obligations contained in the FW Act, except in relation to multi-enterprise agreement which do not involve workers in the low-paid bargaining stream. These orders can include an order that the employer enter into negotiations with its employees for a collective agreement if it can be shown that the majority of employees want a collective agreement.

If there is a dispute about the bargaining process, the FWA can also arbitrate the dispute.

There is also scope for the FWA to make a “serious breach declaration” in limited circumstances where a party has breached a bargaining order made by the FWA

Voting

An enterprise agreement must be voted on by the employees to come into effect.

An employer can request that the vote is by ballot or by an electronic method (section 181 of the FW Act).

In the case of a single enterprise agreement that is not a greenfields agreement, the enterprise agreement is made when the majority of employees of the employer or employers covered by the enterprise agreement cast a valid vote approving the enterprise agreement. (Section 182(1) of the FW Act)

In the case of a multi-enterprise agreement that is not a greenfields agreement, if each group of employees from each different employer have been asked to approve the agreement and have voted, the agreement is passed if a majority of employees of at least one of those employers who cast a valid vote has approved the agreement. The agreement is made immediately after the end of voting process is complete. However, prior to applying to FWA to approve the agreement, the relevant bargaining representative must vary the agreement so that it only applies to those employers whose employees who voted in favour of it.

Greenfields agreements are made when they are signed by each employer and union involved.

8. APPROVAL REQUIREMENTS FOR ENTERPRISE AGREEMENTS

The employer must apply for the enterprise agreement to be approved by FWA.

The application for approval must be made within 14 days after the agreement is made.

The regulations may prescribe additional application and documentation requirements.

To approve the enterprise agreement, FWA must be satisfied that:

- (a) the enterprise agreement (excluding a greenfields agreement) has been genuinely agreed to by the employees;
- (b) in the case of a multi-enterprise agreement, each employer genuinely agreed to the agreement and no one was coerced;
- (c) it does not contain terms which breach the NES;
- (d) if the agreement does not cover all employees in the employer's work force, the group of employees to be covered by the agreement was chosen fairly;
- (e) it does not include any unlawful terms;
- (f) it includes each of the required and mandatory terms;
- (g) approving the agreement would not be inconsistent with or undermine the requirement of good faith bargaining;
- (h) it includes all terms specific to different types of employees;
- (i) in the case of a greenfields agreement, the right unions represented the right potential employees and approving the agreement is in the public interest; and
- (j) it passes the 'Better Off Overall Test' (except in exceptional circumstances where there is some additional public interest in approving the agreement).

(Sections 185, 186, 187, 188 and 189 of the FW Act)

9. **BETTER OFF OVERALL TEST**

One of the most controversial aspects of the WorkChoices amendments to the WR Act was the removal of any test against which the 'fairness' of workplace agreements could be assessed prior to approval by the government body.

For a period, prior to the introduction of the Howard Government's 'Fairness Test', workplace agreements were simply approved on the basis of whether or not they contained any "prohibited content".

This changed first with the introduction of the 'Fairness Test'. The 'Fairness Test' required only that employees be 'fairly' compensated for the removal of protected award conditions. It changed again with the repeal of the fairness test and the re-introduction of the old 'no disadvantage test'. This was the test in place before WorkChoices and it required that the agreement be tested on the basis that employee would be at no overall disadvantage if employed under the workplace agreement when compared to the applicable award.

The FW Act introduces a new test to apply. Rather than relying on the 'no disadvantage test' the new test for agreements is called the Better Off Overall Test (or **BOOT**).

An agreement will pass the BOOT only if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the

relevant modern award applied to that class (Section 193 of the FW Act)

Unlike the 'no disadvantage test', which required that the employee not be disadvantaged, the BOOT requires more. It requires that the employee be better off when assessed against the award.

10. VARIATION AND TERMINATION

The FW Act includes a range of provisions for varying and terminating enterprise agreements.

Generally, agreements may be terminated by consent or by application by either party after the nominal expiry date.

11. WHY HAVE AN ENTERPRISE AGREEMENT?

Given the high threshold to be met as a condition of the approval of enterprise agreements, the obvious question is: why would you want one?

The answer to that question requires consideration of the new modern awards to apply from 1 January 2010. These awards are largely industry-based and have grouped together employers which may have no commonality at all.

The new modern awards are, therefore, unlikely to include any of the industrial, training or operational arrangements specific to small groups of employers. For example, in the retail industry, the myriad of different businesses (from bakers to butchers) are grouped together even though their operational practices may traditionally be very different.

This creates a need to consider whether there are any customs or requirements in your workplace which may make the new modern awards a poor fit and an enterprise agreement a better option overall.

Similarly, notwithstanding the attempt by the AIRC to create awards which are industry based and so able to cover an entire workplace with all the different roles performed, the reality is that many workplaces will still have several modern awards which apply to them. For example, clerical staff are covered in a single modern award so in any workplace with secretaries, receptionists or telephonists and a range of other workers, more than one modern award will apply.

Accordingly, a collective agreement would give an employer the option of covering all its employees in a single instrument.

Enterprise agreements also give the option of allowing for the cashing out of annual leave and personal / carer's leave which may be relevant if such rights are not included in the relevant modern award.

12. TRANSITIONING TO THE FW ACT

Some of the provisions relevant to approval of enterprise agreements will only have meaning on the commencement of the NES or on the commencement of modern awards on 1 January 2010.

The FW Act gives no guidance on the transitional arrangements to apply between 1 July 2009 and when the remainder of the changes take effect.

Accordingly, the Federal Government intends to introduce two separate pieces of legislation to deal with the transition to the FW Act.

The first piece of legislation (and the one relevant to this paper) is the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* (**Transitional Bill**). The second piece of legislation has not yet been introduced.

The Transitional Bill was introduced into Parliament earlier this year and it is intended that it is passed into law before 1 July 2009.

It may be subject to amendment and it currently being reviewed in the Senate. The following summary is subject to any changes which may be made to the Transitional Bill prior to it being passed into law.

What happens to pre-existing agreements after 1 July 2009?

Existing industrial instruments (including AWAs, ITEAs, collective agreements) will all become “*transitional instruments*” on 1 July 2009.

AWAs and ITEAs in operation immediately before the commencement of the FW Act are to become “*agreement based transitional instruments*” under the FW Act.

An ITEA entered into during the “*bridging period*” (that is, between 1 July 2009 and 1 January 2010) will also be an agreement based transitional instrument.

Collective agreements (including collective agreements, workplace determination, preserved collective State agreements, pre-reform collective agreements, old IR agreements and section 170MX awards) are to become “*collective agreement-based transitional instruments*”.

A collective agreement which has been made, but is not lodged, before 1 July 2009 must be lodged within 14 days after it is approved.

All transitional instruments will apply to the same employees, employers and other parties that the instrument currently applies to.

All transitional instruments will continue to be governed by the terms of the WR Act from 1 July 2009 as though it had not been repealed.

That is, the rules governing the instrument content and the instrument interaction rules, subject to our comments below, remain largely the same.

An “*instrument content rule*” is a law which deals with what may or may not be included in an agreement. An “*instrument interaction rule*” is a law which provides for the priority of one type of agreement over another.

An enterprise agreement which is submitted to FWA within the bridging period will have to pass the existing ‘no disadvantage test’ when compared with the current applicable NAPSA or pre-reform federal award. This approval process will apply until the NES and modern awards become effective on 1 January 2010.

There will be limited scope to vary transitional instruments after 1 July 2009.

The Transitional Bill sets out when and how transitional instruments can be amended. For example, an application can be made to vary a transitional instrument to remove any ambiguity.

If an agreement based transitional instrument such as an ITEA or AWA is past its nominal expiry date, it will continue to apply until terminated.

The Transitional Bill also sets out the procedures for the termination of these transitional instruments.

An employer and an employee can apply to FWA for approval to terminate a transitional instrument that has not passed the nominal expiry date. FWA must approve the termination if it is satisfied that the parties have genuinely agreed to the termination and that there are no other reasonable grounds for believing the employee has not agreed to it.

Interestingly, the Transitional Bill allows for a “*conditional termination*”. This is where an enterprise agreement is made that covers (but does not yet apply to) the employee because of the transitional instrument. The purpose of the conditional termination is to allow the employer and employee to negotiate about the parties entering into the enterprise agreement.

If an agreement based transitional instrument has passed the nominal expiry date, either party may apply to FWA for the termination of the transitional instrument.

The provisions of the Australian Fair Pay and Conditions Standard (**AFPCS**) will continue to apply in the bridging period if they apply currently to the transitional instrument.

Once the NES commences, any term of the transitional instrument which is detrimental to an employee in any respect when compared to an entitlement of the employee under the NES will be of no effect, irrespective of whether such term complied with the AFPCS.

From 1 July 2009, the provisions of the FW Act in relation to the payment of wages apply to employees covered by transitional instruments.

Importantly, while a transitional instrument applies to an employee and will continue to apply to that employee after 1 January 2010, the relevant modern award will not apply to the employee except as specified below.

However, a modern award will apply to a “*pre-reform certified agreement*” that applies to an employee. A pre-reform certified agreement is an agreement covering an employer’s workforce and which was entered into before the WorkChoices amendments to the WR Act. In relation to pre-reform certified agreements, the agreement will prevail over the modern award to the extent of any inconsistency, except in relation to base rates of pay as discussed below. Also, in respect of transitional instruments that rely on the conciliation and arbitration power in section (xxxv) of the Constitution (such as pre-reform certified agreements made under Division 3 of Part VI of the WR Act before 27 March 2006), there is a sunset clause at 27 March 2011.

After 1 January 2010, if a transitional instrument applies to an employee and:

- (a) a modern award in operation also covers the employee, the base rate of pay to be paid to the employee must at least be equal to the base rate of pay which would be payable to the employee under the modern award; or
- (b) the employee is not covered by a modern award, the base rate of pay paid to the employee must be at least equal to any applicable national minimum wage order.

If the transitional instrument contains a base rate of pay which is less than the applicable modern award or national minimum wage rate, the transitional instrument has effect as if the rates in the transitional instrument were equal to the higher award or order rates.

A “base rate of pay” is defined in the FW Act as the rate of pay payable to the employee for his or her ordinary hours of work. It does not include incentive-based payments, loadings, monetary allowances, or overtime and penalty rates.

Subject to any amendment of the Transitional Bill, the reference to the base rate of pay means that while employers (currently subject to an agreement) may have to increase the standard base rate of pay for ordinary hours worked to comply with the modern award or national minimum wage order, they will not be obliged to pay the penalty and overtime rates the modern award for the period of time that the agreement applies.

In respect of employers to whom a transitional instrument applies, FWA has the capacity to make an order for the phasing in of higher base rates. However, such an order will only be made if it is necessary for the ongoing viability of the employer’s business.

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