

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission – Transitional Arrangements

Social, Community, Home Care and
Disability Services Industry Award 2010
(AM2018/26)

20 September 2019

Ai
GROUP

AM2018/26 SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

TRANSITIONAL ARRANGEMENTS

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) advances these submissions in relation to the provisional views expressed by the Fair Work Commission (**Commission**) regarding transitional arrangements for the implementation of changes to the *Social, Community, Home Care and Disability Services Industry Award 2010* (**the Award**).
2. In its 2 September 2019 Decision (**the September Decision**) concerning the review of the Award, the Full Bench stated as follows in relation to its approach to considering the transitional arrangements that should be implemented:

[196] We now turn to consider the appropriate transitional arrangements in respect of our decision to vary the rates of pay of casuals working overtime and working on weekends and public holidays.

[197] In the Penalty Rates – Transitional Arrangements decision the Full Bench made the following observation about the determination of transitional arrangements:

‘the determination of appropriate transitional arrangements is a matter that calls for the exercise of broad judgment, rather than a formulaic or mechanistic approach involving the quantification of the weight accorded to each particular consideration.’

[198] The Full Bench went on to observe that the following matters were relevant to its determination of transitional arrangements in relation to the reduction of penalty rates.

(i) The statutory framework: any transitional arrangements must meet the modern awards objective and must only be included in a modern award to the extent necessary to meet that objective. The Full Bench also noted that it must perform its functions and exercise its powers in a manner which is ‘fair and just’ (as required by s.577(a)) and must take into account the objects of the Act and ‘equity, good conscience and the merits of the matter’ (s.578).

(ii) Fairness is a relevant consideration, given that the modern awards objective speaks of a ‘fair and relevant minimum safety net’. Fairness in this context is to be assessed from the perspective of both the employees and employers covered by the modern award in question. The Full Bench said, “while the impact of the reductions in penalty rates on the employees affected is a plainly relevant and important consideration in our determination of appropriate transitional arrangements, it is not appropriate to ‘totally subjugate’ the interests of the employers to those of the employees.”

[199] We adopt the above observations and propose to apply them to the matter before us...¹

3. Against this backdrop, the Full Bench has expressed the *provisional* view that the increase in the weekend and public holiday penalty rates for casuals should be phased in as follows²:

	Saturday	Sunday	Public holidays
	(% of ordinary rate, inclusive of casual loading)		
1 December 2019:	160	210	260
1 July 2020:	175	225	275

4. The Full Bench has also expressed a provisional view that the increase to overtime rates for casuals be operative from 1 December 2019.³
5. In light of consultation with major employers in the industry, we propose that the implementation date for the commencement of the new obligations be deferred.
6. More specifically, we propose that the phased implementation of the increase in the weekend and public holiday penalty rates for casuals should be retained but that the 1 December 2019 and 1 July 2020 dates be amended to 1 July 2020 and 1 December 2020. In the alternate, we propose that the entirety of the increase in the weekend and public holiday penalty rates be implemented from 1 July 2020.
7. We also propose that the implementation date for the commencement of the increases to overtime rates for casuals be deferred until 1 July 2020.
8. In support of this proposal Ai Group advance the following nine propositions.
9. **Firstly**, the changes will have a significant adverse impact upon employers who make substantial use of casual employment arrangements, particularly those that make substantial and systematic use of casual employment arrangements on weekends.

¹ September Decision at [196] – [199].

² September Decision at [199].

³ September Decision at [200].

10. **Secondly**, many employers in this sector that provide services to NDIS participants are struggling, or indeed failing to maintain profitable operations.
11. **Thirdly**, it is difficult for many employers to cover unforeseen and unbudgeted cost increases and as such it fair that they be afforded significant advanced notice of substantial cost increases.
12. **Fourthly**, employers will need time to assess and, if warranted and possible, implement changes to their workforce structure or service offering in light of the changes. Consideration may need to be given to whether it is feasible to substitute the use of casual labour with permanent labour and if it is, to do so. In this regard we observe that it cannot be assumed that an employer's workforce will accept such a change and as such this may not be change that can be implemented easily or quickly.
13. **Fifthly**, while there is no guarantee that there will be a change to funding arrangements, or more specifically to NDIS pricing restrictions, that will provide employers with any ability to recover the newly imposed costs, it is very unlikely that the period between now and 1 December 2019 will be sufficient time for such changes to be secured. A greater period of time should be afforded.

In support of this contention we observe that the Full Bench has already recognised that unfunded costs increases may result in a reduction in services to vulnerable members of the community; that the level of funding is a product of the political processes; that it may take time for funding changes to be implemented and that such matters can be addressed by appropriate transitional arrangements. Relevantly, in its September Decision the Full Bench held: (our emphasis)

[137] In the context of the provision of social services where employers are largely dependent on government funding, or, in the case of the NDIS, a fixed price, we are cognisant of the fact that significant unfunded employment cost increases may result in a reduction in services to vulnerable members of the community – a point made by the NDS. But such outcomes are a consequence of current funding arrangements, which are a matter for Government. Further, as we have mentioned earlier (at [75] above) the evidence as to the impact of the recent budgetary increase to the NDIS is somewhat unsatisfactory. Nor was there much consideration given to the extent to which the impact of an increase in casual overtime work and work on weekends and public holidays may be ameliorated by the utilisation of part time and full time employees.

[138] The Commission's statutory function is to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net. It is not the Commission's function to make any determination as to the adequacy (or otherwise) of the funding models operating in the sectors covered by the SCHADS Award. The level of funding provided and any consequent impact on service delivery is a product of the political process; not the arbitral task upon which we are engaged.

[139] We recognise that it may take time for a funding arrangement to adapt to a change in circumstances, such as an increase in employment costs occasioned by a variation to the award safety net. Such matters can be addressed by appropriate transitional arrangements.

....

[141] If, as the employer parties suggest, the NDIS pricing arrangements are underpinned by flawed assumptions and do not reflect the practicalities of providing services to participants or adequately compensate providers for their labour costs, this is a matter for Government to address, as the funder of the services. Such factors do not provide justification for a distortion of the Commission's statutory functions in setting the award safety net.⁴

14. Ai Group contends that the modified transitional arrangements that we have proposed would be *appropriate* arrangements, as they will provide a more realistic window for the Government to consider amending NDIS pricing arrangements in light of the increased costs that will be visited upon employers as a result of the changes to the Award.
15. **Sixthly**, it is foreseeable that some employers covered by the Award will, as a consequence of the September Decision, elect to cease the provision of some services to NDIS participants unless there is a change to NDIS funding arrangements. It is therefore in the interest of such employers, the NDIS participants who will lose access to such arrangements and ultimately the casual employees that may lose or at least see the curtailment of their employment opportunities with such employers for there to be sufficient time for the carefully consideration and orderly implementation of such changes.
16. **Seventhly**, the delayed implementation of the increase may enable the commencement of changes flowing from the September Decision to be coordinated with the commencement of any other changes to the Award that may fall from these proceedings. In the interests of simplicity, it is desirable that, as

⁴ September Decision at [137] – [141].

far as possible, the outcomes of this stage of the review of the Award not be implemented in a piecemeal manner. This will also enable employers to make a more holistic assessment about what changes they may make to their operations as consequence of the cumulative impact of any changes to the Award flowing from review.