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## Fair Work Australia gives clarification on pay and penalty rates

**The Full Bench of Fair Work Australia has recently handed down a decision clarifying the transitional provisions in modern awards.**

Most modern awards contain transitional provisions that require employers to phase in rates of pay and penalty rates over a four year period between 1 July 2010 and 1 July 2014. Two particular aspects of the transitional provisions have now been addressed by the Full Bench of Fair Work Australia in their recent decision, *Re Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2010] FWA FB 4488:

### 1 Overtime is not phased-in

The model transitional provisions state that phasing-in applies to the following loadings and penalty rates:

- casual or part-time loading;
- Saturday, Sunday, public holiday, evening or other penalty; and
- shift allowance/penalty.

The transitional provisions make no mention of overtime. The question before the Full Bench was whether overtime rates are considered an 'other penalty' that is subject to phasing-in, or whether no phasing-in occurs for overtime rates.

The Full Bench determined that overtime provisions are not included in the definition of an 'other penalty' and, as such, will not be subject to phasing-in. This means that overtime rates in a modern award are to be applied in full from 1 January 2010, regardless of whether a previous instrument provided an overtime rate that was higher or lower than the modern award.

### 2 Over-award payments can be used to absorb increases in award rates

The Full Bench also considered the impact of increases to award rates of pay arising from the modern award transitional provisions or an annual wage review upon employers who already pay above the minimum rate of pay provided by the applicable award.

The Full Bench confirmed that an obligation to increase an employee's pay due to phasing-in or annual wage reviews affects the employee's minimum award rate of pay only. If the employee's actual wage exceeds the minimum amount they are entitled to after the increase to the award rate, there is no obligation to further raise the employee's pay. Any increase to the award rate of pay can be absorbed into an employee's over-award wage.

If you have any questions about employee entitlements under modern awards, please contact the Employment and Industrial Relations team at Russell Kennedy on (03) 9609 1555.

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