

EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No. 335

Issued by the authority of the Minister for Employment and Workplace Relations

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2009 (No. 1)

Section 4 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Act regulates the transition from the federal workplace relations system under the *Workplace Relations Act 1996* (WR Act) to that under the *Fair Work Act 2009* (FW Act). Item 8 of Schedule 2 to the Act provides that the Governor-General may make regulations to modify provisions of the transitional schedules in the Act.

The Regulations amend the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (the Principal Regulations), which were made on 29 June 2009. The Regulations amend Schedule 7 to the Act to insert a new part relating to the transitional assessment of enterprise agreements under the FW Act.

The Regulations confer new requirements of a transitional nature on Fair Work Australia when assessing whether an employee who is covered by a modern award would be better off overall if an enterprise agreement applied to the employee. The Regulations ensure fairness in agreement making during the phasing in period for modern awards.

In its submission to the Australian Industrial Relations Commission on transitional provisions in modern awards dated 29 May 2009 the Government stated that it would make a regulation that makes it clear that Fair Work Australia is to take into account transitional provisions in modern awards when applying the better off overall test.

Consultation with key stakeholders was undertaken in developing the Regulations. The following stakeholders were consulted on the draft regulations and given the opportunity to comment:

- Australian Council of Trade Unions
- Australian Industry Group
- Australian Mines and Metals Association; and
- Australian Council of Commerce and Industry
- Business Council of Australia
- National Farmers Federation.

Fair Work Australia was also consulted on the content of the Regulations through a separate process.

Details of the Regulations are in the Attachment.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on 1 January 2010.

Details of the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2009 (No. 1)*

Regulation 1 – Name of Regulations

This regulation sets out the name of the Regulations as the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2009 (No. 1)*.

Regulation 2 – Commencement

The Regulations commence on 1 January 2010.

Regulation 3 – Amendment of *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*

This regulation provides that the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (the Principal Regulations) are amended in accordance with Schedule 1.

Schedule 1 – Amendment

Item [1] – Part 2, after Division 2

This item inserts new Division 3 (Application of the better off overall test in to the Principal Regulations).

Proposed Division 3 provides that Schedule 7 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* is amended in accordance with Schedule 2.1.

Item [2] – After Part 5

This item inserts new Schedule 2.1 (Modification of Schedule 7 to the Act – better off overall test after the end of the bridging period if modern award contains transitional provisions) after Part 5 of the Principal Regulations.

The effect of this item is to modify Schedule 7 to the Act to insert a new Part 4A (Transitional provisions to apply the better off overall test after end of the bridging period if modern award contains transitional provisions).

Part 4A consists of item 20A. Item 20A provides that a modified better off overall test (modified test) applies to the assessment of enterprise agreements against a modern award if that award contains provisions of a transitional nature.

The modified test would only apply when Fair Work Australia (FWA) assesses an enterprise agreement under section 193 of the *Fair Work Act 2009* (FW Act) during the transitional period (subparagraph 20A(1)(a)). The transitional period is defined as 1 January 2010 to 31 December 2014 (subparagraphs 20A(1)(a)(i) and (ii)).

The modified test only applies in the transitional period where a modern award contains transitional provisions (subparagraph 20A(1)(b)). Transitional provisions are provisions that transition the terms and conditions of employment set out in an award-based transitional instrument to those contained in the modern award.

The intention of modifying the test for modern awards containing transitional provisions is to ensure that FWA compares the enterprise agreement against the relevant modern award as the award will actually operate in the future, taking into consideration the effects of any transitional provisions contained in the modern award (subparagraph 20A(2)(a)).

To achieve this, FWA is required to compare the enterprise agreement against the modern award at separate points in time over the life of the agreement. FWA is only required to assess the enterprise agreement once, at the date the application is made to FWA for approval of the agreement. However, when assessing the agreement, FWA is required to compare the enterprise agreement and the relevant modern award as they would operate:

- 1) on the date the application is made to FWA to assess the agreement (the test time) and;
- 2) on 31 July of each subsequent year until the nominal expiry of the agreement (subparagraph 20A(2)(a)).

This assessment approach requires FWA to compare the terms of the relevant modern award with the enterprise agreement on a line-by-line basis at the test time and on each subsequent 31 July as opposed to taking an aggregated or averaging approach to the terms and conditions.

Paragraph 20A(2)(b) makes it clear that FWA is only required to consider the terms of the modern award as they are at the date of assessment, including the transitional provisions, and that FWA does not have to take into account any variations to that modern award that may be subsequently made.

In respect of orders made by FWA under Part 3 of Schedule 5 to the Act, item 12 of Schedule 5 of the Act provides that a term of a modern award or an enterprise agreement has no effect in relation to an employee to the extent that it is less beneficial to the employee than a term of a take-home pay order that applied to the employee.

When applying the modified test, FWA must be satisfied that each of the employees mentioned in section 193 of the FW Act would be better off overall at each of the points in time that the comparison with the modern award is made (subparagraph 20A(3)).

Illustrative example

A transitional provision in a **modern award** may apply in the following way for an incremental increase in the casual loading:

Test time	8%
31 July 2011	10%
31 July 2012	15%

The **enterprise agreement** may provide for an incremental increase in the casual loading as follows:

Test time	6%
31 July 2011	12%
31 July 2012	20%

On a line-by-line comparison, an employee entitled to the casual loading would be better off under the proposed agreement in only two of the three assessment points. Therefore, the agreement would fail the modified test. This is the case even though the agreement would pass the test on 31 July 2011 and 31 July 2012.

Although the modified test requires FWA to be satisfied that each award covered employee and each prospective award covered employee will be better off overall, it is intended that the approval process does not require FWA to enquire into each employee's individual circumstances. As with section 193 of the FW Act, FWA will be able to apply the modified test to classes of employees (see subsection 193(7) of the FW Act).