

FACT SHEET

Industrial Instruments under the Fair Work Act 2009



Note: The information in this Fact Sheet is for the benefit of members who having incorporated employing entities, that is, a Constitutional Corporation employs staff. Other transitional arrangements apply to unincorporated employing entities (who are also subject to the Fair Work legislation) that have workplace agreements such as Certified Agreements, in place.

The introduction of the *Fair Work Act 2009* on 1 July 2009 raised questions about how existing industrial instruments, such as Collective Agreements, that were implemented during the operation of the *Workplace Relations Act 1996* (the system commonly referred to as WorkChoices) would be affected by the operation of the fair work legislation.

The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* ("Transition Act") which is provides for the ongoing operation of existing 'Workchoices instruments' following the repeal of the *Workplace Relations Act 1996* ("WR Act") and the subsequent commencement of the *Fair Work Act 2009*.

Essentially, the Transition Act provides that a 'Workchoices' instrument will become a **transitional instrument** and continue to operate via one of two means, and will remain in force until formally terminated or replaced by a new Fair Work instrument, despite the repeal of the WR Act.

EXISTING INDUSTRIAL INSTRUMENTS

Prior to 30 June 2009, an employee of an employer subject to the federal workplace relations system may be covered by one of the following instruments:

1. A federal award (eg. *Hospitality Industry – Accommodation, Hotels, Resorts and Gaming – Award 1998*)
2. A notional agreement preserving State awards (NAPSA – eg. *Hotels, Resorts and Certain Other Licensed Premises Award – State (excluding South East Queensland) 2003*)
3. A workplace agreement (Collective Agreement or ITEA made after Workchoices commenced on 27 March 2006)
4. A workplace determination
5. A preserved State agreement
6. An Australian Workplace Agreement (AWA)
7. A pre-reform certified agreement (a Certified Agreement made prior to 27 March 2006)
8. A pre-reform AWA
9. An old IR agreement
10. A section 170MX award

QHA members are likely to be subject to industrial instruments as per the instrument types listed at the points numbered 1, 2, 3, 6 or 7.

Schedule 3 Part 2 of the Transition Act provides that the above types of industrial instruments continue to operate under the Fair Work reforms (post 1 July 2009) as either an:

1. **Agreement-Based Transitional Instrument** - are the following types of industrial instruments are operating on 30 June 2009, or have been made by this date and are due to begin operating:
 - Collective agreements – currently in operation, or by 30 June 2009 had been lodged with the Workplace Authority.
 - Workplace determinations
 - ITEAs and AWAs
 - Pre-reform AWAs – AWAs in operation prior to 27 March 2006
 - Preserved collective State agreements
 - Preserved individual State agreements
 - Pre-reform certified agreements
 - Old IR agreements
 - Section 170MX awards

To further clarify, a Collective Agreement that is lodged with the Workplace Authority before 1 July 2009 but not yet assessed by the No Disadvantage Test, will become a transitional instrument once approved by the Workplace Authority.

2. Award-Based Transitional Instrument - are the following types of industrial instruments are operating on 30 June 2009:

- Federal award
- NAPSA

In allowing for the continued operation of Workchoices instruments as either an agreement-based transitional instrument or an award-based transitional instrument, the Transition Act provides the rules and instructions as to what effect the Fair Work legislation will have on these instruments, given that they were originally implemented under a different legislative framework, and therefore, a different set of employment conditions. These rules are summarised below for each of the two categories.

Members who are currently utilising one or more of the aforementioned types of instruments at their workplace are encouraged to determine how this instrument will be classified as of 1 July 2009 (having regard to the information provided on the previous page) and read further information below pertaining to each of the two categories.

AGREEMENT-BASED TRANSITIONAL INSTRUMENTS

Coverage and content

A transitional instrument covers the same employees, employers and any other persons that it would have covered if the WR Act had continued operating (this includes any new employees). Similarly, the same content rules that applied in relation to WR Act instruments continue to apply to transitional instruments with the exception that certain instrument content rules relating to the standing down of employees do not continue to apply in relation to WR Act instruments that become transitional instruments.

Variation and Termination of Instruments

Variation of agreement-based transitional instruments will only be allowed in limited circumstances which include removing ambiguity or uncertainty in the instrument, resolving an uncertainty or difficulty relating to the interaction between the instrument and a modern award (which takes effect 1 January 2010) or removing terms that are inconsistent with the general protections provided in the *Fair Work Act 2009*. Such variation may only take place following an application to Fair Work Australia by a person covered by the transitional instrument.

Agreement-based transitional instruments such as Collective Agreements and Pre-reform Certified Agreements are subject to the termination rules provided by the *Fair Work Act 2009*.

Other rules allow for individual agreement-based transitional instruments to be terminated unilaterally following the nominal expiry date or by agreement between the parties. If a transitional instrument is terminated, it ceases to cover (and can never again cover) any employees, employers or other persons.

AIRC Powers

Where a reference to the Australian Industrial Relations Commission ("AIRC") is contained within a provision that remains in effect following the repeal of the WR Act, it will be taken that the reference is to Fair Work Australia.

AWARD-BASED TRANSITIONAL INSTRUMENTS

Coverage and content

The coverage and content rules which apply to agreement-based transitional instruments also apply to award-based transitional instruments with the exception that these instruments will not apply to an employee who is a "high income employee", as defined.

Variation and Termination of Instruments

As per agreement-based transitional instruments, variation of award-based transitional instruments will only be allowed in limited circumstances including to remove ambiguity or uncertainty.

In terms of the termination of award-based transitional instruments, a 'sunset' date has been set for NAPSA's to cease existence on 1 January 2014 (or any later date as proscribed by the Regulations).

However, given the modern *Hospitality Industry (General) Award 2010* commencement date of 1 January 2010, this sunset date has limited impact on QHA members who previously utilised NAPSA's as those NAPSA's will have

been replaced by this modern award on 1 January 2010. Similarly, while other transitional award-based instruments (such as federal awards) have not been given a sunset date, award-based transitional instruments will only be relevant until 31 December 2009 as the modern *Hospitality Industry (General) Award 2010* entirely replaces the award-based transitional instruments being utilised from 1 January 2010. – subject to transitional arrangements contained at Schedule A in the Award.

AIRC Powers

Where a reference to the Australian Industrial Relations Commission is contained within a provision that remains in effect following the repeal WR Act, it will be taken that the reference is to Fair Work Australia.

INTERACTION WITH THE NES AND MODERN AWARDS

From 1 January 2010:

- The terms and conditions in the National Employment Standards (NES); and
- The minimum wages under the *Hospitality Industry (General) Award 2010* or other modern award

will override the conditions of an existing Agreement that are inconsistent with above two elements.

From this date employers must provide the base wage in the relevant modern award from 1 January – amending their Agreement base rate to the appropriate modern award rate, and they must provide all of the conditions in the NES to employees where they are not already provided in the Agreement. Where they are in the Agreement and the corresponding NES is more beneficial, the NES provision will apply.

The effect of this is that from 1 January 2010, a term of an agreement-based transitional instrument has no effect where the term is detrimental to an employee when compared to an entitlement provided by the NES. This assessment is referred to as the ‘no detriment test’. A term of a transitional instrument that provides an entitlement that is at least as beneficial to an employee as a corresponding entitlement of the employee under the NES will continue to have effect.

The ‘No Detriment Test’

The Explanatory Memorandum suggests that the no detriment test applies on a ‘line by line’ basis. That is, the NES entitlement will continue to apply and prevail over the corresponding entitlement in the transitional instrument, if the term or entitlement in the transitional instrument is detrimental to an employee, in any respect, in comparison to the NES.

A practical example provided by the Explanatory Memorandum relates to a term in a transitional instrument which provides 6 weeks’ annual leave paid at an employee’s ordinary rate of pay (including overtime and allowances). Under the no detriment test, the leave and payment of leave entitlement provided by the transitional instrument would continue to operate (as it is more favourable than the NES entitlement) however the employee would be subject to more favourable accrual rules in the NES.

The result of this ‘line by line’ assessment is that employees’ entitlements may be comprised from both the NES and the transitional instrument which provides their terms and conditions of employment.

Further Assistance

If after reading this information, you have further queries about your individual situation, please contact the QHA's Employment Relations Department on 07 3221 6999 or er@qha.org.au

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