

Transitional arrangements

The Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (the Transitional Bill) introduced on 19 March 2009 sets out what will happen to “old” awards and agreements, among other things, as businesses transition from the current to the new IR system under the Fair Work Act 2009 (the FW Act).



Most aspects of the new system are expected to commence operation on 1 July 2009. The exception is the new safety net of ten National Employment Standards and modern awards which will commence on 1 January 2010.

This summary concentrates on the impact of the transitional provisions on employers. There are essentially three types of agreements considered in the Transitional Bill: agreements made before 1 July 2009; agreements made between 1 July 2009 and 31 December 2009 and agreements made after 1 January 2010. This summary focuses on the first two types of agreements, the safety net and institutional arrangements.

Information on the substantive changes to the industrial relations system is also available from CCI.

The new system

Q – What are the changes made by the Transitional Bill? Are the changes part of the Fair Work Act?

No, the FW Act is a separate piece of legislation. However, the Transitional Bill and the FW Act are closely related and will interact.

The Transitional Bill primarily deals with those provisions that are necessary to get from the current to the new IR system. The FW Act contains the substantive provisions that will bring about the new system.

Q – What will happen to the *Workplace Relations Act 1996*?

The existing *Workplace Relations Act 1996* (the WR Act) will be repealed on 1 July 2009. However, Schedule 1 (which deals with registered organisations) and Schedule 10 (which deals with transitionally registered associations) of the WR Act will remain and will form a renamed *Fair Work (Registered Organisations) Act 2009*.

While the WR Act will be repealed, the Transitional Bill maintains many WR Act provisions during the “bridging period” from 1 July 2009 until 1 January 2010. More information about the saved provisions is set out below.



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Agreements made before 1 July 2009

Q – The agreements we have in place don't expire until 2011. What will happen to these agreements?

Existing agreements will become “transitional instruments” on 1 July 2009. These transitional instruments will continue to apply until terminated or replaced as if the WR Act had not been repealed.

There is no sunset or “drop dead” date for agreement-based transitional instruments (i.e. all transitional instruments that are not awards or NAPSAs) except any involving an employer that is not a national system employer (i.e. a non-constitutional corporation) in which case the agreement cannot operate beyond 27 March 2011.

Q – What is a transitional instrument?

Existing agreements such as collective agreements (employee and union), pre-reform certified agreements, individual agreements (Australian workplace agreements (AWAs) and individual transitional employment agreement (ITEAs)), preserved state agreements and old IR agreements will all become “transitional instruments” on 1 July 2009.

As well as agreements, awards, notional agreement preserving state awards (NAPSA), section 170MX awards and workplace determinations will also become transitional instruments.

Q – What about new employees?

A transitional instrument covers the same employees and employers that it would have covered if the WR Act had continued in operation.

For those employers using collective-agreement based transitional instruments and award-based transitional instruments, any new employees will also be covered if they fall within the transitional instrument's coverage.

Q - We have a collective agreement that has been voted on, but has not yet been lodged with the Workplace Authority. Can I still lodge my agreement?

Under the Transitional Bill, a collective agreement or union greenfields agreement that is made before 1 July 2009 will still be able to be lodged and approved by the Workplace Authority so long as it is lodged within 14 days of being approved (for union and employee collectives) or made (for union greenfields). Such an agreement will be considered a transitional instrument and will continue to apply as if the WR Act has not been repealed. This means the agreement will need to meet the requirements of the WR Act (such as the no disadvantage test) to become operational.

A collective agreement (both employee and union) is considered made when a majority of eligible employees vote the agreement be approved. However, a union greenfields agreement is considered made when the employer and the union agree to the terms of the agreement.

Q – I lodged a collective agreement with the Workplace Authority in May 2009. I received notification from the Workplace Authority on 1 July 2009 that the agreement does not pass the no-disadvantage test. What can I do?

Under the Transitional Bill, if the Workplace Authority issues a notice that your collective agreement does not pass the no-disadvantage test it will still be possible to lodge a variation of that agreement.

A variation for the purposes of passing the no-disadvantage test must be lodged within 30 days. The 30 day period begins on the 7th day after the date on the notice issued by the Workplace Authority. Under this example, the variation will need to be lodged before the 6th August 2009. However, under certain circumstances (which will be contained in the regulations) the Workplace Authority will be able to extend the 30 day period.

If you do not lodge the variation to the agreement within the period, the agreement will not take effect and a new agreement will need to be negotiated under the requirements of the new system (including the notification and good faith bargaining provisions).

Q – What happens after my agreement expires?

Current agreement-based transitional instruments (including collective agreements and Australian workplace agreements) will continue to operate past their nominal expiry date until terminated in accordance with the provisions of the FW Act or until replaced by a new enterprise agreement made under the FW Act.

Q – How can I terminate my existing collective agreements after 1 July 2009?

Collective agreements existing after 1 July 2009 can be terminated either with the agreement of a majority of employees, or by application to FWA (the latter is only available after the nominal expiry date).

Existing collective agreements can also be replaced at any time with a new enterprise agreement, regardless of whether the nominal expiry date is passed. However, employers cannot be forced into bargaining under the new system until 90 days before the nominal expiry date of existing collective agreements.

Q – Can I vary my agreements after 1 July 2009?

It will generally not be possible to vary existing agreements after 1 July 2009 except to remove discriminatory terms, to resolve difficulties with the NES and to remove ambiguity.

However, the Transitional Bill continues the option of varying and extending pre-WorkChoices collective agreements but only during the bridging period.

Q – What happens if my employees are on AWAs or ITEAs but want to vote on a proposed collective agreement?

An employee who is covered by an AWA or ITEA can only vote for a proposed enterprise agreement if the nominal expiry date of the AWA or ITEA has passed or a “conditional termination” of the individual agreement-based transitional instrument has been made.

A conditional termination has the effect of terminating an individual agreement-based transitional instrument if an enterprise agreement that covers the employer and employee comes into operation.

A conditional termination must be in writing. If the AWA or ITEA has not passed its nominal expiry date the conditional termination must be signed by the employee and the employer. However, if the AWA or ITEA has passed its nominal expiry date, the conditional termination can be signed by either the employer or the employee.

As well as an inability to vote on the proposed agreement, an employee who is covered by an AWA or an ITEA that has *not* passed its nominal expiry date or has *not* made a conditional termination, will not be able to be represented in bargaining for a proposed enterprise agreement, be included in a group of employees covered by a protected action ballot order in relation to the proposed agreement; or have the proposed agreement apply to the employee.

Q – We are currently negotiating an agreement but it hasn’t been voted on. What will happen to our current negotiations?

With the repeal of the WR Act, those involved in bargaining for an agreement will generally need to start the bargaining and industrial action processes afresh under the FW Act in relation to an enterprise agreement.

As such, any applications or reviews relating to bargaining periods or orders suspending or terminating bargaining periods that have not been dealt with are of no effect after 1 July 2009.

Protected action ballot orders under the WR Act are also of no effect after 1 July 2009. This means that even if protected industrial action has taken place prior to 1 July, bargaining representatives will need to apply afresh for protected action ballots after that date.

However, where the AIRC or a court is in the process of dealing with an application under section 496 of the WR Act to stop industrial action, then the AIRC or court will consider the application.

These changes will require employers to re-start the bargain process under the FW Act. Employers will, for example, need to follow the notification requirements and also the good faith bargaining provisions contained in the FW Act. However, the Transitional Bill permits FWA to take into account bargaining conduct of the parties which occurred prior to 1 July 2009.

Agreements made between 1 July 2009 and 1 January 2010

Agreements initiated after 1 July 2009 will be made and negotiated under the provisions of the FW Act. This means applying all new requirements relating to types of agreements, union representational rights, good faith bargaining and the extended ability for the industrial umpire, Fair Work Australia, to make orders and to arbitrate.

More information regarding the new agreement making system under the FW Act is available from CCI.

Q – What is the “bridging period”?

The bridging period is the period starting on 1 July 2009 (the WR Act repeal day) and ending immediately before 1 January 2010 (the FW (safety net provisions) commencement day).

During this period the Australian Fair Pay and Conditions Standard (AFPCS) will continue to set minimum standards as to wages, hours of work, annual leave, personal leave and parental leave. Other standards on matters such as public holidays, rest breaks and notice of termination will also remain in operation. This is because the National Employment Standards will not apply until 1 January 2010.

Q – How are agreements tested during the “bridging period”?

With the NES and modern awards not becoming operative until 1 January 2010, agreements made during the bridging period will not be subject to the new “better off overall test”. Instead the current no-disadvantage test will continue to apply. Enterprise agreements made during the bridging period will be tested against existing awards and NAPSAs.

Further, a term in any agreement made during this period will be of no effect to the extent that it provides a less favourable outcome for an employee compared to the AFPCS.

Q – Is it still possible to make ITEAs?

It is still possible to make ITEAs during the bridging period. However, because ITEAs have a nominal expiry date of 31 December 2009, there is limited opportunity for new ITEAs to apply.

From 1 January 2010 there is no provision for individual agreements.

Agreements from 1 January 2010

From 1 January 2010, the final elements of the new system, the NES and modern awards, will take effect. The new agreement making process operational from 1 July 2009 will apply for all agreements.

The key difference between agreements made during the bridging period and those made after 1 January 2010 is that after 1 January 2010 an agreement will need to pass the 'better off overall test'. This test will require that each employee is better off overall than they would be under a modern award. Further, all agreements will interact with the minimum entitlements prescribed by the NES.

Q – What happens to my existing agreements on 1 January 2010?

Agreements in operation as at 1 January 2010 must comply with the new National Employment Standards (NES) and the relevant modern award base rate of pay.

This includes agreements made before 1 July 2009 and those made during the bridging period.

The Transitional Bill introduces a no-detriment rule so that no term of a transitional instrument has effect if it is detrimental to an employee in any respect when compared to an entitlement of that employee under the NES.

The no-detriment rule is to be applied on a line-by-line basis. This means that an employee's entitlement would be covered by both the NES and the transitional instrument. For example, 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.

Award modernisation

Q – What is happening to awards? When will they be replaced by “modern awards”?

The AIRC is currently undertaking the process of award modernisation. Once this is completed and the modern awards take effect, likely to be 1 January 2010, they will replace all pre-reform awards and NAPSAs.

Once a modern award comes into operation, FWA must terminate an award or NAPSA that is completely replaced by the modern award. If a modern award only partially replaces an award-based transitional instrument (i.e. awards and NAPSAs) FWA is required to vary the coverage of the instrument so that it does not cover those who are covered by the modern award.

Once all modern awards are made, FWA must terminate any remaining awards/NAPSAs, unless it is enterprise specific.

Q – We have a state based enterprise NAPSA. What happens to my enterprise NAPSA?

Enterprise awards and NAPSAs that were derived from a State enterprise award are currently excluded from the award modernisation process that is being undertaken by the AIRC.

However, the Transitional Bill provides for the modernisation of “enterprise instruments” (i.e. enterprise award-based instruments and enterprise preserved collective state agreements). On application, FWA may make a modern enterprise award to replace an enterprise instrument. The application may be made only by a person covered by the enterprise instrument and it must be made between 1 July 2009 and 31 December 2013.

If an application to modernise an enterprise instrument has not been received by FWA by 31 December 2013, the enterprise instrument will cease to operate. Employers and employees would at that point become covered by a relevant modern award.

Until the end of 2013 or until a decision is made by FWA about whether or not to make a modern enterprise award, existing enterprise instruments will continue and the parties covered by the instrument will retain their existing entitlements and obligations.

Q – What is a take home pay order?

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 as such includes a mechanism for an employee to obtain an order from Fair Work Australia if there is a reduction.

An employee’s take-home pay is defined as the pay that the employee actually receives for particular hours or for a particular quantity of work. This includes not only wages and incentive-based payments, but other payments such as penalty rates and allowances. The effect of any deduction from wages (such as a salary sacrifice arrangement) is disregarded when assessing take-home pay.

To make an order Fair Work Australia must determine that the reduction in take home pay is attributable to the modernisation process. If there is a reduction FWA can make an order requiring payment to remedy the difference. According to the explanatory memorandum, it is not intended that the take-home pay orders should prevent an employer from taking action that would otherwise be lawful (such as reorganising roster arrangements).

Further, FWA must not make a take-home pay order in relation to a minor or insignificant reduction in take-home pay, or where there has been adequate compensation for the reduction in other ways.

Q – Who will be able to make an application for a take home pay order?

It will be possible for an employee or a class of employees to make an application to FWA. An organisation entitled to represent the industrial interests of such an employee, such as a union, or a person acting on behalf of a class of employees will also be able to make an application.

However, to avoid repeat applications, the Transitional Bill allows for FWA to dismiss an application in whole or in part if it considers that the circumstances of an employee have already been considered as part of an earlier application (e.g., as part of an application relating to a group or class of employees).

Unfair dismissal

Q – I terminated an employee before 1st July 2009 and they have since made an unfair dismissal claim? What laws will apply?

The laws relating to unfair dismissal (such as the 100 employee exemption) under the WR Act will still apply but the claim will be heard by Fair Work Australia instead of the Australian Industrial Relations Commission.

Q – We currently have an unfair dismissal claim before the Australian Industrial Relations Commission. How will this claim be dealt with if it is not finalised by 1 July 2009?

The AIRC will finish hearing any claim made and not finalised before 1 July 2009.

Transfer of Business

Q – I am taking over a business on the 30th June 2009 but the transferring employees don't start until the end of July 2009. What laws will apply?

The existing transmission of business rules in the WR Act will continue to apply to any transmission that is completed before the FW Act commences, even if any transferring employees are not engaged by the new employer until after that date.

Fair Work Australia

Q – I am worried about a rise in demarcation disputes under the new system. Is there going to be anything employers can do?

The removal of the requirement that a union be bound by an award or agreement to exercise a right of entry and the changes to the bargaining framework proposed under the FW Act are likely to cause demarcation disputes between unions.

To address this issue, the Transitional Bill provides FWA with the power to make 'representation orders' to resolve such disputes.

The Transitional Bill provides that an employer, an organisation or the Minister can apply to FWA for an order that an organisation of employees does or does not have the right to represent members of a

workplace group. These orders will be available when there is a dispute about whether an organisation is entitled to represent the industrial interests of a workplace group under the FW Act.

In considering whether to make an order FWA must have regard for the history of award coverage and agreement-making for the group, the wishes of the employees concerned, and the extent to which a union has previously acted on their behalf.

Q – What is happening to the Workplace Ombudsman?

The Workplace Ombudsman will be abolished and the functions taken over by the Fair Work Ombudsman (FWO). From 1 July 2009, the FWO will also take on the general advisory function currently performed by the Workplace Authority (WA).

Existing investigations and compliance proceedings will be assumed by the Fair Work Ombudsman and Fair Work Inspectors will be able to exercise new compliance powers in relation to breaches that occur before or after 1 July 2009.

Q – What about the other authorities?

The Australian Fair Pay Commission, the Workplace Authority, the Australian Industrial Relations Commission and the Australian Industrial Registry will continue operation for a limited time to finalise existing matters.

The Workplace Authority will cease to exist on 31 January 2010. This should allow it to assess collective agreements made before 1 July 2009 using the current no-disadvantage test and ITEAs made until 31 December 2009 under saved provisions of the WR Act. However, the Workplace Authority will not have responsibility for agreements made under the new system, which will be handled by FWA.

To allow the AIRC sufficient time to complete matters and processes commenced under the WR Act, including award modernisation and existing unfair dismissal applications, the AIRC and the Australian Industrial Registry will continue until 31 December 2009.

The Australian Fair Pay Commission (AFPC) will cease to exist on 31 July 2009, after it has completed its final minimum wage review.

This summary is intended to provide an overview of the provisions of the Transitional Bill and is general advice only. For advice on specific arrangements, please contact your CCI industry adviser or the Employee Relations Advice Centre on (08) 9365-7660.