Inquiry into the Provisions of the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

9 April 2009
Submission prepared by the Chamber of Commerce and Industry of Western Australia

CCI

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AND INDUSTRY
WESTERN AUSTRALIA

About CCI

The Chamber of Commerce and Industry of Western Australia (CCI) is the leading business association in Western Australia (WA).

It is the second largest organisation of its kind in Australia, with a membership of over 5,500 organisations in all sectors including: manufacturing; resources; agriculture; transport; communications; retailing; hospitality; building and construction; community services; and finance.

Most members are private businesses, but CCI also has representation in the not-for-profit sector and the government sector.

CCI members employ a significant number of employees – nearly 73 per cent of members employ up to 19 employees; 21 per cent between 20 and 99 employees and six per cent over 100 employees. CCI members are located in all geographical regions of WA.

CCI's membership in the accommodation, cafes and restaurants; health and community services; property services; and retail industries is around 30 per cent of our members.

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Executive Summary

CCI endorses the submission made by the Australian Chamber of Commerce and Industry. In addition, there are specific elements of the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (the Transitional Bill) which will have a significant impact on Western Australian business.

While CCI commends the Government's decision that current agreements will not have a 'drop dead date', CCI is concerned that the Transitional Bill imposes further costs and red tape on business and that these costs, combined with the costs associated with the *Fair Work Act 2009* (FW Act) will hinder productivity and have a negative effect on employment.

CCI has identified four key areas where the Transitional Bill will directly increase costs for business:

- The interaction of the NES and transitional instruments (the no-detriment rule);
- The interaction between modern awards and agreement-based transitional instruments;
- The ability for Fair Work Australia to make take home pay orders; and
- The interaction between modern award rates of pay and transitional instruments.

To reduce the significant cost increase on employers, CCI makes a number of recommendations:

1. In reference to greenfields agreements, section 187(5)(b) of the FW Act should be substituted with:

   (b) it is not contrary to the public interest to approve the agreement.

2. The Transitional Bill should be amended to enable agreement-based transitional instruments to continue until they are replaced or terminated without the requirement of having the NES interact with the agreement. Without such an amendment, agreement-based transitional instruments negotiated and approved within a significantly different legislative framework and set of minima, would be nonsensical, subject to a complex and time-consuming process and subject to significant additional costs.

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Alternatively: The powers of FWA should be expanded in schedule 3, part 5, item 26 so that FWA can not only vary a transitional instrument but can also determine that a provision of the NES has no effect while the agreement exists.

Further, CCI believes FWA should be able to deal with these applications before 1 January 2010 so these issues can be finalised well before the interaction between the NES and the transitional instruments takes effect.

3. In reference to the interaction of the modern award and agreement-based transitional instruments, proposed item 28(2) should be substituted with the following:

28 Modern awards and agreement-based transitional instruments

(2) If:

(a) an agreement-based transitional instrument of any of the following kinds:

(i) a pre-reform certified agreement;

(ii) an old IR agreement;

(iii) a section 170MX award; and

(b) an award-based transitional instrument;

both apply to an employee, or to an employer or other person in relation to the employee, the agreement-based transitional instrument prevails over the award-based transitional instrument, to the extent of any inconsistency.

(3) Notwithstanding the requirement of schedule 5, part 2, item 3 that FWA must terminate award-based transitional instruments that are completely replaced by the modern award, an award-based transitional instrument that applies in item 28(2) will continue to apply in accordance with 28(2) until the relevant agreement-based transitional instrument is terminated or replaced in accordance with the provisions of the Fair Work Act 2009.

4. In reference to take home pay orders, schedule 5, part 3 of the Transitional Bill is unnecessary and should be removed.

Alternatively: At the very least, FWA should be empowered to award costs for frivolous or vexatious claims.

5. Minimum rates of pay in a modern award should not override rates of pay contained in an agreement-based transitional instrument.

   The proposed provisions simply incorporate rates of pay into an agreement-based transitional instrument with no consideration as to the other terms and conditions that an employee is receiving under that instrument.

   Alternatively: Currently, schedule 9, part 4, item 14 of the Transitional Bill will give FWA the power to make a determination to phase-in the increases if it is satisfied that it is necessary to ensure the ongoing viability of the employer's enterprise.

   A possible alternative would be to empower FWA to consider if the employee is better off overall under the agreement-based transitional instrument when compared to the relevant modern award. It is not sufficient to consider base rates of pay alone – this does not take into account other factors such as higher loadings and allowances.

Critical issues contained in Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

CCI endorses the submission made by the Australian Chamber of Commerce and Industry. In addition, there are specific elements of the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (the Transitional Bill) which will have a significant impact on Western Australian business.

CCI commends the Government's decision that current agreements will not 'drop dead' at a particular time and will be able to continue until they are terminated or replaced. This is an important element of the transition to the new system. However, CCI is concerned that the Transitional Bill imposes further costs and red tape on business and that these costs, combined with the costs associated with the *Fair Work Act 2009* (FW Act) will hinder productivity and have a negative effect on employment.

CCI also commends the Government on removing the barriers for employers to enter into greenfields agreements under the new system. However, CCI believes the public interest test requirement for approval of the agreement by Fair Work Australia (FWA) is unnecessary and is likely to delay approvals. Instead, FWA should only be required to be satisfied that it is not contrary to the public interest in order to approve the agreement.

Recommendation: *Section 187(5)(b) of the FW Act should be substituted with:*

(b) it is not contrary to the public interest to approve the agreement.

The Transitional Bill will increase employer costs both directly and indirectly. These impacts will not apply evenly across industry with some industries being more heavily affected than others.

The Transitional Bill will result in employers facing increased costs because of the following:

- Time and resources spent taking advice and learning a new industrial relations system on top of a complicated transitional system.
- Impost of the national employment standards added to existing agreements.

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- Interaction of modern award rates of pay and existing agreements, with no consideration given to other provisions contained in the agreements.

- Ability for FWA to make take home pay orders and the costs associated in defending frivolous and vexatious claims for take home pay orders.

- Time and resources spent assessing regulatory compliance and implementing compliance measures.

Increasing the costs of employment through government regulation adds a burden to employing staff. The risk is that businesses will become frustrated with the additional regulation and costs, and become reluctant to employ.

Further, inflexible regulation means that the laws do not work effectively for employers and employees of all different shapes and sizes. Inflexible laws lead to inefficiencies, a drag on productivity, a lack of compliance and eventually more changes.

Such increased regulation and cost is exacerbated by current economic conditions. The *Commonwealth Bank-CCI Survey of Business Expectations* showed that confidence has fallen from record highs in June 2006 (where over 87 per cent of businesses expected the WA economy to remain strong or strengthen in the 12 months ahead) to successive lows in December 2008 and March 2009. Around three quarters of businesses now expect the WA economy to weaken in the next 12 months.

The survey also showed that employment activity dropped to its lowest since September 1991 during the March quarter of 2009. Further, around one third of respondents reported cutting staff during the quarter.

It is in this environment that CCI urges caution in the implementation of the new system to minimise unnecessary and costly disruption to business as it manages through the change process.

The no detriment rule

The no detriment rule as set out in schedule 3, part 5, item 23 of the Transitional Bill provides that a term of a transitional instrument has no effect to the extent that it is detrimental to an employee, in any respect, when compared to an entitlement of the employee under the National Employment Standards (NES).

Paragraph 83 of the Fair Work Bill 2008 - Explanatory Memorandum (EM) explains that the no detriment test will apply on a 'line by line' basis. The effect of this application of the test is that the NES will prevail over an entitlement in a transitional instrument if an employee suffers a detriment.

The example used in the EM demonstrates that a term in a transitional instrument about the amount of annual leave to which an employee is entitled, and the amount the employee is entitled to be paid while on leave, might continue to operate, but if there are less favourable accrual rules in the transitional instrument, then the rules in the NES will apply.

CCI recognises that subitem 23(3) of the Transitional Bill will allow for regulations to provide more information as to whether terms of a transitional instrument are detrimental to an employee, when compared to the NES. However, the current uncertainty raises further concern for business and is, for example, already effecting current bargaining. The effect of this clause needs to be fully understood well before the 1 July 2009.

The critical issue identified by CCI is that business will face significant increases in costs because of this provision. For example, it is likely under the no-detriment rule, that employees will access entitlements twice. This will occur because transitional instruments were negotiated, approved and tested against different legislation. The Transitional Bill is not flexible enough to take this into account.

As set out in the examples below, such provisions are not unusual anomalies but are well accepted and utilised provisions in agreements made between employees and unions.

Annual leave and public holidays in the health industry

In the health industry, union and employee collective agreements often contain terms that provide an employee 6 weeks annual leave whereby 2 weeks constitute leave in lieu of public holidays.

This provision is included because as a 24 hour operation it is necessary that staffing levels continue during public holidays and as such employees are expected as part of their contract of employment to be available to work on public holidays.

The following excerpts are taken from a union collective agreement made in 2008 and also replicate the provisions of the *Private Hospital and Residential Aged Care (Nursing Homes) Award 2002* (clauses 26 and 27), which would have been used to determine whether the agreement passed the no-disadvantage test [emphasis added]:

> *21 Public Holidays*
>
> *21.3* ***An employee who is not required to work on any of the public holidays*** *named in this clause or day observed in lieu thereof, shall be entitled to a day's leave and shall be paid at the ordinary rate of wage the employee would receive for hours usually worked on that day.* ***This subclause applies to employees entitled to 4 weeks annual leave per annum.***[1]
>
> *31 Annual Leave*
>
> *31.1* ***Entitlement***
>
> *Except as hereinafter provided, employees shall be entitled to 6 consecutive weeks leave after each 12 months continuous service.*
>
> *Notwithstanding the provisions of subclause 31.1(a), an employee employed regularly in a non-client related position including gardener, machinist, maintenance employee and stores person* ***who is not required to be available to work on any of the public holidays*** *named in clause 21. - Public holidays* ***shall be entitled to 4 consecutive weeks' leave*** *after each 12 months' continuous service.* [2]

Under the proposed no-detriment rule, an employee (other than an employee employed in a non-client related position) would continue to receive 6 weeks annual leave because it is more favourable than the 4 weeks annual leave provided by NES.

[1] The last sentence is only contained in the agreement, not the award.
[2] Union Collective Agreement – health industry

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Under section 114 and 116 of the FW Act employees are eligible to be absent from work on a public holiday, can reasonably refuse to work on a public holiday and will be paid the base rate of pay for absence on a public holiday. However, the contract of employment and the agreement provide that employees must be available to work public holidays and if they are absent they do not receive payment because they received an extra 10 days annual leave instead of the public holiday payment.

These provisions would be found to constitute a detriment when compared with each entitlement under the NES and as such the relevant provisions of the NES will apply notwithstanding that, when read in total, the employee suffers no actual detriment.

As already stated, this practice is commonly used and accepted by both employers and unions, it is reflective of the provisions of the relevant award and such agreements have been approved by the Workplace Authority.

"All in rates" in the engineering industry

Many Australian Workplace Agreements (AWAs) in the past have provided "all in rates" for employees.[3] Before March 2006 AWAs were tested against the no-disadvantage test and after May 2007 AWAs were tested against the fairness test. Such measures ensured that employees entitlements were not 'whittled away'. In fact, in some industries, such as the highly lucrative engineering industry, employees enjoyed a significantly higher rate of pay in lieu of provisions they might not ever access.

The following excerpt is from an AWA applying to an engineer. It was subject to the no-disadvantage test which would have ensured that the employee was not disadvantaged in relation to their terms and conditions of employment.[4] The provisions contained in this AWA were used by the employer with all engineering staff up until March 2006. These AWAs only operated for 3 years and would have expired by March 2009. However, if not replaced or terminated, they have continued effect beyond their nominal expiry dates and as such the provision is still relevant.

[3] CCI has not identified the parties to the AWAs that are used in the following examples. AWAs made under the *Workplace Relations Act 1996* are private documents and are not available on the public record.

[4] Section 170XA of the *Workplace Relations Act 1996* (consolidated to May 2004).

The agreement states that:

> *Your employment is based on a premium rate of pay. Under this system your rate of pay provides a loading in lieu of any paid leave entitlements that would normally be attributable to permanent employees, including (but not limited to) annual leave, sick leave, carers leave, bereavement leave, long service leave or public holidays. This "cashed up" rate of pay applies to all hours of work.*[5]

The agreement provides a 'cashed up rate' in lieu of annual leave, sick leave, carers leave, bereavement leave, long service leave and public holidays. This is not a case where the employer has removed the entitlements and given nothing in return. The employee receives a significantly higher rate and the employee can still take up to 4 weeks unpaid leave. It is unpaid because payment for the leave has already been taken into account in the rate of pay.

The agreement states:

> *You may request unpaid time off for recreational leave of up to 4 weeks in any year, or such longer period as may be agreed between the parties, which shall be granted at a mutually convenient time.*

Further, this was tested against the no-disadvantage test and was held that the employee received no disadvantage under the agreement when compared to the designated award.

Under the no detriment rule, because the entitlements were 'cashed up', an employee would continue to receive a significantly higher rate of pay but would also receive, from 1 January 2010, entitlements under the following sections of the NES:

- Division 6 – annual leave;
- Division 2 – personal/carers leave and compassionate leave;
- Division 10 – public holidays; and
- Division 11 – redundancy pay.

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[5] AWA – engineering industry

Redundancy in the mining industry

In the mining industry it is common for redundancy provisions to be rolled into an hourly rate.

This is an example from an AWA made in 2006 where redundancy has been included in the hourly rate:

> *15. REDUNDANCY*
>
> *A component in lieu of redundancy pay has been included in your hourly rate.*[6]

Notwithstanding the fact that the employee is receiving a monetary benefit in lieu of the entitlement, the no detriment rule will result in the provisions of section 119 of the FW Act, relating to redundancy pay, taking effect.

Recommendation: *The Transitional Bill should be amended to enable agreement-based transitional instruments to continue until they are replaced or terminated without the requirement of having the NES interact with the agreement. Without such an amendment, agreement-based transitional instruments negotiated and approved within a significantly different legislative framework and set of minima, would be nonsensical, subject to a complex and time-consuming process and subject to significant additional costs.*

Alternatively: *The powers of FWA should be expanded in schedule 3, part 5, item 26 so that FWA can not only vary a transitional instrument but can also determine that a provision of the NES has no effect while the agreement exists.*

Further, CCI believes FWA should be able to deal with these applications before 1 January 2010 so these issues can be finalised well before the interaction between the NES and the transitional instruments takes effect.

[6] AWA – mining industry

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Interaction between modern awards and agreement-based transitional instruments

Schedule 3, part 5, item 28 of the Transitional Bill deals with the interaction between modern awards and agreement-based transitional instruments.

Subitem 28(1) and 28(2) provide for agreement-based transitional instruments to be dealt with differently depending on the type of agreement-based transitional instrument.

Under subitem 28(1) when a workplace agreement; a workplace determination; a preserved State agreement; an AWA or a pre-reform AWA applies to an employee, a modern award does not apply.

Under subitem 28(2) when a pre-reform certified agreement; an old IR agreement (as defined by schedule 7 of the WR Act) or a section 170MX award AND a modern award, both apply, the agreement-based transitional instrument will prevail to the extent of any inconsistency.

Subitem 28(2) adapts sections 5 and 26E of schedule 7 of the WR Act which states that:

> ***5 Interaction of agreement with other instruments***
>
> *(1) While a pre-reform certified agreement is in operation, it prevails, to the extent of any inconsistency, over:*
>
> *(a) a preserved State agreement; or*
>
> *(b) a notional agreement preserving State awards.*
>
> *(2) While a pre-reform certified agreement is in operation, it prevails over an award to the extent of any inconsistency (subject to section 170LY of the pre-reform Act, as it applies because of clause 2).*
>
> ***26E Interaction of section 170MX awards with other instruments***
>
> *While a section 170MX award to which this Division applies is in operation, it prevails over a transitional award to the extent of any inconsistency.*

However, the effect of subitem 28(2) is that because a modern award displaces an award-based transitional instrument (such as a pre-reform federal award or NAPSA), the modern award will then be read in conjunction with an

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agreement-based transitional instrument as defined in 28(2) instead of the appropriate award-based transitional instrument. The problem with this approach is that the agreements described were not made with the intention or knowledge that the relevant award or NAPSA would be modernised. The modern award has no place being read in conjunction with an agreement-based transitional instrument. The modern award was the result of the award modernisation process and contains substantially different terms to the awards and NAPSAs that were in place at the time the group of agreements were made and with which they are read in conjunction.

Instead of the proposed subitem 28(2), the Transitional Bill should be amended to include an item that maintains the provisions of award-based transitional instruments that are read in conjunction with agreement-based transitional instruments until the agreement-based transitional instruments are terminated or replaced.

Recommendation: *Proposed item 28(2) should be substituted with the following:*

28 Modern awards and agreement-based transitional instruments

(2) If:

(a) an agreement-based transitional instrument of any of the following kinds:

(i) a pre-reform certified agreement;

(ii) an old IR agreement;

(iii) a section 170MX award; and

(b) an award-based transitional instrument;

both apply to an employee, or to an employer or other person in relation to the employee, the agreement-based transitional instrument prevails over the award-based transitional instrument, to the extent of any inconsistency.

(3) Notwithstanding the requirement of schedule 5, part 2, item 3 that FWA must terminate award-based transitional instruments that are completely replaced by the modern award, an award-based transitional instrument that applies in item 28(2) will continue to apply in accordance with 28(2) until the relevant agreement-based transitional instrument is terminated or replaced in accordance with the provisions of the Fair Work Act 2009.

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Take home pay orders

Schedule 5, part 3, item 8 of the Transitional Bill makes it clear that the award modernisation process is not intended to result in a reduction in the take-home pay of employees, and provides a mechanism for obtaining remedial orders (take-home pay orders) if there is such a reduction.

This item of the Transitional Bill is another example of increased protections for employees, with no consideration to the practical effect that it will have on employers.

The award modernisation request issued by the Hon. Julia Gillard on 18 December 2008 states that award modernisation is not intended to "*2(c) disadvantage employees or 2(d) increase costs for employers*".[7]

While the take home pay orders seek to further protect employees, it gives no consideration to the considerable cost increases that employers are facing as a result of the new legislative framework.

The extent that an employee's take home pay would be reduced under the award modernisation process is limited. While CCI is aware of some provisions that are reduced in modern awards, once considered as a whole, the employee's take home pay is most likely going to be increased because of the award modernisation process. Further, even if an employee's rate of pay under the modern award was less than they currently receive there are contractual obligations that employers need to comply with. To simply reduce an employee's rate of pay would constitute an unlawful, unilateral variation of the contract of employment.

For this reason, CCI argues that the likelihood of employees making genuine claims will be limited under this clause. However, this will not stop employees and unions from making claims that will be time consuming and costly for employers to defend.

[7] Consolidated version of the Award Modernisation Request made under section 576C(1) of the *Workplace Relations Act 1996* issued by the Hon. Julia Gillard, Minister for Employment and Workplace Relations on 18 December 2008. Accessed at <http://www.airc.gov.au/ awardmod/download/amrequest_consolidated081218.doc> on 8 April 2009.

Recommendation: *Schedule 5, part 3 of the Transitional Bill is unnecessary and should be removed.*

Alternatively: *At the very least, FWA should be empowered to award costs for frivolous or vexatious claims.*

Modern award rates of pay and transitional instruments

Schedule 9, part 4, item 13 of the Transitional Bill provides that, on or after FW (safety net provisions) commencement day (likely to be 1 January 2010) all employees are entitled to at least the relevant safety net minimum wage - from either the relevant modern award, transitional APCS or, if the employee is award/agreement free, the national minimum wage order.

This is going to have a significant effect in industries where rates of pay in agreements reflect the rates contained in the relevant reference instrument (often an award or NAPSA) and where the modern award will substantially increase the base rate of pay.

The effect in the retail industry

The following is a specific example that will arise across a range of business sizes in the retail industry. In an effort to ensure passage of the no-disadvantage test under the WR Act,[8] many current agreements mirror the relevant reference instrument (in Western Australia this is the *Shop and Warehouse (Wholesale and Retail Establishments) Notional Agreement Preserving a State Award*, herein referred to as the S&W NAPSA).

[8] Part 8, Division 5A, Subdivision B of the *Workplace Relations Act 1996* (consolidated at 15 May 2008)

Most agreements therefore provide an 'in-charge' loading that reflects clause 28(2) of the S&W NAPSA. Clause 28(2) of the S&W NAPSA provides that an employee who is required by the employer to be in charge of a shop, store or warehouse or other employees shall be paid an in-charge allowance. The allowance is staggered. Employees in charge of a shop, store or warehouse with no other employees, or, if placed in charge of less than three other employees, receive 3.4% of their base rate of pay. Employees in charge of three or more other employees but less than ten other employees receive 6.2% of their base rate of pay and those in charge of ten or more other employees receive 11.2% of their base rate of pay.

The relevant modern award, the *General Retail Industry Award 2010*, does not provide an equivalent in-charge allowance. Instead, it is built into the classification and the base rate of pay.

Under the *General Retail Industry Award 2010*, an employee who would have received this allowance under the S&W NAPSA would be classified at Level 6 (a second in-charge (2IC) or duty manager) or a Level 8 (store manager). The award does not distinguish between the number of staff being supervised so potentially the classification could apply to a small retail shop where less than 3 staff members are being supervised.

In this example, the effect of schedule 9, part 4, item 13 of the Transitional Bill is that an employee will receive a higher base rate of pay in recognition of their supervisory role, but will also receive the applicable allowance under the agreement in recognition of their supervisory role. The increase is compounded further because of the method of calculating the allowance as a percentage of the base rate of pay. According to schedule 9, part 4, item 13 of the Transitional Bill, the rate will be the higher modern award rate of pay. An employer will, in essence, be paying the employee twice for one entitlement.

The wage differentials between an agreement reflecting the rates of the S&W NAPSA and the *General Retail Industry Award 2010* are as follows:

Agreement rate of pay based on the S&W NAPSA		**General Retail Industry Award 2010**	**Difference between base rates**
Base rate of pay	$15.88 per hr	Base rate for 2IC $17.76 Base rate for Store Manager $19.47	**$1.88 extra per hr** **$3.59 extra per hr**
Agreement rate of pay based on S&W NAPSA incorporating in-charge allowance		**Additional cost because of modern award base rate of pay and agreement entitlement to in-charge allowance**	
Plus In-charge of less than 3 – 3.4%	15.88 x 1.034 = $16.42	2IC - 17.76 x 1.034 = $18.36 **($1.94 per hour extra)** Store Manager - 19.47 x 1.034 = $20.13 **($3.71 per hour extra)**	
Plus In-charge of 3 or more but less than 10 – 6.2% on base	15.88 x 1.062 = $16.86	2IC - 17.76 x 1.062 = $18.86 **($2.00 per hour extra)** Store Manager - 19.47 x 1.062 = $20.68 **($3.82 per hour extra)**	
Plus In-charge of 10 or more – 11.2% on base	15.88 x 1.112 = $17.66	2IC - 17.76 x 1.112 = $19.75 **($2.90 per hour extra)** Store Manager - 19.47 x 1.112 = $22.65 **($4.99 per hour extra)**	

It is foreseeable that a small business could be obliged to increase their Store Manager's rate of pay by up to $3.71 per hour (equating to an additional $140.95 per week and $7280 per annum) on 1 January 2010. Additionally, medium size businesses such as individually owned supermarkets could be looking at an additional $5 per hour (equating to an additional $190 per week and $9880 per annum) for store managers.

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This increase would also have flow on effects with penalty rates, loadings and other allowances prescribed by an agreement-based transitional instrument. For example, double time on Sundays for a 2IC currently in charge of less than 3 employees will increase by an additional $20.37 per 7.6 hour Sunday shift and an additional $46.36 for Store Managers undertaking the same shift. Even where only 1 in every 4 Sundays are worked this would increase costs per annum for a small business with one 2IC and one Store Manager by $800.76 over the year for the Sunday work alone.

This example shows the cost increase that employers in WA will face because of the modern award process; it will then be compounded because of schedule 9, part 4, item 13 of the Transitional Bill.

Current agreement-based transitional instruments that have been negotiated and tested against a no-disadvantage test should be allowed to continue for its life. Once it is terminated or replaced then the modern award should take effect.

Recommendation: *Minimum rates of pay in a modern award should not override rates of pay contained in an agreement-based transitional instrument.*

The proposed provisions simply incorporate rates of pay into an agreement-based transitional instrument with no consideration as to the other terms and conditions that an employee is receiving under that instrument.

Alternatively: *Currently, schedule 9, part 4, item 14 of the Transitional Bill will give FWA the power to make a determination to phase-in the increases if it is satisfied that it is necessary to ensure the ongoing viability of the employer's enterprise.*

A possible alternative would be to empower FWA to consider if the employee is better off overall under the agreement-based transitional instrument when compared to the relevant modern award. It is not sufficient to consider base rates of pay alone – this does not take into account other factors such as higher loadings and allowances.

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